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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 45a.)

Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER,

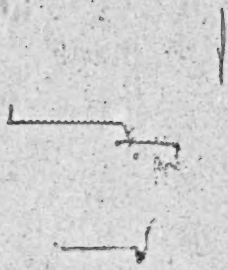
vs.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.



United States Court of Appeals,

EIGHTH CIRCUIT.

No. 13,887.
CIVIL.

NORTHWESTERN PUBLIC SERVICE COMPANY, A CORPORATION, APPELLANT,

vs.

MONTANA-DAKOTA UTILITIES CO., A CORPORATION, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

FILED DECEMBER 20, 1948.

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit, at the March Term, 1950, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Harvey M. Johnsen, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States
(Seal) Court of Appeals for the
Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the 20th day of December, A. D. 1948, a transcript of record pursuant to an appeal taken from the United States District Court for the District of South Dakota, was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein Northwestern Public Service Company, a Corporation, was Appellant, and Montana-Dakota Utilities Co., a Corporation, was Appellee.

Printed record composed of five volumes, Volume I consisting of pages a to 496, inclusive, Volume II consisting of pages 497 to 736, inclusive, Volume III consisting of pages 737 to 1008, inclusive, Volume IV consisting of pages 1009 to 1488, inclusive, and Volume V consisting of pages 1489 to 1984, inclusive, on which the appeal was heard in the United States Court of Appeals for the Eighth Circuit, and proceedings in said Court of Appeals, composed of one volume, Volume VI, consisting of pages 1985 to 2003, inclusive, are in the words and figures following, to-wit:

In the District Court of the United States, in and for the District of South Dakota, Western Division.

Montana-Dakota Utilities Co., a corporation,
Plaintiff,
vs.
Northwestern Public Service Company, a corporation,
Defendant.
No. 241 W. Div. Civ.

Be It Remembered, that on the 3rd day of February, A. D. 1947, there was [file] filed in the above entitled court, on behalf of the plaintiff, Complaint; which Complaint is in words and figures the following, to-wit:

Complaint.

United States District Court,
District of South Dakota,
Western Division.

Montana-Dakota Utilities Co., a corporation,
Plaintiff,
vs.
Northwestern Public Service Company, a corporation,
Defendant.
#241 W. Civ.

Comes now the plaintiff and for its complaint against the defendant herein alleges:

For a first cause of action:

I.

The amount in controversy herein, exclusive of interest and costs, exceeds Three Thousand Dollars ($3,000.00) and

the action arises under the Federal Power Act, as hereinafter more fully appears, and under a law of the United States regulating commerce under said Federal Power Act.

II.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware and on the 27th day of June, 1935, duly qualified as a foreign corporation in the State of South Dakota, and has been continuously so qualified since that date, and on the 2nd day of July, 1935, duly qualified as a foreign corporation in the State of North Dakota, and has been continuously so qualified since said date.

III.

Defendant is a Delaware corporation qualified to do business in the State of South Dakota and has been so qualified ever since the 23rd day of December, 1923.

IV.

At all times hereinafter mentioned, except as hereinafter otherwise stated, Northern Power and Light Company was a corporation existing under the laws of the State of Delaware and duly qualified to do business in the States of North Dakota and South Dakota, and North Dakota Power & Light Company was a Delaware corporation duly qualified to do business in the State of North Dakota and since the 13th day of July, 1939, in the State of South Dakota.

V.

At all times hereinafter mentioned, except as hereinafter stated, Dakota Public Service Company, a Delaware corporation resulting from the merger of Northern Power and Light Company and North Dakota Power & Light Company, as hereinafter stated, has been a Delaware corporation duly qualified as a foreign corporation in the States of North Dakota and South Dakota.

VI.

On the 1st day of July, 1939, the aforesaid Northern Power and Light Company and North Dakota Power & Light Company, pursuant to the laws of the State of Delaware, merged into one corporation, North Dakota Power & Light Company, being the surviving corporation pursuant to the terms of said merger, and changing its name in said merger proceedings to Dakota Public Service Company. Pursuant to the terms of said merger, Dakota Public Service Company became the owner of all of the public utility business of said Northern Power and Light Company, in addition to the properties on the date of said merger owned by North Dakota Power & Light Company, and thereafter said Dakota Public Service Company owned and operated as a public utility the properties formerly owned by it, hereinafter in this complaint referred to, and the properties on the date of said merger owned by Northern Power and Light Company.

VII.

Pursuant to the provisions of the laws of the State of Delaware hereinafter referred to, said Northern Power and Light Company and North Dakota Power & Light Company made and entered into an agreement of merger providing, among other things, that Northern Power and Light Company be merged into North Dakota Power & Light Company as the surviving corporation and that the name of said North Dakota Power & Light Company be changed to Dakota Public Service Company and that said Dakota Public Service Company would become the owner of all the property, real, personal and mixed, and all debts due on whatsoever account to the said merging corporations and the owner of all things in action belonging to said merging corporations. Said agreement of merger was duly adopted by the directors and stockholders of said corporation and duly recorded with the Secretary of State of the State of Delaware on the 1st day of July, 1939, and recorded with the Recorder of New Castle County, Delaware, on the 1st day of July, 1939, and filed and recorded with the Secretary of State of the State of South Dakota on the 13th day of July, 1939.

The corporation laws of the State of Delaware provide that when two corporations of said state merge as was done by the aforesaid Northern Power and Light Company and North Dakota Power & Light Company and adopt a merger agreement as aforesaid and said agreement shall have been signed, acknowledged, filed and recorded as aforesaid, then the surviving corporation shall possess all the rights, privileges, powers and franchises, as well of a public as of a private nature, of the merging corporations and shall possess all and singular the rights, privileges, powers and franchises of each of the merging corporations and all property, real, personal and mixed, and all debts due to each of the merging corporations on whatever account and all things in action or belonging to each of the merging corporations and all property rights, privileges, powers and franchises and all and every other interest shall be thereafter as effectually the property of the surviving corporation as they were of the merging corporations.

VIII.

There is attached hereto and marked Exhibit "A" and expressly by reference made a part hereof a tabulation showing for the years stated thereon the officers and directors of the defendant, Northern Power and Light Company, North Dakota Power & Light Company and Dakota Public Service Company, and in each instance shown on said Exhibit "A", when the name of a person holding an office or a directorship in any of said companies is identical with the name of a person holding an office or directorship in any other of said companies, then and in each of said instances all of said [officers] were held by one and the same person.

IX.

On the 7th day of February, 1937, defendant, pursuant to Order #36 of the Federal Power Commission, filed with the Federal Power Commission Northwestern Public Service Company Rate Schedule F. P. C. No. 1, of which a true and correct copy is hereto attached, marked Exhibit "A-1" and expressly by reference made a part hereof. Without complying with the requirements of Section

205 (d) of the Federal Power Act and on the 7th day of October, 1936, the defendant and said Northern Power and Light Company made and entered into a contract, denominated an interconnection contract, a true and correct copy thereof being hereto attached, marked Exhibit "B" and by reference made a part hereof. At the time of the execution of the original of said Exhibit "B", F. E. Kruesi, who executed said agreement for defendant as president of defendant, and C. L. Sandstedt, who executed the original of Exhibit "B" as Secretary of the defendant and Secretary of Northern Power and Light Company, were respectively President and Secretary of Northern Power and Light Company, and C. J. Strike, who executed the original of said Exhibit "B" as Vice President of Northern Power and Light Company, was Vice President of Northwestern Public Service Company, and at said time the Directors of Northwestern Public Service Company were F. E. Kruesi, C. L. Sandstedt, C. J. Strike, J. F. Buckmier and G. R. McArthur, and at said time the Directors of Northern Power and Light Company were said Kruesi, Strike, Sandstedt and Buckmier and S. W. White.

X.

Plaintiff is informed and believes and on such information and belief alleges that the portion of the Aberdeen interconnected substation and control equipment, the Gettysburg substation, and the transmission lines referred to in said contract, Exhibit "B", and for which a charge was made in Article VI of said contract, were all constructed some time in 1930 for the sole use and benefit of the defendant.

XI.

For several years immediately prior to January 1, 1936, defendant and said Northern Power and Light Company had exchanged electric energy, the energy delivered by Northern Power and Light Company to defendant having been generated in North Dakota and transmitted to defendant in South Dakota where the same was metered and sold to defendant for resale and thereafter transmitted by defendant and resold to customers of its utility business in South Dakota, and some of the energy delivered

by defendant to Northern Power and Light Company having been generated in the State of South Dakota and transmitted to Northern Power and Light Company and sold to it by defendant for resale and by Northern Power and Light Company transmitted to North Dakota and there resold to its public utility customers. Prior to January 1, 1936, the defendant had never made any charge against Northern Power and Light Company or North Dakota Power & Light Company on account of any rental or any other charge on account of the transmission of electric energy over the aforesaid transmission lines or through said substations, but beginning as of the 1st day of January, 1936, to and including June 30, 1939, Northern Power and Light Company was billed by Northwestern Public Service Company for transmission line charges provided for in Article VI of said Exhibit "B" in the sum of Seventy Thousand Dollars ($70,000.00), all of which said Northern Power and Light Company paid to the defendant.

XII.

During said period from January 1, 1936, to and including June 30, 1939, Northern Power and Light Company furnished to Northwestern Public Service Company 20,894,542 kilowatt hours of electric energy and defendant furnished to Northern Power and Light Company only 9,621,021 kilowatt hours of electric energy, all of the aforesaid energy being transmitted through the substations and over the transmission lines referred to in said Exhibit "B."

XIII.

Said contract was made and entered into for the purpose of fixing the terms, rates and charges which would be made by the parties thereto against each other for electric energy and the transmission thereof, said energy to be generated in the State of North Dakota and transmitted to the State of South Dakota, and for electric energy and the transmission thereof, said energy to be generated in the State of South Dakota and transmitted to the State of North Dakota. At the time of the execution of the original of said Exhibit "B," it was contemplated by the

parties thereto that the bulk of the energy to be interchanged would be generated in the State of North Dakota and transmitted to the State of South Dakota, and the bulk of said energy was so generated and transmitted, said bulk of said energy in fact being generated by North Dakota Power and Light Company aforesaid in the State of North Dakota and sold and delivered to the aforesaid Northern Power and Light Company at Driscoll, in North Dakota, or at a point on the North Dakota-South Dakota State Line near Keldron, South Dakita, and from said last mentioned points of delivery transmitted to the lines of the defendant at Barnard, Ipswich and Gettysburg, all located in the State of South Dakota. The said energy thus received by the defendant at Barnard, Ipswich and Gettysburg was by the defendant resold to the retail customers of the defendant in the operation of an electric public utility business by the defendant in the State of South Dakota. Defendant did not file said Exhibit "B", or any copy thereof, with the Federal Power Commission until December 23, 1938, when, without compliance with Section 205 (d) of the Federal Power Act, it filed the same with said Federal Power Commission as Northwestern Public Service Company F. P. C. Schedule No. 3, and the said transmission line charge of One Thousand Six Hundred Sixty-six and 66/100 Dollars ($1,666.66) per month provided for in the original of said Exhibit "B" and which was fixed by the aforesaid common officers and directors purporting to act for both of said corporate parties thereto was without consideration, unjust, unreasonable and unlawful in its entirety, and the defendant unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from said Northern Power and Light Company and caused said Northern Power and Light Company to pay to defendant said amount of Seventy Thousand Dollars ($70,000.00), for which said defendant became indebted to said Northern Power and Light Company; and by reason of the merger of the Northern Power and Light Company and North Dakota Power & Light Company hereinbefore alleged, and by reason of the assignment of claims to the plaintiff as hereinafter alleged, the defendant is now indebted to, and must account to the plaintiff for said amount, with interest thereon from the respective dates of payment thereof to

defendant, which payments were made at the rate of One Thousand Six Hundred Sixty-six and 66/100 Dollars ($1,666.66) per month, beginning with the month of February, 1936, and terminating in the month of July, 1939.

XIV.

On the 19th day of October, 1945, said Dakota Public Service Company, for value, transferred, sold and assigned to plaintiff all claims, demands and causes of action of every kind which it then had against defendant.

For a second cause of action:

I.

Realleges and expressly by reference makes parts of this cause of action the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII set forth in plaintiff's first cause of action herein.

II.

From the 1st day of September, 1935, to July 1, 1939, the defendant, through its officers and directors, who were officers and directors in common with Northern Power and Light Company and North Dakota Power & Light Company, caused said North Dakota Power & Light Company to generate in the State of North Dakota and transmit to Northern Power and Light Company at Keldron, South Dakota, and at Driscoll, North Dakota, electrical energy which was in turn by Northern Power and Light Company transmitted to defendant at Gettysburg, Barnard, Ipswich and Aberdeen, South Dakota, and at said points purchased for resale by defendant. The amount of such energy was 12,550,381 kilowatt hours and said energy was of the just and reasonable value of Ninety-four Thousand One Hundred Twenty-seven and 86/100 Dollars ($94,127.86), but the defendant, through its officers and directors aforesaid, caused said Northern Power and Light Company to pay, and said North Dakota Power & Light Company to receive, for said energy only the sum of Sixty-two Thousand Seven Hundred Fifty-one and 90/100 Dollars ($62,751.90),

which was an unjustly and unreasonably and unlawfully low price therefor.

III.

The officers and directors of Northwestern Public Service Company, who were at the same time directors and officers of Northern Power and Light Company as hereinbefore alleged, during the period of time in this cause of action hereinbefore stated, caused said Northern Power and Light Company to deliver the aforesaid energy to Northwestern Public Service Company. That by reason of the facts hereinbefore alleged, the defendant became indebted to and liable to said North Dakota Power & Light Company in the sum of Thirty-one Thousand Three Hundred Seventy-five and 95/100 Dollars ($31,375.95), no part of which has been paid.

IV.

On the 19th day of October, 1945, said Dakota Public Service Company, for value, transferred, sold and assigned to plaintiff all claims, demands and causes of action of every kind which said Dakota Public Service Company then had against defendant.

For a third cause of action:

I.

Realleges and expressly by reference makes parts of this cause of action the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII set forth in plaintiff's first cause of action herein.

II.

For about eight (8) years prior to the 1st day of January, 1938, the defendant and Northern Power and Light Company and North Dakota Power & Light Company had exchanged electrical energy transmitted across the North Dakota-South Dakota State Line, the bulk of said energy being generated by North Dakota Power & Light Company in North Dakota and delivered to Northern Power and Light Company and by it sold to defendant in South Dakota for resale, and during none of said years was

any charge made by one of said parties against the other on account of any so-called deficiency in generating capacity of any kind.

III.

On the 7th day of February, 1937, defendant, pursuant to Order #36 of the Federal Power Commission, filed with the Federal Power Commission Northwestern Public Service Company Rate Schedule F. P. C. No. 1, of which a true and correct copy is hereto attached, marked Exhibit "A-1" and expressly by reference made a part hereof. Without complying with the requirements of Section 205 (d) of the Federal Power Act and some time about April 15, 1938, but purporting to act as of the 1st day of January, 1938, defendant, by and through its directors and officers, who were then directors and officers of North Dakota Power & Light Company and Northern Power and Light Company, as hereinbefore alleged, and for the benefit of the defendant and to the detriment of North Dakota Power & Light Company and Northern Power and Light Company, caused said Northern Power and Light Company and said North Dakota Power & Light Company to make and enter into a contract with the defendant, a true and correct copy thereof being hereto attached, marked Exhibit "C" and expressly by reference made a part hereof.

IV.

Said contract was made and entered into for the purpose of fixing terms, rates and charges which would be made by the parties thereto against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota and for electric energy to be generated in the State of South Dakota and transmitted to the State of North Dakota. At the time of the execution of the original of said Exhibit "C," it was contemplated by the parties thereto that the bulk of the energy to be interchanged would be generated in the State of North Dakota and transmitted to the State of South Dakota, and the bulk of said energy was so generated and transmitted, said bulk of said energy in fact

being generated by North Dakota Power & Light Company aforesaid in the State of North Dakota and sold and delivered to the aforesaid Northern Power and Light Company at Driscoll, in North Dakota, or at a point on the North Dakota-South Dakota State Line near Keldron, South Dakota, and from said last mentioned points of delivery transmitted to the lines of the defendant at Barnard, Ipswich and Gettysburg, all located in the State of South Dakota. The said energy thus received by the defendant at Barnard, Ipswich and Gettysburg was by the defendant resold to the retail customers of the defendant in the operation of an electric public utility business by the defendant in the State of South Dakota, and portions of the energy generated by the defendant in the State of South Dakota and sold to said Northern Power and Light Company were transmitted to the State of North Dakota and sold by said Northern Power and Light Company to retail customers in the operation of an electric public utility business in the State of North Dakota. Defendant did not file said Exhibit "C," or any copy thereof, with the Federal Power Commission until December 23, 1938, when, without compliance with Section 205 (d) of the Federal Power Act, it filed the same with said Federal Power Commission as Northwestern Public Service Company F. P. C. Schedule No. 4. Said charge of Thirteen and 20/100 Dollars ($13.20) per kilowatt of firm demand per year referred to in Article VIII of said Exhibit "C" was fixed by the aforesaid common directors and officers purporting to act for all of said corporate parties thereto, was without consideration, unjust, unreasonable and unlawful in its entirety and the defendant unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from Northern Power and Light Company and caused said Northern Power and Light Company to pay to defendant for said so-called firm demand charge the following amounts, in the following years, viz.:

In the year 1938, Twenty-two Thousand Four Hundred Forty Dollars ($22,440.00)

In the year 1939, Nine Thousand Sixty-eight and 40/100 Dollars ($9,068.40).

V.

The original of said Exhibit "C" was a scheme and plan conceived and put into operation by the defendant and its aforesaid directors and officers for the purpose of exacting large charges from Northern Power and Light Company and North Dakota Power & Light Company for the purpose, among other things, of offsetting charges of said Companies for electrical energy generated in North Dakota and transmitted to and sold to defendant for resale in South Dakota.

VI.

On the 19th day of October, 1945, said Dakota Public Service Company, for value, transferred, sold and assigned to plaintiff all claims, demands and causes of action of every kind which it then had against defendant.

For a fourth cause of action:

I.

Realleges and expressly by reference makes parts of this cause of action the allegations contained in paragraphs I, II, III and VIII of plaintiff's first cause of action herein.

II.

At all times in this cause of action alleged, Dakota Public Service Company, a Delaware corporation, resulting from the merger of Northern Power and Light Company and North Dakota Power & Light Company has been a Delaware corporation, duly qualified as a foreign corporation in the States of North Dakota and South Dakota.

III.

On the 7th day of February, 1937, defendant, pursuant to Order #36 of the Federal Power Commission, filed with the Federal Power Commission Northwestern Public Service Company Rate Schedule F. P. C. No. 1, of which a true and correct copy is hereto attached, marked Exhibit "A-1" and expressly by reference made a part hereof. Without complying with the requirements of Section

205 (d) of the Federal Power Act and for several years immediately prior to January 1, 1936, defendant and said Northern Power and Light Company had exchanged electric energy, the energy delivered by Northern Power and Light Company to defendant having been generated in North Dakota and transmitted to defendant in South Dakota where the same was metered and sold to defendant for resale and thereafter transmitted by defendant and resold to customers of its utility business in South Dakota, and some of the energy delivered by defendant to Northern Power and Light Company having been generated in the State of South Dakota and transmitted to Northern Power and Light Company and sold to it by defendant for resale and by Northern Power and Light Company transmitted to North Dakota and there resold to its public utility customers. Prior to January 1, 1936, the defendant had never made any charge against Northern Power and Light Company or North Dakota Power & Light Company on account of any rental or other charge on account of the transmission of electric energy over the transmission lines referred to in Exhibit "D", hereinafter referred to, but on the 7th day of October, 1936, defendant caused Northern Power and Light Company and North Dakota Power & Light Company to make a contract as alleged in paragraphs XI and XII of plaintiff's first cause of action, which said paragraphs are incorporated herein by reference for the purpose of reciting herein the history of the making and execution of said contract, Exhibit "B", referred to in said paragraphs, and the allegations of paragraph XIII of plaintiff's first cause of action herein are by reference incorporated herein for the purpose of reiterating herein the purpose of the said contract. Exhibit "B", therein referred to, and the facts with reference to the filing thereof with the Federal Power Commission.

Paragraphs VI and VII of plaintiff's first cause of action herein are realleged herein and expressly by reference made parts of this cause of action.

On the 1st day of July, 1939, the defendant and said Dakota Public Service Company made and entered into a contract, denominated an interconnection contract, a true and correct copy thereof being hereto attached, marked

Exhibit "D" and expressly by reference made a part hereof. Defendant, working through officers and directors of defendant, who were at the same time officers and directors of Dakota Public Service Company, as hereinbefore alleged, caused said agreement to be entered into by said Dakota Public Service Company for the advantage and benefit of defendant, and to the injury of said Dakota Public Service Company.

IV.

Plaintiff is informed and believes and on such information and belief alleges that the portion of the Aberdeen interconnected substation and control equipment, the Gettysburg substation and the transmission lines referred to in said contract, Exhibit "D", and for which a charge was made in Article VI of said contract, were all constructed some time in 1930 for the sole use and benefit of defendant.

V.

Although under the terms of said contract, neither party bound itself to render to the other any specific or actual service save as such party was from time to time willing and able to render the same, and although defendant knew that it would receive, as it had in the past, the greatest amount of energy and the greatest benefit from said contract, it caused said contract to be executed and complied with by Dakota Public Service Company through the aforesaid common directors and officers.

VI.

The aforesaid contract was made and entered into for the purpose of fixing terms, rates and charges which would be made by the parties thereto against each other for electric energy and the transmission thereof, said energy to be generated in the State of North Dakota and transmitted to the State of South Dakota, and for electric energy and the transmission thereof, said energy to be generated in the State of South Dakota and transmitted to the State of North Dakota. At the time of the execution of the original of said Exhibit "D", it was contemplated by the parties thereto that the bulk of energy to be interchanged would

be generated in the State of North Dakota and transmitted to the State of South Dakota, and the bulk of said energy was so generated and transported, the said bulk of said energy in fact being generated by Dakota Public Service Company aforesaid in the State of North Dakota and sold and delivered to the defendant at Barnard, Ipswich and Gettysburg, South Dakota, for resale by the defendant in the operation of defendant's electric public utility business in the State of South Dakota, and substantial amounts of electrical energy during a considerable portion of the time the original of said Exhibit "D" was in effect were generated by the defendant in the State of South Dakota and transmitted to said Dakota Public Service Company at points in the State of South Dakota for transmission to points in the State of North Dakota for resale. Defendant did not file said Exhibit "D", or any copy thereof, with the Federal Power Commission until January 10, 1940, when, without compliance with Section 205(d) of the Federal Power Act, it filed the same with said Federal Power commission as Northwestern Public Service Company Schedule F. P. C. No. 5-A, and no certificate of concurrence was filed by or on behalf of said Dakota Public Service Company. The said transmission line charge of One Thousand Six Hundred Sixty-six and 66/100 Dollars ($1,666.66) per month provided for in the original of said Exhibit "D" and which was fixed by the aforesaid common officers and directors purporting to act for both of said corporate parties thereto was without consideration, unjust, unreasonable and unlawful in its entirety, and the defendant unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from said Dakota Public Service Company, and caused said Dakota Public Service Company to pay to defendant on account of said transmission line charge, the sum of Ten Thousand Dollars ($10,000.00) for said charge in the year 1939 and the sum of Twenty Thousand Dollars ($20,000.00) for said charge in the year 1940, and the sum of Ten Thousand Dollars ($10,000.00) for said charge in the year 1941.

During the life of said contract, Dakota Public Service Company delivered to defendant 15,961,599 kilowatt hours of electrical energy generated, transmitted and sold as

hereinbefore alleged, and defendant delivered to Dakota Public Service Company only 4,092,454 kilowatt hours of electrical energy.

The net energy sold as aforesaid by Dakota Public Service Company to Northwestern Public Service Company from July 1, 1939, to July 1, 1941, under the terms of said original of said Exhibit "D", was fairly, justly and reasonably of the value of Eighty-nine Thousand Eighteen and 59/100 Dollars ($89,018.59), but the defendant, through its officers and directors aforesaid, paid to said Dakota Public Service Company, and caused said Dakota Public Service Company to receive for said energy, only the sum of Fifty-nine Thousand Three Hundred Forty-five and 74/100 Dollars ($59,345.74), which was an unjustly, unreasonably and unlawfully low and inadequate price therefor.

VII.

By reason of the facts hereinbefore in this cause of action alleged, defendant became liable to and indebted to Dakota Public Service Company in the amount of Sixty-nine Thousand Six Hundred Seventy-two and 85/100 Dollars ($69,672.85), no part of which has been paid.

VIII.

On the 19th day of October, 1945, said Dakota Public Service Company, for value, transferred, sold and assigned to plaintiff all claims, demands and causes of action of every kind which Dakota Public Service Company then had against the defendant.

For a fifth cause of action:

I.

Realleges and expressly by reference makes parts of this cause of action the allegations contained in paragraphs I, II, III and VIII of plaintiff's first cause of action.

II.

At all times in this cause of action alleged, Dakota Public Service Company, a Delaware corporation, resulting from the merger of Northern Power and Light Company and North Dakota Power & Light Company, has been a Delaware corporation duly qualified as a foreign corporation in the States of North Dakota and South Dakota.

III.

On the 7th day of February, 1937, defendant, pursuant to Order #36 of the Federal Power Commission, filed with the Federal Power Commission Northwestern Public Service Company Rate Schedule F. P. C. No. 1, of which a true and correct copy is hereto attached, marked Exhibit "A-1" and expressly by reference made a part hereof. Without complying with the requirements of Section 205 (d) of the Federal Power Act and some time about April 15, 1938, but purporting to act as of the 1st day of January, 1938, defendant, by and through its directors and officers, who were then directors and officers of North Dakota Power & Light Company and Northern Power and Light Company, as hereinbefore alleged, and for the benefit of the defendant and to the detriment of North Dakota Power & Light Company and Northern Power and Light Company, caused said Northern Power and Light Company and said North Dakota Power & Light Company to make and enter into the contract attached to this complaint, marked Exhibit "C" and in the third cause of action herein referred to. Said contract was made and entered into for the purpose of fixing terms, rates and charges which would be made by the parties thereto against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota and for electric energy to be generated in the State of South Dakota and transmitted to the State of North Dakota. At the time of the execution of the original of said Exhibit "C", it was contemplated by the parties thereto that the bulk of the energy to be interchanged would be generated in the State of North Dakota and transmitted to the State of South Dakota, and the

bulk of said energy was so generated and transmitted, said bulk of said energy in fact being generated by North Dakota Power & Light Company aforesaid in the State of North Dakota and sold and delivered to the aforesaid Northern Power and Light Company at Driscoll, in North Dakota, or at a point on the North Dakota-South Dakota State Line near Keldron, South Dakota, and from said last mentioned points of delivery transmitted to the lines of the defendant at Barnard, Ipswich and Gettysburg, all located in the State of South Dakota. The said energy thus received by the defendant at Barnard, Ipswich and Gettysburg was by the defendant resold to the retail customers of the defendant in the operation of an electric public utility business by the defendant in the State of South Dakota, and portions of the energy generated by the defendant in the State of South Dakota and sold to said Northern Power and Light Company were transmitted to the State of North Dakota and sold by said Northern Power and Light Company to retail customers in the operation of an electric public utility business in the State of North Dakota. Defendant did not file said Exhibit "C", or any copy thereof, with the Federal Power Commission until December 23, 1938, when, without compliance with Section 205 (d) of the Federal Power Act, it filed the same with said Federal Power Commission as Northwestern Public Service Company F. P. C. Schedule No. 4.

On the 1st day of July, 1939, the defendant and said Dakota Public Service Company made and entered into a contract, denominated an interchange capacity agreement, a true and correct copy thereof being hereto attached, marked Exhibit "E" and expressly by reference made a part hereof. Defendant, working through officers and directors of defendant, who were at the same time officers and directors of Dakota Public Service Company, as hereinbefore alleged, caused said agreement to be entered into by said Dakota Public Service Company for the advantage and benefit of defendant, and to the injury of said Dakota Public Service Company.

Although under the terms of said contract, Exhibit "E", neither party bound itself to render to the other any specific or actual service save as such party was from time

to time willing and able to render the same, and although the defendant knew that it would receive, as it had in the past, the greatest amount of energy and the greatest benefit from said contract, it caused said contract to be executed and complied with by Dakota Public Service Company through the aforesaid common directors and officers of said Company.

IV.

For nine and one-half (9½) years prior to the execution of the original of said Exhibit "E", parties to said contract had exchanged electrical energy, by far the largest amount thereof being generated by Dakota Public Service Company in North Dakota and by it transmitted to defendant and sold to defendant in South Dakota for resale, and, except as in this complaint alleged in the third cause of action pleaded in this complaint, during none of said years was any charge made by either of the parties to said original of said Exhibit "E" against the other on account of any so-called deficiency in generating capacity. The original of Exhibit "E" was a scheme and plan conceived and put into effect by the officers and directors of Northwestern Public Service Company for the purpose of exacting large charges from Dakota Public Service Company for the purpose, among other things, of offsetting charges of said Dakota Public Service Company for electrical energy then being sold and thereafter to be sold by said Dakota Public Service Company to defendant at an already inadequate price.

V.

The original of Exhibit "E" was made and entered into for the purpose of fixing terms, rates and charges which would be made by the parties thereto against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota and for electric energy to be generated in the State of South Dakota and transmitted to the State of North Dakota. At the time of the execution of the original of said Exhibit "E", it was contemplated by the parties thereto that the

bulk of the energy to be interchanged would be generated in the State of North Dakota and transmitted to the State of South Dakota, and the bulk of said energy was so generated and transmitted, said bulk of said energy in fact being generated by Dakota Public Service Company aforesaid in the State of North Dakota and transmitted, sold and delivered to the defendant at Barnard, Ipswich and Gettysburg, all located in the State of South Dakota. The said energy thus received by the defendant at Barnard, Ipswich and Gettysburg was transmitted by the defendant and resold to the retail customers of the defendant in the operation of an electric public utility business by the defendant in the State of South Dakota, and portions of the energy generated by the defendant in the State of South Dakota were transmitted by defendant to Dakota Public Service Company and by it transmitted to the State of North Dakota and sold by said Dakota Public Service Company to retail customers in the operation of an electric public utility business in the State of North Dakota. Defendant did not file said Exhibit "E", or any copy thereof, with the Federal Power Commission until January 10, 1940, when, without compliance with Section 205 (d) of the Federal Power Act, it filed the same with said Federal Power Commission as Northwestern Public Service Company F. P. C. Schedule No. 5-B, and no certificate of concurrence was filed by or on behalf of Dakota Public Service Company. Said charge of Thirteen and 20/100 Dollars ($13.20) per kilowatt of firm demand per year referred to in Article VIII of said Exhibit "E" was fixed by the aforesaid common directors and officers purporting to act for all of said corporate parties thereto, was without consideration, unjust, unreasonable and unlawful in its entirety and the defendant unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from Dakota Public Service Company and caused said Dakota Public Service Company to pay to defendant for said so-called firm demand charge the following amounts, in the following years, viz.:

In the year 1939, Nine Thousand Sixty-eight and 40/100 Dollars ($9,068.40)

In the year 1940, Twelve Thousand Six Hundred Eighty-five and 20/100 Dollars ($12,685.20)

In the year 1941, Two Thousand One Hundred Thirty-eight and 40/100 ($2,138.40);

and by reason of the facts hereinbefore alleged, defendant became indebted to said Dakota Public Service Company in the aforesaid amounts, no part of which has been paid.

VI.

On the 19th day of October, 1945, said Dakota Public Service Company, for value, transferred, sold and assigned to plaintiff all claims, demands and causes of action of every kind which it then had against the defendant.

For a sixth cause of action:

I.

Realleges and expressly by reference makes parts of this cause of action the allegations contained in paragraphs I, II, III, and VIII of plaintiff's first cause of action.

II.

At all times in this cause of action alleged, Dakota Public Service Company, a Delaware corporation, resulting from the merger of Northern Power and Light Company and North Dakota Power & Light Company, has been a Delaware corporation duly qualified as a foreign corporation in the States of North Dakota and South Dakota.

III.

On the 1st day of July, 1941, the defendant and said Dakota Public Service Company made and entered into a contract, a true and correct copy thereof being hereto attached, marked Exhibit "F" and expressly by reference made a part hereof. Defendant, working through officers and directors of defendant, who were at the same time officers and directors of Dakota Public Service Company as hereinbefore alleged, caused said agreement to be entered into by said Dakota Public Service Company for the advantage and benefit of defendant, and to the injury of said Dakota Public Service Company.

IV.

For eleven and one-half (11½) years prior to the execution of the original of said Exhibit "F", the parties to said original contract had exchanged electrical energy, by far the largest amount thereof being generated by Dakota Public Service Company, and during none of said years was any charge made by either of the parties to said original of Exhibit "F" against the other on account of any so-called deficiency in generating capacity, except as hereinbefore set forth in the third and fifth causes of action pleaded in this complaint. The original of said Exhibit "F" was a scheme and plan conceived and put into operation by the defendant through its aforesaid officers and directors for the purpose of exacting large charges from Dakota Public Service Company for the advantage and benefit of the defendant, and, among other purposes, to offset charges of Dakota Public Service Company for electrical energy then being sold and thereafter to be sold by Dakota Public Service Company to the defendant at an already inadequate price.

V.

The original of Exhibit "F" was made and entered into for the purpose of fixing terms, rates and charges which would be made by the parties thereto against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota and for electric energy to be generated in the State of South Dakota and transmitted to the State of North Dakota. At the time of the execution of the original of said Exhibit "F", it was contemplated by the parties thereto that the bulk of the energy to be interchanged would be generated in the State of North Dakota and transmitted to the State of South Dakota, and the bulk of said energy was so generated and transmitted, said bulk of said energy in fact being generated by Dakota Public Service Company aforesaid in the State of North Dakota and transmitted, sold and delivered to the defendant at Barnard, Ipswich and Gettysburg, all located in the State of South Dakota. The said energy thus received by the defendant at Barnard, Ipswich and Gettysburg was transmitted by the

defendant and resold to the retail customers of the defendant in the operation of an electric public utility business by the defendant in the State of South Dakota, and portions of the energy generated by the defendant in the State of South Dakota were transmitted by defendant to Dakota Public Service Company and by it transmitted to the State of North Dakota and sold by said Dakota Public Service Company to retail customers in the operation of an electric public utility business in the State of North Dakota. Defendant did not file said Exhibit "F", or any copy thereof, with the Federal Power Commission until February 28, 1942, when, without complying with the requirements of Section 205 (d) of the Federal Power Act, it filed the same with said Federal Power Commission as Northwstern Public Service Company F. P. C. Schedule No. 6. Said charge of Thirteen and 20/100 Dollars ($13.20) per kilowatt of firm demand per year referred to in Article VIII of said Exhibit "F" was fixed by the aforesaid common directors and officers purporting to act for all of said corporate parties thereto, was without consideration, unjust, unreasonable and unlawful in its entirety and the defendant unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from Dakota Public Service Company, and caused said Dakota Public Service Company to pay to defendant, for said so-called firm demand charge the following amounts, in the following years, viz.:

In the year 1941, Two Thousand One Hundred Thirty-eight and 40/100 Dollars ($2,138.40)

In the year 1942, Seventeen Thousand One Hundred Ninety-nine and 60/100 Dollars ($17,199.60)

In the year 1943, Eight Thousand Five Hundred Fourteen Dollars ($8,514.00)

In the year 1944, Nine Thousand Nine Hundred Ninety-two and 40/100 Dollars ($9,992.40)

In the year 1945 (through October 19th), Eighteen Thousand Four Hundred Twenty and 25/100 Dollars ($18,420.25);

and by reason of the facts hereinbefore alleged, defendant became indebted to said Dakota Public Service Company in the aforesaid amounts, no part of which has been paid.

VI.

Plaintiff is informed and believes and on such information and belief alleges that the portion of the Aberdeen interconnected substation and control equipment, the Gettysburg substation, and the transmission lines referred to in said Exhibit "F", for which a charge was made pursuant to said original of said Exhibit "F", were all constructed some time in 1930 for the defendant's own use and benefit.

VII.

Although under the terms of said contract, Exhibit "F", neither party bound itself to render to the other any specific or actual service save as such party was from time to time willing and able to render the same, and although the defendant knew that it would receive, as it had in the past, the greatest amount of energy and the greatest benefit from said contract, it caused said contract to be executed and complied with by Dakota Public Service Company through the aforesaid common directors and officers of said Company.

Subsequent to the execution of said contract and during the term thereof through the 19th day of October, 1945, defendant delivered to Dakota Public Service Company 5,471,154 kilowatt hours of electric energy, whereas during the same period, Dakota Public Service Company delivered to defendant 49,270,000 kilowatt hours of electric energy.

VIII.

For several years immediately prior to January 1, 1936, defendant and said Northern Power and Light Company had exchanged electric energy, the energy delivered by Northern Power and Light Company to defendant having been generated in North Dakota and transmitted to defendant in South Dakota where the same was metered and sold to defendant for resale and thereafter transmitted by defendant and resold to customers of its utility business in South Dakota and some of the energy delivered by defendant to Northern Power and Light Company having been generated in the State of South Dakota and trans-

mitted to Northern Power and Light Company and sold to it by defendant for resale and by Northern Power and Light Company transmitted to North Dakota and there resold to its public utility customers.

Thereafter no transmission line charges were ever made against Dakota Public Service Company or its predecessor companies except as hereinbefore alleged in the third and fifth causes of action herein and, as stated in said causes of action, the agreements under which the defendant purported to make charges against Dakota Public Service Company and its predecessors were never properly and validly filed with the Federal Power Commission.

The said transmission line charges referred to herein and in said Exhibit "F" and fixed by the aforesaid common officers and directors purporting to act for both of the parties to said contract were without consideration, unjust, unreasonable and unlawful in their entirety, and the defendant unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from Dakota Public Service Company, and caused said Dakota Public Service Company to pay to the defendant, on account of said transmission line charges, at the rates set forth in said contract, the following amounts, in the following years, to-wit:

In the year 1941, Ten Thousand Dollars ($10,000.00)

In the year 1942, Twenty Thousand Dollars ($20,000.00)

In the year 1943, Twenty Thousand Dollars ($20,000.00)

In the year 1944, Twenty Thousand Dollars ($20,000.00)

In the year 1945, (through October 19th), Sixteen Thousand Twenty-one and 51/100 Dollars ($16,021.51).

IX.

From the 1st day of July, 1941, to the 19th day of October, 1945, the defendant, through its officers and directors, who were officers and directors in common with Dakota Public Service Company, caused said Dakota Public Service Company to generate electrical energy in the State of North Dakota and transmit the same to the

defendant at Gettysburg, Barnard and Ipswich, South Dakota, and there to sell the same to the defendant, and defendant transmitted the same and resold the same to its public utility customers in the State of South Dakota, and the net energy thus generated, transmitted and sold by Dakota Public Service Company to defendant was fairly, justly and reasonably of the value of Three Hundred Twenty-eight Thousand Four Hundred Ninety-one and 35/100 Dollars ($328,491.35), but the defendant, through its aforesaid officers and directors, paid to said Dakota Public Service Company, and caused said Dakota Public Service Company to receive for said energy, only the sum of Two Hundred Eighteen Thousand Nine Hundred Ninety-four and 23/100 Dollars ($218,994.23), which was an unjustly, unreasonably and unlawfully low price therefor.

X.

By reason of the facts hereinbefore in this cause of action alleged, defendant became indebted to the Dakota Public Service Company in the amount of Two Hundred Fifty-one Thousand Seven Hundred Eighty-three and 28/100 Dollars ($251,783.28), no part of which has been paid.

XI.

On the 19th day of October, 1945, said Dakota Public Service Company, for value, transferred, sold and assigned to the plaintiff all claims, demands and causes of action, of every kind, which said Dakota Public Service Company then had against defendant.

Wherefore, plaintiff demands judgment against the defendant:

(1) Declaring each of the contracts pleaded in plaintiff's complaint to be void.

(2) Declaring all of the aforesaid charges for interconnection facilities and transmission line charges to be unjust and unreasonable and unlawful in their entirety.

(3) Determining the fair and just and reasonable amount owing to plaintiff on account of the aforesaid electrical energy purchased by defendant.

(4) Requiring defendant to account to the plaintiff for all funds received by defendant from Northern Power and Light Company, North Dakota Power & Light Company and Dakota Public Service Company as set forth in plaintiff's complaint or as may be shown by such accounting.

(5) For Four Hundred Seventy-eight Thousand Two Hundred Thirty-two and 48/100 Dollars ($478,232.48), with interest at the rate of six per cent (6%) per annum from the date of each payment of each portion thereof by North Dakota Power & Light Company, Northern Power and Light Company and Dakota Public Service Company to the defendant.

(6) For such other and further relief as is just and equitable.

(7) For plaintiff's costs and disbursements herein.

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Mobridge, South Dakota,
JULIUS SKAUG,
Mobridge, South Dakota,
Attorneys for Plaintiff.

JOHN C. BENSON
and
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Minneapolis 2, Minnesota,
Of Counsel.

	Northwestern Public Service Company	North Dakota Power & Light Company	Northern Power and Light Company
1935			
President and Director	F. E. Kruesi	F. E. Kruesi	F. E. Kruesi
Vice-President and Director	(1) W. F. Gazin	(1) W. R. Gazin	(1) W. F. Gazin
Vice-President and Director	C. J. Strike	C. J. Strike	C. J. Strike
Treasurer	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Assistant Secretary and Assistant Treasurer	(5) J. F. Buckmier (6) R. L. Walsh	(2) J. F. Buckmier (3) R. L. Walsh	(2) J. F. Buckmier (3) R. L. Walsh
Director	(4) G. R. McArthur (5) John E. Barber (5) D. C. Green (5) Geo. A. Mills (5) N. P. Zech J. F. Buckmier	S. W. White (4) M. C. Blackstun	S. W. White (4) M. C. Blackstun
1936			
President and Director	F. E. Kruesi	F. E. Kruesi	F. E. Kruesi
Vice-President and Director	C. J. Strike	C. J. Strike	C. J. Strike
Treasurer	C. L. Sandstedt	C. L. Sandstedt	C. L. Standstedt
Secretary and Director	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Assistant Secretary and Assistant Treasurer	(1) Wm. M. Dunn (2) E. W. Dempewolf	(1) Wm. M. Dunn (2) E. W. Dempewolf	(2) E. W. Dempewolf (1) Wm. M. Dunn
Directors	G. R. McArthur J. F. Buckmier	S. W. White M. C. Blackstun	S. W. White J. F. Buckmier

(1) Jan. 1 to Jan. 31
(2) Jan. 1 to Mar. 20
(3) Mar. 20 to Oct. 25
(4) Jan. 31 to Dec. 31
(5) Jan. 1 to Feb. 26
(6) Feb. 26 to Oct. 25

(1) Feb. 28 to Nov. 27
(2) Nov. 27 to Dec. 31

Tabulation of Officers and Directors

1937	Northwestern Public Service Company	North Dakota Power & Light Company	Northern Power and Light Company
President and Director	(6) F. E. Kruesi (7) C. J. Strike	(1) F. E. Kruesi (2) C. J. Strike	(1) F. E. Kruesi (2) C. J. Strike
Vice-President and Director	(6) C. J. Strike (7) G. R. McArthur	(1) C. J. Strike (2) G. R. McArthur	(1) C. J. Strike (2) G. R. McArthur
Treasurer	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Assistant Secretary and Assistant Treasurer	E. W. Dempewolf (5) J. A. Connor	E. W. Dempewolf (5) J. A. Connor	E. W. Dempewolf (5) J. A. Connor
Directors	(7) B. L. Palm G. R. McArthur J. F. Buckmier	S. W. White (4) M. C. Blackstun (3) J. F. Buckmier	S. W. White (3) J. F. Buckmier (4) M. C. Blackstun

(1) Jan. 1 to Aug. 10
(2) Aug. 10 to Dec. 31
(3) Mar. 10 to Dec. 31
(4) Jan. 1 to Jan. 10
(5) May 4 to Dec. 15
(6) Jan. 1 to June 21
(7) June 21 to Dec. 31

1938			
President and Director	(1) C. J. Strike (3) A. B. Sanborn	(1) C. J. Strike (2) A. B. Sanborn	(1) C. J. Strike (2) A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur	G. R. McArthur
Vice-President and Director	(3) C. L. Sandstedt	(3) C. L. Sandstedt	(3) C. L. Sandstedt
Treasurer	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	(4) C. L. Sandstedt	(4) C. L. Sandstedt	(4) C. L. Sandstedt
Secretary	(3) J. F. Buckmier	(3) J. F. Buckmier	(3) J. F. Buckmier
Assistant Secretary and Assistant Treasurer	E. W. Dempewolf	E. W. Dempewolf	E. W. Dempewolf
Directors	B. L. Palm J. F. Buckmier	S. W. White J. F. Buckmier	S. W. White J. F. Buckmier

(1) Jan. 1 to June 1
(2) July 1 to Dec. 31
(3) June 7 to Dec. 31
(4) Jan. 1 to June 7

1939	Northwestern Public Service Company	Dakota Public Service Company (North Dakota Power & Light Company) (a)	Northern Power and Light Company (Until merger July 1, 1939)
President and Director	A. B. Sanborn	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur	G. R. McArthur
Vice-President and Director	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Treasurer	C. L. Sandstedt	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	J. F. Buckmier	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	E. W. Dempewolf	E. W. Dempewolf	E. W. Dempewolf
Directors	(1) W. J. Allen (1) W. S. Fantle (1) O. C. Stokke (2) B. L. Palm	S. W. White	S. W. White

(1) April 18 to December 31

(2) January 1 to April 18

(a) Agreement of merger authorized directors of surviving corporation to hold office until next annual meeting of stockholders of surviving corporation or until successors were elected and qualified.

1940		
President and Director	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur
Vice-President and Director	C. L. Sandstedt	C. L. Sandstedt
Treasurer	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	E. W. Dempewolf	E. W. Dempewolf
Directors	W. J. Allen W. S. Fantle O. C. Stokke	S. W. White

Tabulation of Officers and Directors

	Northwestern Public Service Company	Dakota Public Service Company
1941		
President and Director	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur
Vice-President and Director	C. L. Sandstedt	C. L. Sandstedt
Treasurer	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	(1) E. W. Dempewolf (2) Ralph Mauch	(1) E. W. Dempewolf (2) Ralph Mauch
Directors	W. J. Allen W. S. Fantle O. C. Stokke	S. W. White

(1) January 1 to April 21
(2) April 21 to December 31

1942		
President and Director	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur
Vice-President and Director	C. L. Sandstedt	C. L. Sandstedt
Treasurer	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	(1) Ralph Mauch (2) Margaret Frost	(1) Ralph Mauch (2) Margaret Frost
Directors	W. J. Allen W. S. Fantle O. C. Stokke	S. W. White

(1) January 1 to September 14
(2) September 14 to December 31

Tabulation of Officers and Directors

	Northwestern Public Service Company	Dakota Public Service Company
1943		
President and Director	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur
Vice-President and Director	C. L. Sandstedt	C. L. Sandstedt
Treasurer	C. L. Sandstedt	C. L. Sandstedt
Secretary and Director	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	Margaret Frost	Margaret Frost
Directors	W. J. Allen W. S. Fantle O. C. Stokke	S. W. White
1944		
President and Director	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur
Vice-President and Director	(1) C. L. Sandstedt	(1) C. L. Sandstedt
Treasurer	(1) C. L. Sandstedt (2) Wm. M. Dunn	(1) C. L. Sandstedt (2) Wm. M. Dunn
Secretary and Director	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	Margaret Frost	Margaret Frost
Directors	W. J. Allen W. S. Fantle O. C. Stokke (2) Wm. M. Dunn	S. W. White (3) Wm. M. Dunn

(1) Jan. 1 to June 28 (deceased)
(2) July 24 to Dec. 31
(3) Aug. 16 to Dec. 31

Tabulation of Officers and Directors

1945	Northwestern Public Service Company	Dakota Public Service Company to October 19, 1945
President and Director	A. B. Sanborn	A. B. Sanborn
Vice-President and Director	G. R. McArthur	G. R. McArthur
Treasurer and Director	Wm. M. Dunn	Wm. M. Dunn
Secretary and Director	J. F. Buckmier	J. F. Buckmier
Assistant Secretary and Assistant Treasurer	Margaret Frost	Margaret Frost
Directors	W. J. Allen	S. W. White
	(1) W. S. Fantle	
	O. C. Stokke	

(1) January 1 to September 17 (Deceased)

Exhibit "A-1".

[thwestern] Public Service Co.

Rate Schedule F. P. C. No. 1
Effective Date Jan. 31, 1936

Northwestern Public Service Company

5351-R

Copy

(Federal Power Commission
Feb. 7-1936 Received)

January 28, 1936

Federal Power Commission
Washington, D. C.

Gentlemen:

Your letter of December 21, 1935 with which you enclosed your Order #36 was duly received. Reference is made to the extension of time until January 31, 1936 in which to furnish the information requested.

In reply we beg to advise as follows:

1. Northwestern Public Service Company purchases and interchanges surplus electric energy under an oral agreement between it and Northern Power and Light Company. Under normal conditions the movement of the bulk of the energy is from Northern Power and Light Company to Northwestern Public Service Company although the movement is reversed in events of emergency. Deliveries under this agreement are made at Barnard, Ipswich and Gettysburg, all located in South Dakota, Northwestern Public Service Company owning no lines interconnected with those of Northern Power and Light Company located outside the state of South Dakota. Energy delivered to Northwestern Public Service Company under this oral agreement may be generated in part at Mobridge, in South Dakota, but the bulk of the energy so delivered is generated in North Dakota at plants owned by North Dakota Power and Light Company and sold by North Dakota Power and Light Company to Northern Power and Light Company and delivered to the latter company at Driscoll in North

Dakota or at a point on the North Dakota-South Dakota state line near Keldron. The price of the surplus electric energy sold or interchanged under this agreement is 5 mills per kilowatt-Hour. This agreement is terminable at the will of either party.

We do not concede that the purchase or interchange of energy under this oral agreement is in interstate commerce as an analysis of all the facts leads to the conclusion that no interstate movement is involved but that it has ceased before delivery of energy to or from Northwestern Public Service Company.

So far as we are advised, aside from the above transaction, this company neither owns nor operates any facilities for the transmission or sale of electric energy at wholesale in interstate commerce for resale.

This information is filed without prejudice or waiver of any legal or constitutional rights of the company with respect to the Public Utility Act of 1935 or any provision thereof.

Yours very truly,
C. J. STRIKE,
Vice-President.

Exhibit "B".

Northwestern Public Service Company
Rate Schedule FPC No. 3,
Effective date, January 1, 1936,
Filing date, December 23, 1938.

(Federal Power Commission
Received Jan. 25, 1939)

Interconnection Contract.

Northwestern Public Service Company.

Northern Power and Light Company.

This Contract and Agreement, Made and entered into this 7 day of October, 1936, by and between Northwestern Public Service Company, a Delaware Corporation, hereinafter referred to as "Northwestern Company," and North-

ern Power and Light Company, a Delaware Corporation, hereinafter referred to as "Northern Company."

Witnesseth:

Whereas, both companies desire to interchange electric power and energy in order to utilize existing power plants to their maximum capacity and to provide emergency service, one to the other, and,

Whereas, Northwestern Company has heretofore, at its own cost and expense, constructed inter-connection facilities with the transmission system of Northern Company, which facilities are more specifically described as follows:

Item 1. Portion of Aberdeen's inter-connected sub-station and control equipment used exclusively for inter-connection with Northern Company.

Item 2. Gettysburg sub-station used exclusively for inter-connection with Northern Company and serving Gettysburg, a Northern Company property.

Item 3. Twenty-two/thirty-eight kilovolt transmission lines from Aberdeen to Barnard and from Aberdeen to Ipswich, totaling fifty (50) miles for interconnection with Northern Company.

Item 4. Thirty-three kilovolt transmission line from Highmore to Gettysburg, a distance of sixty-two (62) miles for interconnection at Gettysburg with Northern Company, and,

Whereas, the inter-connection facilities above listed make possible the interchange of energy between the respective companies, thereby enabling both companies to render more reliable service and utilize existing plants to their maximum efficiency.

Now, therefore, the parties hereto agree as follows, to-wit:

Article I.

Definition of Terms.

For the purpose of this Agreement, certain terms herein used are defined as follows:

The term, "points of delivery", means the various points where the transmission lines of Northwestern

Company meet the transmission lines of Northern Company.

The term, "firm power", means that power which either company is obligated to furnish the other and for which the receiving company would be obligated to pay.

The term, "surplus energy", means that energy which either Company may, in its judgment, have available from time to time and desires to sell to the other Company and which energy the other Company desires to receive.

The term, "emergency power", means that power which either Company, upon receiving due notice from the other Company, can and does furnish the other Company for a short period of time during an emergency caused by the failure or breakdown of any of the facilities of the other party.

The term, "billing period", means that period between successive meter readings taken for the purpose of power and energy billing which readings will be taken as nearly as practicable on the 25th day of each current month.

Article II.

Term of Contract.

This Contract will become effective on January 1, 1936, and will continue thereafter for a period of five (5) years. It will thereafter remain in effect until cancelled by eighteen (18) months' written notice by either party.

It is understood that such notice may be given on or before July 1, 1939, to terminate the contract as of January 1, 1941. In like manner, such notice may be given on any date after July 1, 1939, for termination of the contract in eighteen (18) months' from date of notice.

Article III.

General Agreement.

Subject to the terms and conditions of this Agreement, each Company will sell surplus energy to the

other, and each Company will furnish, one to the other, such emergency power as the one Company may need and the other Company have available during such emergency. Neither Company hereunder obligates itself to furnish or receive any firm power.

Article IV.

Voltage and Frequency.

Power and energy to be delivered or interchanged hereunder will be of a character commonly known as three-phase, alternating current at approximately 60 cycles and at approximately 33 kilovolts and 22,000/38,000 kilovolts respectively.

Article V.

Rate.

Northwestern Company will pay to Northern Company for surplus energy during each billing period a sum equivalent to .5 cents per kilowatt-hour.

Northern Company will pay to Northwestern Company for surplus energy during each billing period a sum equivalent to .5 cents per kilowatt-hour.

It is understood between the parties hereto that fuel prices and generating efficiencies may change, causing the desirability of an adjustment in the energy rates contained in this Article. In January of each year the parties hereto will review production costs and if necessary re-determine the energy rates to be contained herein. Such revision, if any, will be made by supplements to this Contract.

It is understood that billing under the rates contained herein will become effective July 1, 1936. The first review will then be made in January, 1937, and each January thereafter.

Article VI.

Transmission Line Charges

As Northern Company's share of the fixed charges, maintenance and operating expenses relating to the inter-connection facilities enumerated above, North-

ern Company agrees to pay Northwestern Company beginning January 1, 1936, the sum of $1,666.66 a month. This charge is over and above all energy charges provided under Article V above.

Upon the termination of this Contract by either party, Northern Company will pay Northwestern Company, in addition to all other charges hereinbefore enumerated, a sum equivalent to one-half the actual cost to Northwestern Company to remove and dismantle the inter-connection facilities enumerated above and to return all material to the store-room of Northwestern Company in Aberdeen, South Dakota.

Northern Company has no obligation to pay Northwestern Company for any part of the construction cost of the inter-connection facilities enumerated above, or for the use of such facilities for any period prior to January 1, 1936.

Article VII.

Emergency Power.

In the event of total or partial failure of the facilities for generation or transmission of electric power of either party, the other party agrees to use all reasonable effort and all facilities at its command (after the requirements of the other customers of the party delivering such power have been met) to furnish power and energy to the receiving party for short periods of time and to the extent of such failure or interruption and only for such period of time as may be required to restore such facilities, by the exercise of every reasonable effort on the part of the party possessed of such facilities, to their normal operating condition.

Billing for such emergency power and energy will be on the basis of the energy charge as provided in Article V above, plus whatever additional expense the delivering party may incur in placing in operation and operating high priced plants and facilities. It is the intent that the delivering Company will not make a profit on such emergency power but will be reimbursed for all added expense that such party may incur during such emergency.

No service will be emergency service, however, unless due notice has been given by the party in need of emergency power to the other party and the other party agrees to furnish such emergency power.

Article VIII.

Metering.

Suitable standard 33 kilovolt and/or 22,000/38,000 kilovolt metering equipment agreeable to both parties will be installed, owned and maintained by Northwestern Company at the points of delivery (or as near thereto as practicable.) Meters will be of such number, type and arrangement, as will show separately the amounts of power and energy supplied at each location. Metering equipment will be tested at intervals not exceeding sixty (60) days with a representative of each party present. If, as the result of such tests, the metering equipment is found to be inaccurate, it will be restored to a condition of accuracy. If inaccuracy exceeds 2%, the readings of the meters taken during the period (30) days preceding (or during such shorter period as may have intervened since a periodic test) will be corrected and payments adjusted accordingly, prior to which period no correction of such readings will be made.

Northern Company may at its own expense, install and maintain additional metering equipment at the point of delivery for the purpose of checking the meters installed and maintained by Northwestern Company, and the readings thereof.

If the meters installed by Northwestern Company wholly failed to register the power and energy during any period of time for any reason whatsoever, the amount of power and energy delivered during each period will be measured by means of the meters installed by Northern Company, and if the Northern Company has not so installed meters, or if its meters have wholly failed to register during this period of time, the amounts of power and energy so delivered will be estimated according to the amounts previously delivered under sub-stantially similar conditions.

Article IX.

Continuity of Service.

Both Companies will exercise reasonable diligence and care to avoid interruptions of delivery of power and energy hereunder but will not be liable for any damage or loss that may be occasioned by any failure or interruptions caused by fires, strikes, riots, floods, lightning, storms, acts of God, civil disturbances, action of public authority, litigation, breakdown, or causes beyond its reasonable control. Either Company may interrupt service to make necessary repairs or to make changes in equipment or to install new equipment but only for such time as may be unavoidable. Reasonable advance notice of such interruption will be given if the nature of the situation permits.

Article X.

Liability Clause.

Each party hereto will save and keep the other harmless from any and all loss, cost, damage or expense, including reasonable attorneys' fees, for, or by reason of, any claim for injury to its own employees at any location and to other persons or property occasioned by the electric power and energy or equipment on its own side of the points of delivery hereunder, however caused, provided however, that each party will be liable for any damage to persons or property arising out of the maintenance and/or operation of transmission lines it may own beyond the points of delivery herein defined.

Article XI.

Bills and Payments.

Bills for power and energy delivered hereunder will be rendered each month as nearly as may be practicable on or before the [fifty] (5th) day of the calendar month, and will be payable within ten (10) days from the date thereof.

If either Company [failes] to perform any of its obligations under this Contract including the prompt payment of monthly bills, the other Company may suspend delivery

of power and energy and will not be liable in any manner for loss or damage arising from such suspension. No such suspension will interfere with the enforcement by the other Company of any other legal right or remedy or relieve the delinquent Company from liability to pay the transmission line charges during any such suspension. No delay by either Company in enforcing any of its rights hereunder will be deemed a Waiver of such rights.

Article XII.

Conclusion.

This Contract will inure to, and be binding upon the successors and assigns of the respective parties.

In Witness Whereof, the parties hereto have caused this contract to be executed by these duly authorized officers, and impressed with their respective corporate seals the date and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By F. E. KRUESI,

President.

Attest:

C. L. SANDSTEDT,

Secretary.

NORTHERN POWER AND LIGHT COMPANY,

By C. J. STRIKE,

Vice-President.

Attest:

C. L. SANDSTEDT,

Secretary.

Exhibit "C".

Northwestern Public Service Company
Rate Schedule F. P. C. No. 4,
Also Supplement No. 1
to
Rate Schedule F. P. C. No. 3,
Effective date January 1, 1938,
Filing date December 23, 1938.

Interchange Capacity AGR.

Northwestern Public Service Company

North Dakota Power & Light Company

Northern Power & Light Company ..... "Northern".

(Federal Power Commission
Received Dec. 23, 1938)

This agreement was made and entered into this 1st day of January 1938, by and between Northwestern Public Service Company, a corporation organized under the laws of Delaware, herinafter referred to as "Northwestern", North Dakota Power & Light Company, likewise organized under the laws of Delaware, hereinafter referred to as "North Dakota", and Northern Power & Light Company, also organized under the laws of Delaware, herinafter referred to as "Northern".

Witnesseth:

Whereas, "Northwestern" is engaged in the business of producing and selling electrical energy within the geographical area of the eastern half of the state of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto, marked Exhibit "A", and hereby made a part hereof; and

Whereas, "North Dakota" is engaged in the business of producing and selling electrical energy within a geographical area located in the central and southwestern parts of the state of North Dakota, such territorial limits as they exist at the date hereof being so designated and

shown on the plat attached hereto marked Exhibit "A", and hereby made a part hereof; and

Whereas, "Northern" is engaged in the business of producing and selling electrical energy within geographical areas located in the north central and south central parts of the states of South Dakota and North Dakota respectively, such hereof being so designated and shown on the plat marked Exhibit "A", attached hereto, and hereby made a part hereof; and

Whereas, "Northwestern" and "Northern" have provided the inter-connection facilities and the basis for the transfer of energy all as provided for in the interconnection agreement dated October 7th, 1936, and by reference, made a part hereof, and

Whereas, the transmission systems of the said companies are now interconnected as shown on the plat attached marked Exhibit "A", and such systems are now operated as an inter-connected system, and

Whereas, it is the desire of the three companies to make full and mutual use of the inter-connection of their respective transmission systems for the interchange of reserve or spare capacity in their combined systems as such reserve or spare capacity may obtain in their respective generating stations and may from time to time be available; it being recognized that economy of supply is to be realized by all the companies when any one of them is entitled to draw upon the reserve or spare capacity of each of the others, whether for use in the Receiving Company's (as hereinafter defined), general light and power business or for the purpose of securing to the Receiving Company a reserve capacity during emergencies or during the overhauling of equipment, or whenever other need may arise; and it being further recognized that it is to the interest not only of the Companies themselves but of the public, that their respective systems shall be developed with such proper harmonious co-operation as will tend to prevent avoidable expenditures and thereby tend to minimize the cost of producing and supplying electrical energy; and it being further recognized that if two or more neighboring supply companies are adequately interconnected it is not

necessary for any of them to own and maintain as large an amount of reserve or spare capacity as though each Company were separate and isolated from the others; and

Whereas, it is now the desire of each of the parties hereto that under and pursuant to the agreement such as this is intended to be, a flexible and equitable basis be established for the apportionment of charges covering the interchange or use of said reserve or spare generating capacity as may now or hereafter obtain either incident to the actual exchange of such capacity or its employment for standby purposes all in order that the three companies may be operated at the highest efficiency and the lowest practical cost, and

Now therefore, in consideration of the premises and of One Dollar and other good and valuable considerations in hand paid by each of the parties to each of the others, the receipt of which payment is hereby by each of the parties confessed, and in consideration of the mutual covenants and conditions hereinafter set forth, and of the benefits expected to be derived herefrom, the parties hereby agree as follows:

Article I—Definitions

Section 1—The term "Supplying Company", as used in this agreement, shall, so far as appropriate, designate and apply to any party hereto which, under the terms hereof, for the time being, shall be obligated to stand ready to supply electrical capacity and/or energy to any other of said parties, or from which capacity and/or energy for the time being shall be desired hereunder by any other of said parties.

Section 2—The term "Receiving Company" shall, so far as appropriate, designate and apply to any party hereto which, under the terms hereof, for the time being, shall be entitled to obtain or be obtaining, or be desirous of obtaining, capacity from any other of said parties.

Section 3—The term "point of delivery" shall mean any point (to be, in each case, however, a point on the boundary line between the respective territories of the parties hereto, unless otherwise agreed) at which, under the terms hereof,

the respective transmission lines of any two parties shall join, and at which capacity and energy shall be delivered hereunder by any party hereto to any other party hereto. Said "points" of delivery are shown on the attached plat marked Exhibit "A".

Section 4—The term "interconnected system" shall mean the combined system of generating station and interconnecting transmission lines of all the parties hereto, all or some part of the capacity of which is available for the transfer [or] energy from the system of one company to that of another.

Section 5—The term "station generating capacity" with respect to any generating station owned, leased, or otherwise controlled by any of the parties hereto, shall mean the rated capacity in kilowatts of such station, or the number of kilowatts of electrical energy such station can supply to the interconnected system, whichever is lower.

Section 6—The term "Company generating capacity", with respect to any party hereto, in any month as may be hereinafter designated shall mean the sum total capacity in kilowatts of (1) all the several station generating capacities, as above defined of such party, in such month, and (2) the amount of firm capacity (as hereinafter defined) now or hereafter purchased in each month, by such party, when such firm capacity is of the same general character with relation to such party's operation as an equal amount of steam turbine or internal combustion engine driven generating capacity owned or leased by such party.

Section 7—The term "interconnected generating capacity", shall mean the sum of the Company generating capacities, as above defined, of all the parties hereto.

Section 8—The term "Company system maximum demand", with respect to any party, for such month as hereinafter designated shall mean the demand (in kilowatts) made upon the system of such party during that half hour in such month in which demand was greater than in any half hour previously recorded.

Section 9—The term "interconnected system maximum demand", with respect to any party, for such month as

hereinafter designated shall mean the arithmetical sum of Company system maximum demand during that half hour in such month in which such combined demand was greater than in any other half hour.

Section 10—The term "Company reserve capacity", with respect to any party in any given month, shall mean the excess (in kilowatts) of the Company generating capacity of such party, over and above the highest previous recorded Company system maximum demand (in kilowatts) of such party during the term hereof.

Section 11—The term "per cent Company reserve capacity", with respect to any party, at any given time shall mean the percentage which the Company reserve capacity of such party (as defined in the last preceding paragraph) at such time bears to the Company system maximum demand of such party.

Section 12—The term "interconnected system reserve capacity", shall mean the net total of the Company reserve capacities, as hereinbefore defined (after deducting any deficiency in Company generating capacity of any party or parties) of all the parties hereto.

Section 13—The term "per cent interconnected system reserve capacity", shall pertain to the interconnected system and, at any given time, shall mean the percentage which the "interconnected reserve capacity" then bears to the sum of the "Company system maximum" demands of all the parties hereto.

Section 14—The term "Company excess reserve capacity", with respect to any party, in any such month as hereinafter determined shall mean the amount (in kilowatts) by which the "Company reserve capacity" of such party in such month exceeds the product of its "Company system maximum demand" multiplied by the "per cent interconnected reserve capacity" of the interconnected system.

Section 15—The term "Company deficiency in reserve capacity", with respect to any party, in any such month as hereinafter determined shall mean the number of kilowatts by which its "Company generating capacity" is less

than the sum of (1) the product of its "Company system maximum demand" in such month multiplied by the "per cent interconnected reserve capacity" of the interconnected system in such month and (2) its "Company system maximum demand".

Section 16—The term "firm capacity", with respect to any party, when so indicated by the context, shall mean the number of kilowatts of energy which such party has obligated itself to supply or stand ready to supply to any electric public utility company not a signatory hereto in consideration of payment therefor, and which serves to reduce the "Company reserve capacity" of such party available to the interconnected system; and shall also mean, when so indicated by the context, the number of kilowatts purchased by any party hereto from a source not a part of the interconnected system but available for use within such system, when of a quality as described in the definition of "Company generating capacity" hereinabove set forth.

Section 17—The term "half hour" shall mean the thirty-minute period beginning or ending on a clock hour, as for example, between five o'clock and five thirty o'clock or between five thirty o'clock and six o'clock.

Section 18—The term "month" shall mean the billing period.

Section 19—The word "Term", unless otherwise indicated by the context shall include not only the original term of the agreement, but also any and every period of extension effected under the provisions hereof.

Article II—Term—Essence.

Section 1—Term. This agreement will become effective on January 1st, 1938, and will thereafter remain in effect for succeeding terms of one (1) year. It shall continue in effect for successive periods of one year each unless cancelled by six (6) months' notice written by any party to the other parties, prior to the expiration of any term hereof, of its intention not to renew contract.

Section 2—Essence. It is the intent of this agreement that the "percentage of Company reserve capacity" shall

be the same for each of the parties hereto. Any company or companies having a "deficiency or deficiencies in reserve capacities" shall supply such deficiency from the company or companies having "Company excess reserve capacity". Such excess shall be apportioned so that the "percentage of Company reserve capacity" is identical with the percentage of interconnected reserve capacity.

Article III—General Conditions.

Section 1—General Obligations as to Supply. For and during the term hereof each of the parties hereto having "Company interchange capacity" shall supply and/or stand ready to supply capacity to each of the other parties hereto, and any party to whom capacity shall be supplied hereunder shall take and/or pay for capacity in accordance with and subject to the terms and provisions hereinafter set forth.

Section 2—Form of Energy. The capacity and/or energy to be supplied hereunder shall be in the form of three phase alternating current, having a frequency of sixty (60) cycles per second at suitable voltage, or in such other form as in any instance may mutually be agreed upon.

Section 3—Limitation of Use. The capacity and/or energy supplied hereunder to any Receiving Company shall not be used by such Receiving Company within, nor be sold by such Receiving Company to any purchaser for use within the limits of the territory of any of the other Companies, parties hereto, except in each instance by and with the written consent of such other Company.

Section 4—Ownership of Lines. All energy supplied hereunder by any supplying company shall be supplied over lines owned or leased by it, so far as such lines shall be located within its territory, and over lines owned or leased by the Receiving Company to which such energy is delivered, so far as such lines shall be located within the territory of such Receiving Company.

Section 5—Points of Delivery to Be Economically Located. The points of delivery shall be fixed by agreement between the Supplying Company and the Receiving Company in each case, and shall be so located that the neces-

sary transmission lines may be operated at a minimum total cost, and in such manner that the division of cost shall be equitable to all parties concerned as geographical arrangement and physical conditions will permit.

Section 6—Supply to Outside Electric Utilities. Any of the parties hereto may supply energy to an electric utility not a signatory hereto under an interchange or pool agreement subject to the following conditions; (a) the other parties hereto shall be fully informed as to the terms and provisions of any such agreement with an outside utility and no such agreement shall become effective without the consent of the other parties hereto; (b) any firm demand resulting from the provisions of any such outside agreement shall not be included as a part of the Company system maximum demand of the party hereto entering into such an agreement, but shall be deducted from the Company generating capacity of such party; (c) the Operating Committee shall be kept fully informed as to the energy delivered by any party hereto to outside electric utilities whether delivered as emergency or as firm demand energy.

Section 7—Additional Capacity. When, in the opinion of the parties hereto the inter-connected system coincident demand increases to a point that the system in the aggregate does not have adequate reserve facilities to insure reliable service, then, and in such event, the parties hereto will agree on the installation of additional capacity. The location of such additional capacity will be by mutual agreement as to the most feasible and practical location, taking into consideration, all other factors. When such installations are completed, the effective generating capacities of the respective parties hereto will be adjusted accordingly for billing purposes.

No plant improvements, additions or betterments by either party will be considered for billing purposes except as all of the parties hereto have approved such extension, improvement or betterment and mutually agreed on the increase in effective capacity resulting therefrom.

Article IV—Transmission Lines.

Section 1—Each company shall provide sufficient capacity in interchange lines within its own territory to transmit excess reserve capacity to the interconnected system,

but any company may, if it desires, provide such capacity in excess of immediate requirements.

Section 2—It is agreed that the status of existing interchange lines shall remain as of the date hereof until changed by mutual agreement of the parties hereto. As the requirements of service change, the parties may by mutual agreement reinforce, reconstruct, or remove any interchange line.

Section 3—It is further recognized that if one Company has provided capacity between existing points of interchange which is in excess of its own reserve requirements and such excess may be used for the interchange of reserve capacity between the other companies, it shall be entitled to and receive compensation for the use of its transmission facilities from the other Companies employing such excess, either for the actual transmission of power or for standby protection as determined and agreed upon by the Operating Committee.

Section 4—In determining compensation for excess transmission line capacity, such excess as may exist in terminal facilities such as transformers, switches and meters may be included.

Section 5—The capacity and location of any future interchange line shall be as agreed upon by the parties hereto upon recommendation of the Committee of Operations.

Article V—Rating of Generating Stations.

Section 1—The rated capacity (in kilowatts) of any generating station owned, leased, or otherwise controlled by any of the parties hereto, shall be the sum of the manufacturers' name plate ratings of all generating units except those supplying power for station auxiliaries and not available for the supply of energy used elsewhere. In each case the Committee on Operations (provided for hereinafter) shall, however, investigate the entire equipment and shall determine that which in its judgment make equitable a rating other than the sum of the name plate ratings; such rating of all such generating capacity shall, however, be fixed after full investigation and by unani-

mous agreement as hereinafter described of the Committee on Operations after investigation.

Section 2—At any time when there shall have been a change in conditions which seems to warrant a change in rating, the rating previously established for any generating station may be brought up for revision by the Committee on Operations. Generating capacity which is temporarily out of service for repairs or maintenance work shall not be deducted from the rating of the generating station during such temporary outage.

Section 3—The Committee on Operations shall determine at the expiration of each term of this contract, and previous to the beginning of a succeeding term, the "Station generating capacity" and therefrom the "company generating capacity" that shall obtain for the next succeeding term of this contract.

The foregoing shall be set forth in detail and therefrom shall be determined the "interconnected generating capacity" all of which shall be assembled in a memorandum signed by each member of the Committee on Operations, and marked "Exhibit B." The initial and each subsequent memorandum shall state the term of contract to which such exhibit is applicable.

Article VI—Determination of Maximum Demand.

Section 1—The Company system maximum demand of any party hereto shall be determined by the Committee on Operations and shall be ascertained as hereinafter set forth by multiplying by two the net total output in kilowatt hours during the half hour of system maximum demand including, (1) the energy produced by the generating stations of such party, and (2) the energy purchased by such party from all sources, and by deducting from such product (a) twice the number of kilowatt hours of energy supplied hereunder by such party in such half hour to any other party hereto, and (b) twice the number of kilowatt hours of energy supplied by such party in such half hour in any portion of its territory which is not a part of the interconnected system, and (c) twice the number of kilowatt hours of energy supplied by such

party in such half hour to any electric public utility company not a party hereto, when said supply is of an emergency or surplus nature and reported to and approved as such, in each instance, by the Operating Committee. The highest net total thus found for the system of any party in any half hour shall be the company system maximum demand of such party for the month hereinafter designated in which such half hour occurs.

Section 2—The Committee on Operations shall determine at the expiration of each term of this contract and previous to the beginning of a succeeding term thereof the "Company system demands" for each company as defined in Section 8 of Article I hereof and therefrom establish the total of the "Company system demands" for all parties hereto.

The foregoing shall set forth the time and date which such "Company system demands" were ascertained, the items making up such total for each company and the sum total thereof for the "interconnected system." All of this shall be assembled in a memorandum which shall be attached hereto and be marked "Exhibit C."

The contract and each subsequent memorandum so prepared shall be signed by each member of the Committee on Operations and shall state the term of the contract in which such "Company system demands" are to be used for billing purposes.

Article VII—Interchange Capacity.

Section 1—The Committee on Operations shall prepare as a supplement to this contract for its initial term and for each succeeding term thereafter, same to be marked "Exhibit C," a summary of "Company generating capacities" as described in Section 3 of Article V; and likewise a summary of "Company system maximum demands" as described in Section 2 of Article VI hereof.

Therefrom shall be determined the "interconnected generating capacity" the interconnected "system maximum demands," the "interconnected system reserve capacity" and the per cent interconnected system reserve capacity. Likewise thereon shall be set forth the company

or companies having "Company excess reserve capacity" and the company or companies having "Company deficiency in reserve capacity" and the amounts thereof.

This exhibit shall establish the distribution or apportionment of such excess reserve capacity that may exist, as such apportionment shall obtain during the succeeding term of this contract. The summary so prepared shall be signed by each member of the Committee of Operations.

Section 2—Any company or companies having a deficiency of reserve capacity shall be deemed to have established a firm demand hereunder respectively upon the other parties or party hereto having excess reserve capacity for the number of kilowatts constituting such deficiency in reserve capacity as previously defined in Article I, Section 14 hereof.

Section 3—The firm demand for any Receiving Company or Companies shall be determined by the deficiency or deficiencies of reserve capacity as ascertained at the expiration of each term of this contract and previous to the succeeding term unless otherwise mutually agreed upon.

Section 4—The firm demand so established by any Receiving Company or Companies shall obtain for the succeeding term of the contract.

Such Company or Companies shall pay to the Supplying Company or Companies for the total number of kilowatts of firm demand, so deemed to be established (whether actually availed of and used or not) a demand charge at the rate hereinafter specified in Article VIII, Section 1.

Section 5—Unless otherwise mutually agreed, it shall be the duty of such Supplying Company or Companies to maintain its or their capacity in readiness to supply the Receiving Company or Companies capacity up to the amount of its or their respective proportion or proportion of such firm demand.

Article VIII—Demand Charge.

Section 1—Subject to the terms and conditions of this agreement each company will furnish its proportion of the "reserve capacity" required for the interconnected sys-

tem, or in lieu thereof, the company or companies with a deficiency of reserve capacity will pay the other company or companies having an excess reserve capacity a demand charge of $13 and 20 cents per kilowatt of firm demand per year. One twelfth of such firm demand charge shall be due and payable by the Receiving Company or Companies to the Selling Company or Companies at the expiration of each calendar month during the succeeding term of this contract all as herein prescribed.

Section 2—The total firm demand of such Receiving Company or any Companies for the contract term shall be apportioned to each Supplying Company having "Company excess reserve capacity" in the proportion which the number of kilowatts of "Company excess reserve capacity of such Supplying Company" bears to the sum of Company excess reserve capacities of all the Supplying Companies and payments shall be apportioned in like manner.

Article IX—Energy Charges.

Section 1—Charges for the electrical energy flow incidental to the exchange of capacity hereto shall be covered by separate agreements. These agreements shall also cover flow of energy incident to exchange of emergency or surplus capacity.

Article X—Continuity of Service.

Each of the parties hereto will exercise reasonable diligence and care to avoid interruptions in delivery of power hereunder but will not be liable for any damage or loss which may be occasioned by any failure or interruptions caused by fires, strikes, riots, floods, lightning, storms, Acts of God, civil disturbances, action of Public [Authorty] litigation, break-downs or causes beyond reasonable control.

Either of the parties may take equipment out of service to make necessary repairs or to make changes in equipment or to install new equipment or any of these purposes, but only for such time as may be unavoidable.

It is understood and agreed that each of the parties hereto will use reasonable diligence and care in maintaining and operating the effective diligence and care in maintaining and operating the effective generating capacity of their respective systems provided for herein, to the end that they will perpetuate approximately the stated effective capacities.

Article XI—Emergency Power.

In the event of total or partial failure of the facilities for generation or transmission of electric power by either party, the other party or parties agree to use all reasonable effort and all facilities at their command after the requirements of the other customers of the party or parties delivering such power have been met, including any firm power commitments by reason of this Agreement, to furnish power to the receiving party or parties for short periods of time and to the extent of such failure or interruption, but only for such periods of time as may be required to restore such facilities by the exercise of every reasonable effort on the part of the party or parties possessed of such facilities to their normal operating condition.

There will be no billing for such emergency power except that it is mutually agreed that should either of the parties hereto be obliged to incur additional expense in bringing reserve equipment back into service for emergency operation, that such additional expense will be chargeable to the party or parties requiring this abnormal emergency service.

It is the intent that the delivering company will not make a profit on such emergency power, but will be reimbursed only for added expense that such company may incur during such emergency at the request of the party desiring the power.

No service charge however, will be made for such emergency service unless due notice has been given by the party in need of emergency power to the other party or parties and the other party has agreed to the charge.

Article XII—Liability.

Each party hereto will save and keep the other harmless from any and all loss, cost, damage or expense, or including attorney fees for, or by reason of, any claim for injury to its own employees at any location, and to persons or property occasioned by the electric power or equipment owned or operated by it however caused. Neither party hereto assumes any responsibility for the equipment of the other party.

Article XIII—Bills and Payment.

In the event of billing hereunder such bills will be rendered each month as nearly as practical on or before the 5th day of the succeeding calendar month and will be payable within ten days from date thereon.

If either party fails to perform any of its obligations under this contract, including prompt payment of monthly bills, the other party may suspend delivery of power hereunder and will not be liable in any manner for loss or damage arising from such suspension. No such suspension will interfere with the enforcement by the parties hereto of any other legal right or remedy or relieve the delinquent company from liability to pay the demand charges during any such suspension. No delay by the parties hereto in enforcing any of their rights hereunder will be deemed as a waiver of such rights.

Article XIV—Metering.

Suitable standard metering equipment agreeable to all parties will be installed, owned and maintained by the respective parties hereto at the point of inter-connection. Meters will be of such number, type and arrangement as will show separately the demand at such point of interconnection.

Metering equipment will be tested at intervals not exceeding six months with a representative of each party present. If, as a result of such test, the metering equipment is found to be inaccurate, it shall be restored to as near as possible, a condition of one hundred per cent accuracy. Adjustments for such charges during such periods as the equipment was known to be inaccurate, or

during such periods as was known that the metering equipment was entirely out of commission, will be made by mutual agreement based on the last billing when the equipment was in normal operating condition and adjusted for seasonal variations.

Article XV—Conclusion.

This Contract will inure to and be binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the parties hereto have caused this Contract to be executed by these duly authorized officers and impressed with their respective corporate seals the date and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,
President.

Attest:
J. F. BUCKMIER,
Secretary.

NORTH DAKOTA POWER & LIGHT COMPANY,

By C. L. SANDSTEDT,
Vice-President.

Attest:
J. F. BUCKMIER,
Secretary.

NORTHERN POWER & LIGHT COMPANY,

By G. R. McARTHUR,
Vice-President.

Attest:
J. F. BUCKMIER,
Secretary.

Exhibit A (Page 59) is shown on Card 11.

Exhibit "D"

Northwestern Public Service Company
Rate Schedule FPC No. 5-A
Effective date: July 1, 1939
Filing date: January 10, 1940
(Cancels Rate Schedule FPC No. 3)

Interconnection Contract

Northwestern Public Service Company

Dakota Public Service Company

This Contract and Agreement, Made and entered into this 1st day of July, 1939 by and between Northwestern Public Service Company, a Delaware corporation, hereinafter referred to as "Northwestern Company" and Dakota Public Service Company, a Delaware corporation, hereinafter referred to as "Dakota Company".

Witnesseth:

Whereas, both companies desire to interchange electric power and energy in order to utilize existing power plants to their maximum capacity and to provide emergency service, one to the other, and,

Whereas, Northwestern Company has heretofore, at its own cost and expense, constructed interconnection facilities with the transmission system of Dakota Company, which facilities are more specifically described as follows:

Item 1. Portion of Aberdeen's interconnected substation and control equipment used exclusively for interconnection with Dakota Company.

Item 2. Gettysburg substation used exclusively for interconnection with Dakota Company and serving Gettysburg, a Dakota Company property.

Item 3. Twenty-two/thirty-eight kilovolt transmission lines from Aberdeen to Barnard and from Aberdeen to Ipswich, totaling fifty (50) miles for interconnection with Dakota Company.

Item 4. Thirty-three kilovolt transmission line from Highmore to Gettysburg, a distance of sixty-two (62)

miles for interconnection at Gettysburg with Dakota Company, and

Whereas, the interconnection facilities above listed make possible the interchange of energy between the respective companies, thereby enabling both companies to render more reliable service and utilize existing plants to their maximum efficiency.

Now, Therefore, the parties hereto agree as follows, to-wit:

Article I.

Definition of Terms.

For the purpose of this Agreement, certain terms herein used are defined as follows:

The term, "points of delivery", means the various points where the transmission lines of Northwestern Company meet the transmission lines of Dakota Company.

The term, "firm power", means that power which either company is obligated to furnish the other and for which the receiving company would be obligated to pay.

The term "surplus energy", means that energy which either company may, in its judgment, have available from time to time and desires to sell to the other company and which energy the other company desires to receive.

The term "emergency power" means that power which either company, upon receiving due notice from the other company, can and does furnish the other company for a short period of time during an emergency caused by the failure or break-down of any of the facilities of the other party.

The term "billing period", means that period between successive meter readings taken for the purpose of power and energy billing which reading will be taken as nearly as practicable on the 25th day of each current month.

Article II.

Term of Contract.

This Contract will become effective on July 1, 1939, and will continue thereafter for a period of eighteen (18) months. It will thereafter remain in effect until canceled by eighteen (18) months' written notice by either party.

It is understood that such notice may be given on any date for termination of the contract in eighteen (18) months' from date of notice.

Article III.

General Agreement.

Subject to the terms and conditions of this Agreement, each company will sell surplus energy to the other, and each company will furnish, one to the other, such emergency power as one company may need and the other company have available during such emergency. Neither company hereunder obligates itself to furnish or receive any firm power.

Article IV.

Voltage and Frequency.

Power and energy to be delivered or interchanged hereunder will be of a character commonly known as three phase, alternating current at approximately 60 cycles and at approximately 33 kilovolts and 22,000/38,000 volts respectively.

Article V.

Rate.

Northwestern Company will pay to Dakota Company for surplus energy during each billing period a sum equivalent to .5 cents per kilowatt-hour.

Dakota Company will pay to Northwestern Company for surplus energy during each billing period a sum equivalent to .5 cents per kilowatt-hour.

It is understood between the parties hereto that fuel prices and generating efficiencies may change, causing the

desirability of an adjustment in the energy rates contained in this Article. In January of each year the parties hereto will review production costs and if necessary re-determine the energy rates to be contained herein. Such revision, if any, will be made by supplements to this Contract.

It is understood that billing under the rates contained herein will become effective July 1, 1939. The first review will then be made in January, 1940, and each January thereafter.

Article VI.

Transmission Line Charges.

As Dakota Company's share of the fixed charges, maintenance and operating expenses relating to the interconnection facilities enumerated above, Dakota Company agrees to pay Northwestern Company, beginning July 1, 1939, the sum of $1,666.66 a month. This charge is over and above all energy charges provided under Article V above.

Upon the termination of this Contract by either party, Dakota Company will pay Northwestern Company, in addition to all other charges hereinbefore enumerated a sum equivalent to one-half the actual cost to Northwestern Company to remove and dismantle the interconnection facilities enumerated above and to return all material to the storeroom of Northwestern Company in Aberdeen, South Dakota.

Dakota Company has no obligation to pay Northwestern Company for any part of the construction cost of the interconnection facilities enumerated above or for the use of such facilities for any period prior to January 1, 1936.

Article VII.

Emergency Power.

In the event of total or partial failure of the facilities for generation or transmission of electric power of either party, the other party agrees to use all reasonable effort and all facilities at its command (after the requirements of the other customers of the party delivering such power

have been met) to furnish power and energy to the receiving party for short periods of time and to the extent of such failure or interruption and only for such period of time as may be required to restore such facilities, by the exercise of every reasonable effort on the part of the party possessed of such facilities, to their normal operating condition.

Billing for such emergency power and energy will be on the basis of the energy charge as provided in Article V above, plus whatever additional expense the delivering party may incur in placing in operation and operating high priced plants and facilities. It is the intent that the delivering company will not make a profit on such emergency power but will be reimbursed for all added expense that such party may incur during such emergency.

No service will be emergency service, however, unless due notice has been given by the party in need of emergency power to the other party and the other party agrees to furnish such emergency power.

Article VIII.

Metering.

Suitable standard 33 kilovolt and/or 22,000/38,000 volt metering equipment agreeable to both parties will be installed, owned and maintained by Northwestern Company at the points of delivery (or as near thereto as practicable). Meters will be of such number, type and arrangement, as will show separately the amounts of power and energy supplied at each location. Metering equipment will be tested at intervals not exceeding sixty (60) days with a representative of each party present. If, as the result of such tests, the metering equipment is found to be inaccurate, it will be restored to a condition of accuracy. If inaccuracy exceeds 2%, the readings of the meters taken during the period (30) days preceding (or during such shorter period as may have intervened since a periodic test) will be corrected and payments adjusted accordingly, prior to which period no correction of such readings will be made.

Dakota Company may at its own expense install and maintain additional metering equipment at the point of delivery for the purpose of checking the meters installed and maintained by Northwestern Company, and the readings thereof.

If the meters installed by Northwestern Company wholly fail to register the power and energy during any period of time for any reason whatsoever, the amount of power and energy delivered during such period will be measured by means of the meters installed by the Dakota Company, and if the Dakota Company has not installed meters, or if its meters have wholly failed to register during this period of time, the amounts of power or energy so delivered will be estimated according to the amounts previously delivered under substantially similar conditions.

Article IX.

Continuity of Service.

Both companies will exercise reasonable diligence and care to avoid interruptions of delivery of power and energy hereunder but will not be liable for any damage or loss that may be occasioned by any failure or interruptions caused by fire, strikes, riots, floods, lightning, storms, Acts of God, civil disturbances, actions of public authority, litigation, break-down, or causes beyond its reasonable control. Either company may interrupt service to make necessary repairs or to make changes in equipment or to install new equipment but only for such time as may be unavoidable. Reasonable advance notice of such interruption will be given if the nature of the situation permits.

Article X.

Liability Clause.

Each party hereto will save and keep the other harmless from any and all loss, cost, damage or expense, including reasonable attorneys' fees, for or by reason of, any claim for injury to its own employees at any location and to other persons or property occasioned by the electric power and energy or equipment on its own side of the

points of delivery hereunder, however caused, provided however, that each party will be liable for any damage to persons or property arising out of the maintenance and/or operation of transmission lines it may own beyond the points of delivery herein defined.

Article XI.

Bills and Payments.

Bills for power and energy delivered hereunder will be rendered *each month* as nearly as may be practicable on or before the fifth (5th) day of the calendar month, and will be payable within ten (10) days from the date thereof.

If either company fails to perform any of its obligations under this contract including the prompt payment of monthly bills, the other company may suspend delivery of power and energy and will not be liable in any manner for loss or damage arising from such suspension. No such suspension will interfere with the enforcement by the other company of any other legal right or remedy or relieve the delinquent company from liability to pay the transmission line charges during any such suspension. No delay by either company in enforcing any of its rights hereunder will be deemed a waiver of such rights.

Article XII.

Conclusion.

This Contract will inure to, and be binding upon the successors and assigns of the respective parties.

It is understood that this Agreement cancels and supersedes the Interconnection Contract dated October 7, 1936, between Northwestern Public Service Company and Northern Power and Light Company, and is made for the purpose of confirming an agreement of merger dated January 28, 1939 and effective July 1, 1939, whereby Northern Power and Light Company became merged into North Dakota Power & Light Company as the surviving corporation under the corporate title of "Dakota Public Service Company."

In Witness Whereof, the parties hereto have caused this Contract to be executed by their duly authorized officers, and impressed with their respective corporate seals the date and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,
President.

(Corporate Seal)

Attest:
J. F. BUCKMIER,
Secretary.

DAKOTA PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,
Vice-President.

(Corporate Seal)

Attest:
J. F. BUCKMIER,
Secretary.

Exhibit "E."

Northwestern Public Service Company
Rate Schedule FPC No. 5-B
Effective date: July 1, 1939
Filing date: January 10, 1940
(Cancels Rate Schedule FPC No. 4)

Interchange Capacity Agreement.

Northwestern Public Service Company..."Northwestern"

Dakota Public Service Company....."Dakota"

This Agreement made and entered into this 1st day of July, 1939, by and between Northwestern Public Service Company, a corporation organized under the laws of Dela-

ware, hereinafter referred to as "Northwestern", and Dakota Public Service Company, likewise organized under the laws of Delaware, hereinafter referred to as "Dakota".

Witnesseth:

Whereas, "Northwestern" is engaged in the business of producing and selling electrical energy within the geographical area of the eastern half of the State of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto, marked Exhibit "A", and hereby made a part hereof; and

Whereas, "Dakota" is engaged in the business of producing and selling electrical energy within the geographical area located in the southern half of North Dakota and the north Central part of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto marked Exhibit "A" and hereby made a part hereof.

Whereas, "Northwestern" and "Dakota" have provided the interconnection facilities and the basis for the transfer of energy all as provided for in the interconnection agreement dated July 1, 1939 and by reference made a part hereof, and

Whereas, the transmission systems of the said companies are now interconnected as shown on the plat attached marked Exhibit "A", and such systems are now operated as an interconnected system, and

Whereas, it is the desire of the two companies to make full and mutual use of the interconnection of their respective transmission systems for the interchange of reserve or spare capacity in their combined systems as such reserve or spare capacity may obtain in their respective generating stations and may from time to time be available; it being recognized that economy of supply is to be realized by both companies when either of them is entitled to draw upon the reserve or spare capacity of the other, whether for use in the Receiving Company's (as hereinafter defined), general light and power busi-

ness or for the purpose of securing to the Receiving Company a reserve capacity during emergencies or during the overhauling of equipment or whenever other need may arise; and it being futher recognized that it is to the interest not only of the companies themselves but of the public, that their respective systems shall be developed with such proper harmonious co-operation as will tend to prevent avoidable expenditures and thereby tend to minimize the cost of producing and supplying electrical energy; and it being further recognized that if two neighboring supply companies are adequately interconnected it is not necessary for either of them to own and maintain as large an amount of reserve or spare capacity as though each company was separate and isolated from the other; and

Whereas, it is now the desire of each of the parties hereto that under and pursuant to the agreement such as this is intended to be, a flexible and equitable basis be established for the apportionment of charges covering the interchange or use of said reserve or spare generating capacity as may now or hereafter obtain either incident to the actual exchange of such capacity or its employment for stand-by purposes all in order that the two companies may be operated at the highest efficiency and the lowest practical cost, and

Now, Therefore, in consideration of the premises of One Dollar and other good and valuable considerations in hand paid by each of the parties to the other, the receipt of which payment is hereby by each of the parties confessed, and in consideration of the mutual covenants and conditions hereinafter set forth, and of the benefits expected to be derived herefrom the parties hereby agree as follows:

Article I—Definitions.

Section 1—The term "Supplying Company", as used in this agreement, shall, so far as appropriate, designate and apply to either party hereto which, under the terms hereof, for the time being, shall be obligated to stand ready to supply electrical capacity and/or energy to the other party, or from which capacity and/or energy for the time

being shall be desired hereunder by the other of said parties.

Section 2—The term "Receiving Company" shall, so far as appropriate, designate and apply to either party hereto which, under the terms hereof, for the time being, shall be entitled to obtain or be obtaining or be desirous of obtaining, capacity from the other party.

Section 3—The term "point of delivery" shall mean any point (to be, in each case, however, a point on the boundary line between the respective territories of the parties hereto, unless otherwise agreed) at which, under the terms hereof, the respective transmission lines of either party shall join, and at which capacity and energy shall be delivered hereunder by either party hereto to the other party hereto. Said "points" of delivery are shown on the attached plat marked Exhibit "A".

Section 4—The term "interconnected system" shall mean the combined system of generating station and interconnecting transmission lines of both parties hereto, all or some part of the capacity of which is available for the transfer of energy from the system of one company to that of the other.

Section 5—The term "station generating capacity" with respect to any generating station owned, leased, or otherwise controlled by either of the parties hereto, shall mean the rated capacity in kilowatts of such station, or the number of kilowatts of electrical energy such station can supply to the interconnected system, whichever is lower.

Section 6—The term "Company generating capacity", with respect to either party hereto, in any month as may be hereinafter designated shall mean the sum total capacity in kilowatts of (1) all the several station generating capacities, as above defined of such party, in such month, and (2) the amount of firm capacity (as hereinafter defined) now or hereafter purchased in each month, by such party, when such firm capacity is of the same general character with relation to such party's operation as an equal amount of steam turbine or internal combustion engine driven generating capacity owned or leased by such party.

Section 7—The term "Interconnected generating capacity", shall mean the sum of the Company generating capacities, as above defined, of both parties hereto.

Section 8—The term "Company system maximum demand", with respect to either party, for such month as hereinafter designated shall mean the demand (in kilowatts) made upon the system of such party during that half hour in such month in which demand was greater than in any half hour previously recorded.

Section 9—The term "interconnected system maximum demand" with respect to either party, for such month as hereinafter designated shall mean the arithmetical sum of Company system maximum demand during that half hour in such month in which such combined demand was greater than in any other half hour.

Section 10—The term "Company reserve capacity" with respect to either party in any given month, shall mean the excess (in kilowatts) of the Company generating capacity of such party, over and above the highest previous recorded Company system maximum demand (in kilowatts) of such party during the term hereof.

Section 11—The term "per cent Company reserve capacity" with respect to either party, at any given time shall mean the percentage which the Company reserve capacity of such party (as defined in the last preceding paragraph) at such time bears to the Company system maximum demand of such party.

Section 12—The term "interconnected system reserve capacity", shall mean the net total of the Company reserve capacities, as hereinbefore defined (after deducting any deficiency in Company generating capacity of either party) of both parties hereto.

Section 13—The term "per cent interconnected system reserve capacity" shall pertain to the interconnected system and, at any given time, shall mean the percentage which the "interconnected reserve capacity" then bears to the sum of the "Company system maximum demands" of both parties hereto.

Section 14—The term "Company excess reserve capacity", with respect to either party, in any such month as hereinafter determined shall mean the amount (in kilowatts) by which the "Company reserve capacity" of such party in such month exceeds the product of its "Company system maximum demand" multiplied by the "per cent interconnected reserve capacity" of the interconnected system.

Section 15—The term "Company deficiency in reserve capacity", with respect to either party, in any such month as hereinafter determined shall mean the number of kilowatts by which its "Company generating capacity" is less than the sum of (1) the product of its "Company system maximum demand" in such month multiplied by the "per-cent interconnected reserve capacity" of the interconnected system in such month and (2) its "Company system maximum demand".

Section 16—The term "firm capacity", with respect to either party, when so indicated by the context, shall mean the number of kilowatts of energy which such party has obligated itself to supply or stand ready to supply to any electric public utility company not a signatory hereto in consideration of payment therefor, and which serves to reduce the "Company reserve capacity" of such party available to the interconnected system; and shall also mean, when so indicated by the context, the number of kilowatts purchased by either party hereto from a source not a part of the interconnected system but available for use within such system, when of a quality as described in the definition of "Company generating capacity" hereinabove set forth.

Section 17—The term "half hour" shall mean the thirty-minute period beginning or ending on a clock hour, as, for example, between five o'clock and five thirty o'clock or between five thirty o'clock and six o'clock.

Section 18—The term "month" shall mean the billing period.

Section 19—The word "term", unless otherwise indicated by the context shall include not only the original

term of the agreement, but also any and every period of extension effected under the provisions hereof.

Article II—Term—Essence.

Section 1—Term. This agreement will become effective on July 1, 1939, and will thereafter remain in effect for succeeding terms of one (1) year. It shall continue in effect for successive periods of one year each unless cancelled by six (6) months' notice written by either party to the other party, prior to the expiration of any term hereof, of its intention not to renew contracts.

Section 2—Essence. It is the intent of this agreement that the "percentage of Company reserve capacity" shall be the same for either of the parties hereto, either party having a "deficiency in reserve capacities" shall purchase such deficiency from the party having "Company excess reserve capacity", such excess shall be apportioned so that the "percentage of Company reserve capacity" is identical with the percentage of interconnected reserve capacity.

Article III—General Conditions.

Section 1—General Obligations as to Supply. For and during the term hereof either of the parties hereto having "Company interchange capacity" shall supply and/or stand ready to supply capacity to the other party hereto, and either party to whom capacity shall be supplied hereunder shall take and/or pay for capacity in accordance with and subject to the terms and provisions hereinafter set forth.

Section 2—Form of Energy. The capacity and/or energy to be supplied hereunder shall be in the form of three phase alternating current, having a frequency of sixty (60) cycles per second at suitable voltage, or in such other form as in any instance may mutually be agreed upon.

Section 3—Limitation of Use. The capacity and/or energy supplied hereunder to the Receiving Company shall not be used by such Receiving Company within, nor be sold

by such Receiving Company to any purchaser for use within the limits of the territory of the other party hereto, except in each instance by and with the written consent of the other party.

Section 4—Ownership of Lines. All energy supplied hereunder by either company shall be supplied over lines owned or leased by it, so far as such lines shall be located within its territory, and over lines owned or leased by the Receiving Company to which such energy is delivered, so far as such lines shall be located within the territory of such Receiving Company.

Section 5—Points of Delivery to Be Economically Located. The points of delivery shall be fixed by agreement between the parties hereto and shall be so located that the necessary transmission lines may be operated at a minimum total cost, and in such manner that the division of cost shall be equitable to both parties concerned as geographical arrangement and physical condition will permit.

Section 6—Supply to Outside Electric Utilities. Either party hereto may supply energy to an electric utility not a signatory hereto under an interchange or pool agreement subject to the following conditions; (a) the other party hereto shall be fully informed as to the terms and provisions of any such agreement with an outside utility and no such agreement shall become effective without the consent of the other party hereto; (b) any firm demand resulting from the provisions of any such outside agreement shall not be included as a part of the Company system maximum demand of the party hereto entering into such an agreement, but shall be deducted from the Company generating capacity of such party; (c) the Operating Committee shall be kept fully informed as to the energy delivered by either party hereto to outside electric utilities, whether delivered as emergency or as firm demand energy.

Section 7—Additional Capacity. When, in the opinion of the parties hereto the interconnected system coincident demand increases to a point that the system in the aggregate does not have adequate reserve facilities to insure re-

liable service, then, and in such event, the parties hereto will agree on the installation of additional capacity. The location of such additional capacity will be by mutual agreement as to the most feasible and practical location, taking into consideration, all other factors when such installations are completed, the effective generating capacities of the respective parties hereto will be adjusted accordingly for billing purposes.

No plant improvements, additions or betterments by either party will be considered for billing purposes except as both of the parties hereto have approved such extension, improvement or betterment and mutually agreed on the increase in effective capacity resulting therefrom.

Article IV—Transmission Lines.

Section 1—Each company shall provide sufficient capacity in interchange lines within its own territory to transmit excess reserve capacity to the interconnected system but either company may, if it desires, provide such capacity in excess of immediate requirements.

Section 2—It is agreed that the status of existing interchange lines shall remain as of the date hereof until changed by mutual agreement of the parties hereto. As the requirements of service change, the parties may by mutual agreement reinforce, reconstruct or remove any interchange line.

Section 3—It is further recognized that if one company has provided capacity between existing points of interchange which is in excess of its own reserve requirements and such excess may be used for the interchange of reserve capacity between the parties hereto, it shall be entitled to and receive compensation for the use of its transmission facilities from the other party employing such excess, either for the actual transmission of power or for stand-by protection as determined and agreed upon by the Operating Committee.

Section 4—In determining compensation for excess transmission line capacity, such excess as may exist in terminal

facilities such as transformers, switches and meters may be included.

Section 5—The capacity and location of any future interchange line shall be as agreed upon by the parties hereto upon recommendation of the Committee of Operations.

Article V—Rating of Generating Stations.

Section 1—The rated capacity (in kilowatts) of any generating station owned, leased, or otherwise controlled by either party hereto, shall be the sum of the manufacturers' name plate ratings of all generating units except those supplying power for station auxiliaries and not available for the supply of energy used elsewhere. In each case the Committee on Operations (provided for hereinafter) shall, however, investigate the entire equipment and shall determine that which in its judgment makes equitable a rating other than the sum of the name plate ratings; such rating of all such generating capacity shall, however, be fixed after full investigation and by unanimous agreement as hereinafter described of the Committee on Operations after investigation.

Section 2—At any time when there shall have been a change in conditions which seems to warrant a change in rating, the rating previously established for any generating station may be brought up for revision by the Committee on Operations. Generating capacity which is temporarily out of service for repairs or maintenance work shall not be deducted from the rating of the generating station during such temporary outage.

Section 3—The Committee on Operations shall determine at the expiration of each term of this contract, and previous to the beginning of a succeeding term, the "station generating capacity" and therefrom the "Company generating capacity" that shall obtain for the next succeeding term of this contract.

The foregoing shall be set forth in detail and therefrom shall be determined the "interconnected generating capac-

ity" all of which shall be assembled in a memorandum signed by each member of the Committee on Operations, and marked "Exhibit B". The initial and each subsequent memorandum shall state the term of contract to which such exhibit is applicable.

Article VI—Determination of Maximum Demand.

Section 1—The Company system maximum demand of either party hereto shall be determined by the Committee on Operations and shall be ascertained as hereinafter set forth by multiplying by two the net total output in kilowatt hours during the half hour of system maximum demand including (1) the energy produced by the generating stations of such party, and (2) the energy purchased by such party from all sources, and by deducting from such product (a) twice the number of kilowatt hours of energy supplied hereunder by such party in such half hour to the other party hereto, and (b) twice the number of kilowatt hours of energy supplied by such party in such half hour in any portion of its territory which is not a part of the interconnected system, and (c) twice the number of kilowatt hours of energy supplied by such party in such half hour to any electric public utility not a party hereto, when said supply is of an emergency or surplus nature and reported to and approved as such, in each instance, by the Operating Committee. The highest net total thus found for the system of either party in any half hour shall be the Company system maximum demand of such party for the month hereinafter designated in which such half hour occurs.

Section 2—The Committee on Operations shall determine at the expiration of each term of this contract and previous to the beginning of a succeeding term thereof the "Company system demands" for each company as defined in Section 8 of Article I hereof and therefrom establish the total of the "Company system demand" for both parties hereto.

The foregoing shall set forth the time and date which such "Company system demands" were ascertained, the items making up such total for each company and the sum

total thereof for the "interconnected system." All of this shall be assembled in a memorandum which shall be attached hereto and be marked "Exhibit C".

The contract and each subsequent memorandum so prepared shall be signed by each member of the Committee on Operations and shall state the term of the contract in which such "Company system demands" are to be used for billing purposes.

Article VII—Interchange Capacity.

Section 1—The Committee on Operations shall prepare as a supplement to this contract for its initial term and for each succeeding term thereafter, same to be marked "Exhibit D", a summary of "Company generating capacities" as described in Section 3 of Article V; and likewise a summary of "Company system maximum demands" as described in Section 2 of Article VI hereof.

Therefrom shall be determined the "interconnected generating capacity", the interconnected "system maximum demands", the "interconnected system reserve capacity" and the per cent interconnected system reserve capacity. Likewise thereon shall be set forth the company having "Company excess reserve capacity" and the company having "Company deficiency in reserve capacity" and the amounts thereof.

This exhibit shall establish the distribution or apportionment of such excess reserve capacity that may exist, as such apportionment shall obtain during the succeeding term of this contract. The summary so prepared shall be signed by each member of the Committee on Operations.

Section 2—Either company having a deficiency of reserve capacity shall be deemed to have established a firm demand hereunder respectively upon the other party hereto having excess reserve capacity for the number of kilowatts constituting such deficiency in reserve capacity as previously defined in Article I, Section 14, hereof.

Section 3—The firm demand for the Receiving Company shall be determined by the deficiency of reserve capacity

as ascertained at the expiration of each term of this contract and previous to the succeeding term unless otherwise mutually agreed upon.

Section 4—The firm demand so established by any Receiving Company shall obtain for the succeeding terms of the contract.

Such company shall pay to the Supplying Company for the total number of kilowatts of firm demand, so deemed to be established (whether actually availed of and used or not) a demand charge at the rate hereinafter specified in Article VIII, Section 1.

Section 5—Unless otherwise mutually agreed, it shall be the duty of such Supplying Company to maintain its capacity in readiness to supply the Receiving Company capacity up to the amount of its respective proportion of such firm demand.

Article VIII—Demand Charge.

Section 1—Subject to the terms and conditions of this agreement each company will furnish its proportion of the "reserve capacity" required for the interconnected system, or in lieu thereof, the company with a deficiency of reserve capacity will pay the other company having an excess reserve capacity a demand charge of $13 and 20 cents per kilowatt of firm demand per year. One twelfth of such firm demand charge shall be due and payable by the Receiving Company to the Selling Company at the expiration of each calendar month during the succeeding term of this contract all as herein prescribed.

Article IX—Energy Charges.

Section 1—Charges for the electrical energy flow incidental to the exchange of capacity hereto shall be covered by separate agreements. These agreements shall also cover the flow of energy incident to exchange of emergency or surplus capacity.

Article X—Continuity of Service.

Each of the parties hereto will exercise reasonable diligence and care to avoid interruptions in delivery of power hereunder but will not be liable for any damage or loss which may be occasioned by any failure or interruptions caused by fires, strikes, riots, floods, lightning, storms, Acts of God, civil disturbances, action of Public Authority, litigation, break-downs, or causes beyond reasonable control.

Either of the parties may take equipment out of service to make necessary repairs or to make changes in equipment or to install new equipment or any of these purposes, but only for such time as may be unavoidable.

It is understood and agreed that each of the parties hereto will use reasonable diligence and care in maintaining and operating the effective generating capacity of its respective system provided for herein, to the end that it will perpetuate approximately the stated effective capacity.

Article XI—Emergency Power.

In the event of total or partial failure of the facilities for generation or transmission of electric power by either party, the other party agrees to use all reasonable effort and all facilities at its command after the requirements of the other customers of the party delivering such power have been met, including any firm power commitments by reason of this Agreement, to furnish power to the receiving party for short periods of time and to the extent of such failure or interruption, but only for such periods of time as may be required to restore such facilities by the exercise of every reasonable effort on the part of the party possessed of such facilities to its normal operating condition.

There will be no billing for such emergency power except that it is mutually agreed that should either of the parties hereto be obliged to incur additional expense in

bringing reserve equipment back into service for emergency operation, that such additional expense will be chargeable to the party requiring this abnormal emergency service.

It is the intent that the delivering company will not make a profit on such emergency power, but will be reimbursed only for added expenses that such company may incur during such emergency at the request of the party desiring the power.

No service charge however, will be made for such emergency service unless due notice has been given by the party in need of emergency power to the other party and the other party has agreed to the charge.

Article XII—Liability.

Each party hereto will save and keep the other harmless from any and all loss, cost, damage or expense, or including attorney fees for, or by reason of, any claim for injury to its own employees at any location, and to persons or property occasioned by the electric power or equipment owned or operated by it however caused. Neither party hereto, assumes any responsibility for the equipment of the other party.

Article XIII—Bills and Payment.

In the event of billing hereunder such bills will be rendered each month as nearly as practical on or before the 5th day of the succeeding calendar month and will be payable within ten days from the date thereon.

If either party fails to perform any of its obligations under this contract, including prompt payment of monthly bills, the other party may suspend delivery of power hereunder and will not be liable in any manner for loss or damage arising from such suspension. No such suspension will interfere with the enforcement by the parties hereto of any other legal right or remedy or relieve the delinquent company from liability to pay the demand charges

during any such suspension. No delay by the parties hereto in enforcing any of their rights hereunder will be deemed as a waiver of such rights.

Article XIV—Metering.

Suitable standard metering equipment agreeable to all parties will be installed, owned and maintained by the respective parties hereto at the point of interconnection. Meters will be of such number, type and arrangement as will show separately the demand at such point of interconnection.

Metering equipment will be tested at intervals not exceeding six months with a representative of each party present. If, as a result of such test, the metering equipment is found to be inaccurate, it shall be restored to as near as possible, a condition of one hundred per cent accuracy. Adjustments for such charges during such periods as the equipment was known to be inaccurate, or during such periods as was known that the metering equipment was entirely out of commission, will be made by mutual agreement based on the last billing when the equipment was in normal operating condition and adjusted for seasonal variations.

Article XV—Conclusion.

This contract will inure to and be binding upon the parties hereto, their successors and assigns.

It is understood and agreed that this agreement cancels and supersedes the Interchange Capacity Agreement dated January 1, 1938 between Northwestern Public Service Company, North Dakota Power & Light Company and Northern Power and Light Company, and is made for the purpose of confirming an agreement of merger dated January 28, 1939 and effective July 1, 1939, whereby Northern Power and Light Company became merged into North Dakota Power & Light Company as the surviving corporation under the corporate title of "Dakota Public Service Company."

In Witness Whereof, the parties hereto have caused this Contract to be executed by their duly authorized officers and impressed with their respective corporate seals the date and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,
President.

(Corporate seal)

Attest:

J. F. BUCKMIER,
Secretary

DAKOTA PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,
Vice President.

(Corporate seal)

Attest:

J. F. BUCKMIER,
Secretary

Exhibit A (Page 85) is shown on Card 11

Exhibit "F."

Northwestern Public Service Company
Rate Schedule FPC—No. 6
Effective date, July 1, 1941.
Filing date: February 28, 1942

(Supercedes FPC No. 5A and 5B)

(Federal Power Commission
Feb. 5, 1942 Received)

Northwestern Public Service Company—

Dakota Public Service Company—"Dakota"

Official Filing Date 2/28/42. See Company's letter of 2/24/42.

This Agreement made and entered into this 1st day of July, 1941, by and between Northwestern Public Service Company, a corporation organized under the laws of Delaware, hereinafter referred to as "Northwestern," and Dakota Public Service Company, likewise organized under the laws of Delaware, hereinafter referred to as "Dakota."

Witnesseth:

Whereas, "Northwestern" is engaged in the business of producing and selling electrical energy within the geographical area of the eastern half of the State of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto, marked "Exhibit A", and hereby made a part hereof; and

Whereas, "Dakota" is engaged in the business of producing and selling electrical energy within the geographical area located in the southern half of North Dakota and the north central part of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto marked "Exhibit A" and hereby made a part hereof.

Whereas, both companies desire to interchange electric energy in order to utilize existing power plants to their maximum capacity and to provide emergency service, one to the other, and,

Whereas, "Northwestern" has heretofore constructed at its own sole expense, and hereby agrees to own, maintain, repair and renew during the term of this contract certain interconnection facilities with the transmission system of "Dakota" which facilities are more specifically described as follows:

Item 1. A certain portion of Aberdeen's interconnected substation and control equipment used exclusively for interconnection with "Dakota" located within the corporate limits of the city of Aberdeen, South Dakota.

Item 2. A certain Gettysburg substation, located at Gettysburg, South Dakota, used exclusively for interconnection with "Dakota" and serving Gettysburg, a Dakota property.

(Received Feb. 6-1942
Division of Rates)

Item 3. Certain twenty-two/thirty-eight kilovolt transmission lines from Aberdeen, South Dakota to Barnard, South Dakota and from Aberdeen, South Dakota to Ipswich, South Dakota, totaling fifty (50) miles more or less for interconnection with "Dakota."

Item 4. A certain thirty-three kilovolt transmission line from Highmore, South Dakota to Gettysburg, South Dakota, a distance of sixty-two (62) miles more or less for interconnection at Gettysburg with "Dakota" and,

Whereas, the transmission systems of the said companies are now interconnected as shown on the plat attached hereto marked "Exhibit A", and made a part hereof and such systems are now operated as an interconnected system, and

Whereas, it is the desire of the two companies to interchange electric energy in order to utilize existing power

plants to their maximum capacity and to make full and substantial use of the interconnection of their respective transmission systems for the interchange of electrical energy and/or reserve and/or spare capacity in their combined systems as such reserve or spare capacity may obtain in their respective generating stations and may from time to time be available; it being recognized that economy of supply is to be realized by both companies when either of them is entitled to draw upon the reserve or spare capacity of the other, whether for use in general light and power business or for the purpose of having available such reserve capacity during emergencies or during the overhauling of equipment or whenever other need may arise; it being further recognized that it is to the interest not only of the companies themselves but of the public, that their respective systems shall be developed with such proper harmonious cooperation as will tend to prevent avoidable expenditures and thereby tend to minimize the cost of producing and supplying electrical energy; and it being further recognized that if two neighboring supply companies are adequately interconnected it is not necessary for either of them to own and maintain as large an amount of reserve or spare capacity as though each company was separate and isolated from the other; and

Whereas, it is now the desire of each of the parties hereto that under and pursuant to the agreement such as this is intended to be, a flexible and equitable basis be established for the apportionment of charges covering the interchange or use of said reserve or spare generating capacity as may now or hereafter obtain either incident to the actual exchange of such capacity or its employment for stand-by purposes all in order that the two companies may be operated at the highest efficiency and the lowest practicable cost.

Now, therefore, in consideration of the premises of One Dollar and other good and valuable considerations in hand paid by each of the parties to the other, the receipt of which payment is hereby by each of the parties confessed, and in consideration of the mutual covenants and conditions hereinafter set forth, and of the benefits expected to be derived herefrom, the parties hereby agree as follows:

Article I—Definitions.

Section 1—The term, "points of delivery" means the various points where the transmission lines of "Northwestern" meet the transmission lines of "Dakota."

Section 2—The term, "surplus energy" means that energy which either company may, in its judgment, have available from time to time and desire to furnish and sell to the other company and which energy the other company may desire to take, and for which it agrees to pay.

Section 3—The term, "emergency power" means that energy which either company, upon receiving notice from the other company, can and does furnish the other company during an emergency caused by the failure or breakdown of any of the facilities of the other party.

Section 4.—The term "billing period" means that period between successive meter readings taken for the purpose of power and energy billing which reading will be taken as nearly as practicable on the 25th day of each month.

Section 5—The term "station generating capacity" with respect to any generating station owned, leased, or otherwise controlled by either of the parties hereto, shall mean the rated capacity in kilowatts of such station; or the number of kilowatts of capacity which such station can contribute to the interconnected system continuously (except for periods of repair and inspection), whichever is lower; subject, however, to the provisions of Section 1 of Article IV hereinafter.

Section 6—The term "Company generating capacity" with respect to either party hereto shall mean the sum total in kilowatts of all the several stations generating capacities of such party as above defined and described.

Section 7—The term "Company system maximum demand" as hereinafter designated with respect to either party for any year shall be the coincident demands (in

kilowatts) made upon the system of such party during that one normal integral hour in each calendar year in which hour the combined coincident system demands of both parties were greater in the aggregate than in any other hour previously recorded during that calendar year.

Section 8—The term "Company reserve capacity" with respect to either party shall mean the excess (in kilowatts) of the "Company generating capacity" of such party over and above the "Company system maximum demand" (in kilowatts) of such party during the calendar year.

Section 9—The term "per cent Company reserve capacity" with respect to either party shall mean the percentage which the "Company reserve capacity" of such party bears to the "Company system maximum demand" of such party.

Section 10—The term "per cent interconnected system reserve capacity" shall mean the percentage which the combined "Company reserve capacities" of both parties hereto bears to the sum of the "Company system maximum demands" of both parties hereto.

Section 11—The term "Required reserve" with respect to either party shall mean the amount (in kilowatts) obtained by multiplying the "Company system maximum demand" of such party by the "per cent interconnected system reserve capacity".

Section 12—The term "Company excess reserve capacity" with respect to either party shall mean the amount (in kilowatts) by which the "Company reserve capacity" of such party exceeds the "required reserve."

Section 13—The term "Company deficiency in required reserve" with respect to either party shall mean the amount (in kilowatts) by which the "required reserve" of such party exceeds the "Company reserve capacity."

Section 14—The word "term" unless otherwise indicated by the context shall include not only the original

term of the agreement but also any and every period of extension effected under the provisions hereof.

Article II—Term.

Section 1—This agreement will become effective on July 1, 1941, and will continue thereafter for a period of ten (10) years, and thereafter unless and until specifically terminated by written notice by registered mail from either party to the other party of its intention or desire to terminate this agreement and such notice of termination shall precede the intended and desired date of termination by not less than eighteen (18) months.

Article III—General Agreement—Voltage & Frequency.

Section 1—Voltage and Frequency—Power and energy to be delivered or interchanged hereunder between the parties hereto will be of a character commonly known as three phase, alternating current at approximately 60 cycles and at approximately 22,000/33,000 and/or 38,000 volts pressure or at any higher voltage as such voltage or pressure may now exist or may be hereafter mutually agreed upon at the points of interconnection between the transmission systems of the two companies.

Article IV—General Agreement—Reserve Capacity Charge.

Section 1—General Provisions—Subject to the terms and conditions of this agreement either party having a "deficiency in required reserve capacity" shall pay reserve capacity charges to the party having "Company excess reserve capacity" in accordance with and subject to the terms and provisicns hereinafter set forth.

(a) Operating Committee—The terms and conditions of this agreement including the determination of "Company generating capacity," "Company system maximum demand," "Company reserve capacity," the "per cent Company reserve capacity" and the "required reserve," shall be ascertained by an Operating Committee consisting of

two members, one member to be appointed by each of the parties hereto. In case the members of this Committee are unable to reach an agreement on any provision of this contract they will select a third party who shall be mutually agreeable to them and the decision of this third party shall be considered final and binding upon the parties hereto.

(b) Station Generating Capacity—The rated capacity (in kilowatts) of any generating station owned, loaned, leased and/or otherwise controlled by iether party hereto as defined in Section 6 of Article I shall, in general, be the sum of the manufacturers' name plate ratings at 0.8 power factor of all generating units therein, except those supplying power for station auxiliaries and/or not available for the supply of energy elsewhere or whose use is impractical or uneconomical. In case the Operating Committee shall determine, however, after full investigation and by unanimous agreement that a generating station should be rated on some basis other than the sum of the manufacturers' name plate ratings, such other rating shall be used for the purpose of this agreement.

For the purpose of this agreement and until such time as there has been a change in station or company generating capacity that may warrant a change in rating of any individual station or the total "Company generating capacity," it is agreed by the parties hereto that the "station generating capacity" and the "Company generating capacity" of each party shall be as hereinafter set forth:

Northwestern Public Service Company	
Station	Station Generating Capacity Rating (Kilowatts)
Aberdeen	6,250 Kw
Webster	760 "
Redfield	900 "
Faulkton	110 "
Huron	1,130 "
Highmore	140 "
Mitchell	7,500 "
Armour	980 "
Yankton	2,520 "
Company Generating Capacity	20,290 Kw

Dakota Public Service Company	
Station	Station Generating Capacity Rating (Kilowatts)
Beulah	6,000 Kw
Bismarck	5,250 "
Dickinson	700 "
Mott	230 "
Mobridge	1,000 "
Ellendale	400 "
Lemmon	235 "
Gettysburg	140 "
Company Generating Capacity	13,955 Kw

At any time when there shall have been a change which may call for a new rating, the rating previously established for any "Station generating capacity" or "Company generating capacity" may be brought up for revision by the Operating Committee. Capacity of any generating equipment which is temporarily out of service for repair or maintenance work shall not be deducted from the rating of the "Station generating capacity" during such temporary outage.

(c) Additional Capacity—When, in the opinion of the parties hereto, the interconnected system coincident demand increases to a point that the combined systems do not have adequate reserve facilities to supply the interconnected system load requirements or to assure reliable service, then, and in such event, the parties hereto shall agree on the installation of additional capacity. The location of such additional capacity shall be by mutual agreement as to the most feasible and practical location; the amount and nature of such additional capacity and by which party it shall be installed; taking into consideration the service requirements of each company in order that, upon completion of the installation, the requirements of the interconnected system will have been most effectively provided for. When such additional generating capacity becomes available to the interconnected system, the "Station generating capacity" and "Company generating capacity" for either or both parties shall be adjusted for future billing purposes.

No additions to "Station generating capacity" by either party will be considered for billing purposes except as both of the parties hereto have approved such additions, in writing.

Section 2—Determination of "Company Excess Reserve Capacity" and "Company Deficiency in Required Reserve Capacity."

(a) "Company excess reserve capacity" and "Company deficiency in required reserve capacity" are subject to redetermination each year and may be re-determined oftener

if a revision is warranted by the installation or removal of equipment that increases or decreases the "Company generating capacity" of either of the parties hereto.

In December of each year the Operating Committee shall determine the "Company system maximum demand" as well as the "Company generating capacity" for each of the parties hereto and shall assemble and prepare an exhibit in form similar to Exhibit "B" for the year 1941, attached hereto. This exhibit shall be marked "Exhibit B" and signed by each member of the Operating Committee and shall become the basis for billing under this agreement for the ensuing year, or until such time as interim adjustment is warranted by a change in station generating capacity of either party hereto.

It shall be the duty of the Operating Committee to ascertain from the combined "Company generating capacities" and the combined "Company system maximum demand" the combined "Company reserve capacities" in order to determine the "required reserve" and the amount which the company having "Company excess reserve capacity" shall stand ready to supply to the company having a "Company deficiency in required reserve capacity."

In case of a "Company deficiency in required reserve capacity" such deficiency shall be determined by deducting the "Company reserve capacity" from the "required reserve" for the party having a deficiency, but for billing purposes the "required reserve" in kilowatts shall in no event exceed 25% of the "Company system demand."

(b) The "Company system maximum demand" of either party hereto, as defined in Section 7 of Article I hereof, shall be ascertained by the Operating Committee.

The time and date when such "Company system maximum demands" are ascertained shall be shown on Exhibit "B".

(c) Either Company having a "company deficiency in required reserve capacity" as determined under Section 2-(a) of Article IV hereof shall be deemed to have estab-

lished hereunder demand for firm power upon the other party hereto for the number of kilowatts constituting such deficiency. Such company having a "Company deficiency in required reserve capacity" shall pay to the other company a "reserve capacity charge" at the rate hereinafter specified in Article V.

(d) Unless otherwise mutually agreed, the company having a "Company excess reserve capacity" agrees hereunder to maintain such capacity in readiness to furnish and supply power to the company having a "Company deficiency in required reserve capacity", up to the amount of such excess (not to exceed 25%).

(e) Subject to the terms and conditions of this agreement each company shall furnish surplus energy to the other company, as available and required.

(f) It is further understood and agreed that under emergency conditions either party shall supply the other party with emergency power up to the reasonable limit of its ability.

Article V—Rates and Charges.

Section 1—Company Reserve Capacity Charge—Subject to the terms and conditions of this agreement the company with a "Company deficiency in required reserve capacity" as provided in Section 2 of Article IV hereof, shall pay the other company having "Company excess reserve capacity" a charge of Thirteen Dollars and Twenty Cents ($13.20) per year, per kilowatt of such deficiency. One twelfth of such charge shall be due and payable at the expiration of each calendar month during the term of this contract.

Section 2—Energy Charges—All energy delivered under this agreement shall be billed and paid for at the rate of five tenths (0.5) cents per kilowatt hour.

In addition to the energy charge, billing for emergency power may by agreement be surcharged with the addi-

tional expense incurred by the delivering party in placing in operation and operating high cost plants for the sole purpose of supplying such emergency power. It is the intent that the delivering company will not make a profit on such emergency power but will be reimbursed for all added expense that the delivering company may incur during and on account of such emergency.

It is understood between the parties hereto that fuel prices and generating efficiencies may change and may require an adjustment in the energy rate contained in this Section.

In January of 1942, and of each year thereafter, the parties hereto shall review production costs and if necessary re-determine the energy rate to be charged. Such revision, if any, will be effected by supplement to this contract.

Section 3.—Transmission Line Charges—As "Dakota's" share of the fixed charges, maintenance and operating expenses incurred by "Northwestern" in its ownership and operation of the interconnection facilities enumerated above, "Dakota" agrees to pay "Northwestern" the sum of $1,666.66 per month beginning January 1, 1936 and continuing through the payment due June 1, 1950 and the further sum of $1,348.82 on July 1, 1950. Beginning August 1, 1950 and continuing monthly thereafter such monthly payments shall be $442.53. This charge is over and above all other charges provided herein.

"Dakota" has no obligation to pay "Northwestern" for any part of the construction cost of the interconnection facilities enumerated above or for the use of such facilities for any period prior to January 1, 1936.

Article VI—Metering.

Suitable standard 33 kilovolt and/or 22,000/38,000 volt metering equipment agreeable to both parties shall be installed, owned and maintained by "Northwestern" at the points of delivery (or as near thereto as practicable). Meters shall be of such number, type and arrangement as

will show separately the amounts of energy delivered at each location. Metering equipment will be tested at intervals not exceeding sixty (60) days with a representative of each party present. If the metering equipment is found to be inaccurate, it shall be restored to a condition of accuracy. If inaccuracy exceeds 2%, the readings of the meters during a preceding period of not more than thirty (30) days will be corrected and payments adjusted accordingly.

"Dakota" may at its own expense install and maintain duplicate metering equipment at the points of delivery for the purpose of checking the meters installed and maintained by "Northwestern" and the readings thereof.

If during any period of time and for any reason whatsoever, the meters installed by "Northwestern" fail wholly to register the energy delivered readings of meters installed by "Dakota" shall be controlling; and if "Dakota" has not installed meters, or if its meters have failed wholly to register during this period of time, the amounts of energy delivered will be estimated according to the amounts previously delivered under substantially similar conditions.

Article VII—Continuity of Service.

Each of the parties hereto will exercise reasonable diligence and care to avoid interruptions in delivery of energy hereunder but will not be liable for any damage or loss which may be occasioned by any failure or interruptions caused by fires, strikes, riots, floods, lightning, storms, acts of God, civil disturbances, action of Public Authority, litigation, break-downs, or causes beyond reasonable control.

Either of the parties may take equipment out of service for repairs or to make changes in equipment or to install new or substitute equipment or for any similar purpose, but only for such time as may be reasonably necessary.

It is understood and agreed that each of the parties hereto will use reasonable diligence and care in maintaining each of its generating stations at its rated capacity as determined and agreed upon by the Operating Committee.

Article VIII—Liability.

Each party hereto shall save and keep the other harmless from any and all loss, cost, damage or expense, including attorney fees for, or by reason of, any claim for injury to its own employees at any location, and to persons or property occasioned by the electric power or equipment owned or operated by it, however caused. Neither party hereto, assumes any responsibility for the equipment of the other party.

Article IX—Bills and Payment.

Bills shall be rendered each month as nearly as practical on or before the 5th day of the calendar month succeeding the meter reading date and will be payable within ten days from the date thereof.

If either party fails to perform any of its obligations under this contract, including prompt payment of monthly bills, the other party may suspend delivery of energy hereunder and will not be liable in any manner for loss or damage arising from such suspension. No such suspension will interfere with the enforcement by either party hereto of any legal right or remedy or relieve the delinquent company from liability to pay the "reserve capacity charge" during any such suspension. No delay by the parties hereto in enforcing any of their rights hereunder will be deemed a waiver of such rights.

Article X—Conclusion.

This contract will inure to and be binding upon the parties hereto, their successors and assigns.

It is understood and agreed that this agreement cancels and supersedes the Interchange Capacity Agreement, dated July 1, 1939, and the Interconnection Contract, dated July 1, 1939, between the parties hereto.

In Witness Whereof, the parties hereto have caused this contract to be executed by their duly authorized officers

and impressed with their respective corporate seals the date and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,
President.

Attest:

J. F. BUCKMIER,
Secretary.

(Corporate Seal)

DAKOTA PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,
Vice-President.

Attest:

RALPH MAUCH,
Ass't Secretary.

(Corporate Seal)

Exhibit A (page 101) is shown on Card 11

Northwestern Public Service Co.,
Supplement No. 1,
Effective Date: May 8, 1943,
Filing Date: Apr. 8, 1943,
to
Rate Schedule FPC No. 6.

(Federal Power Commission
Apr. 8, 1943 Received)

Supplemental Agreement made March 13th, 1943, between Northwestern Public Service Company (Northwestern) and Dakota Public Service Company (Dakota).

There exists between the parties an Agreement, dated July 1, 1941 (herein called Basic Agreement) relating to inter-change capacity and energy, which Agreement supersedes two prior agreements known as Interconnection Contract and Interchange Capacity Agreement, both dated July 1, 1939. Northwestern owns certain interconnection facilities which are described in the Basic Agreement and at January 1, 1936. Northwestern's investment in these interconnection facilities was $303,449.26. The Basic Agreement is for a minimum term of ten years and thereafter until terminated by either party on 18 months prior written notice and provides that Dakota shall pay Northwestern the sum of $1666.66 per month for the period January 1, 1936 to June 30, 1950, inclusive, the sum of $1,348.82 on July 1, 1950, and beginning August 1, 1950, the sum of $442.53 per month. The foregoing payments made and to be made by Dakota represent the agreed amount required fully to amortize by July 1, 1950, a one-half share or $151,724.63 of the aforesaid Northwestern investment with interest in the interim at 5% per annum on the unamortized portions of the one-half share and also the monthly amount of $442.53 to be contributed by Dakota to the cost of operation, maintenance, taxes, insurance and all other charges applicable to the interconnection facilities. Whereas the two prior agreements were for indefinite terms subject to termination on specified notice, the Basic Agreement provided a minimum term in order to afford Northwestern a measure of protection with respect to its

proposed investment in an installation of additional generating capacity at its Aberdeen Plant, a project which Northwestern has been compelled to abandon because of war conditions. Inasmuch as the underlying consideration for the minimum term no longer exists. the purpose of this Supplemental Agreement is to eliminate the minimum term and otherwise protect Northwestern with respct to any unamortized balance of one-half of its investment in the interconnection facilities.

Accordingly the parties mutually agree as follows:

1. Article I, Section 14 of the [Basis] Agreement is hereby eliminated.

2. Article II, Section 1, of the Basic Agreement is hereby amended to read as follows:

> "This Agreement will become effective on July 1, 1941, and shall continue thereafter unless and until terminated by written notice by registered mail from either party to the other party terminating the agreement. The Agreement may be terminated only at the end of a calendar month and the written notice shall precede the termination date by not less than 18 months."

3. Article V, Section 3, of the Basic Agreement is hereby amended by the addition of the following paragraph:

> "In event of the termination of this Agreement by either party to Article II, Section 1, hereof, then the obligation of Dakota to make further monthly payments under this Section 3 shall cease but Dakota shall pay Northwestern at the termination date (a) the unamortized balance of one-half of Northwestern's investment in the interconnection facilities, that is, the sum of $151,724.63 with interest at the rate of 5% per annum from January 1, 1936 to the date of termination on the unamortized balances thereof less such payments as may have been made on account thereof under this Section 3 and under prior agreements described in Article X below, and (b) any monthly payment or payments of $442.53 each due

prior to the termination date which at that date shall not have been paid."

4. Subject to the amendments herein prescribed the Basic Agreement shall continue in full force and effect as therein provided.

In Witness Whereof the parties hereto have caused this Agreement to be executed by their duly authorized officers and impressed with their respective seals this 13th day of March, 1943.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,
President.

Attest: J. F. BUCKMIER,
Secretary.

DAKOTA PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,
Vice-President.

Attest: MARGARET FROST,
Assistant Secretary.

(Indorsed)—Filed Feb. 3, 1947, Roy B. Marker, Clerk, by C. C. Schwarz, Deputy.

(Motion of Defendant to Dismiss.)

United States District Court,
District of South Dakota,
Western Division.

Montana-Dakota Utilities Co., a corporation,
Plaintiff,
vs.
Northwestern Public Service Company, a corporation,
Defendant.

Now comes Northwestern Public Service Company, defendant in the above entitled cause, and moves the Court, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, to dismiss the above entitled action for want of jurisdiction over the subject matter for the following reasons:

1. The Complaint fails to set forth allegations necessary to confer jurisdiction upon this Court.

2. The Complaint does not show that any federal question is involved in this proceeding.

3. The Complaint alleges that the action is brought "under a law of the United States regulating commerce under said Federal Power Act" but fails to allege what law of the United States regulating commerce under the Federal Power Act is involved in this proceeding.

4. The Complaint refers to the Federal Power Act (a law of the United States which regulates commerce) but the Complaint fails to allege any right of Plaintiff created by said Federal Power Act which is an essential element of Plaintiff's alleged cause of action.

5. The Complaint does not show that the said action and proceeding is a suit or proceeding under any law of the United States regulating commerce but, on the contrary, shows that it is a suit or proceeding not arising under any law of the United States regulating commerce.

6. The Complaint fails to allege any right of Plaintiff created by the Constitution or laws of the United States, which is an essential element of Plaintiff's alleged cause of action and which will be supported if the Constitution or laws of the United States are given one construction or effect and will be defeated if the Constitution or laws of the United States are given another construction or effect.

7. The Complaint fails to allege any right of Plaintiff, created by the Constitution or laws of the United States, which is an essential element of Plaintiff's alleged cause of action, and on the contrary, clearly shows that Plaintiff's alleged cause of action is not founded upon a right created by the Constitution or laws of the United States.

8. Plaintiff's alleged cause of action does not really and substantially involve a dispute or controversy respecting the validity, construction or effect of the Constitution or laws of the United States nor does a determination of this suit depend thereon.

Dated this 20th day of February, 1947.

SYDNEY K. SCHIFF,
Chicago, Illinois,
MAX ROYHL,
Huron, South Dakota,
GEORGE E. LONGSTAFF,
Huron, South Dakota,
Attorneys for Defendants.

PAM, HURD & REICHMANN,
QUERIN P. DORSCHEL,
FREDRIC H. STAFFORD,
JOHN B. ROBINSON, JR.,
231 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

(Indorsed)—Filed Feb. 21, 1947. Roy B. Marker, Clerk.

Exhibit 1.

United States of America,
Federal Power Commission.

Commissioners:

Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

February 23, 1939.

In the Matter of
Northwestern Public Service Company.

Order Allowing Rate Schedule to Take Effect Prior to Date of Filing.

It appearing to the Commission that:

(a) On December 23, 1938, the Northwestern Public Service Company filed with the Federal Power Commission its agreement, dated October 7, 1936, with the Northern Power and Light Company, designated in the files of the Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, providing for the interchange of surplus electric energy, and emergency service and the rendition of transmission service by the Northwestern Public Service Company for the Northern Power and Light Company;

(b) Northwestern Public Service Company has requested that the said agreement be accepted by the Commission for filing, effective as of January 1, 1936;

(c) Good cause has been shown for, and the public interest will be served by, allowing Northwestern Public Service Company Rate Schedule F. P. C. No. 3 to take effect as of January 1, 1936;

The Commission orders that:

The agreement of October 7, 1936, between the Northwestern Public Service Company and Northern Power and Light Company, as filed with the Commission on December 23, 1938, and designated as

Northwestern Public Service Company Rate Schedule F. P. C. No. 3, be and the same is hereby allowed to take effect as of January 1, 1936.

By the Commission.

LEON M. FUQUAY,
Secretary.

Exhibit 2.

United States of America,
Federal Power Commission.

100-2
R-Contracts

Commissioners: Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

February 23, 1939.

In the Matter of
Northwestern Public Service Company }

Order Allowing Rate Schedule to Take Effect Prior to Date of Filing.

It appearing to the Commission that:

(a) On December 23, 1938, the Northwestern Public Service Company filed with the Federal Power Commission its agreement, dated January 1, 1938, with the Northern Power and Light Company and the North Dakota Power and Light Company, designated in the files of the Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, providing for the pooling of the generating facilities of these companies to make available to each of the said companies the spare or reserve power of the other companies, and also providing for the interchange of surplus electric energy and the furnishing of emergency service when needed;

(b) Northwestern Public Service Company has requested that the said agreement be accepted by the Commission for filing, effective as of January 1, 1938;

(c) Good cause has been shown for, and the public interest will be served by, allowing Northwestern Public Service Company Rate Schedule F. P. C. No. 4 to take effect as of January 1, 1938;

The Commission orders that:

The agreement of January 1, 1938, between the Northwestern Public Service Company, the Northern Power and Light Company, and the North Dakota Power and Light Company, as filed with the Commission on December 23, 1938, and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, be and the same is hereby allowed to take effect as of January 1, 1938.

By the Commission.

LEON M. FUQUAY,
Secretary.

Exhibit 3.

United States of America,
Federal Power Commission.

Commissioners: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

March 31, 1942.

In the Matter of
Northwestern Public Service Company

Order Allowing Rate Schedule to Take Effect.

Upon consideration by the Commission of application filed by Northwestern Public Service Company, request-

ing that Northwestern Public Service Company Rate Schedule FPC No. 6, providing for the interchange of electric energy with Dakota Public Service Company, be allowed to take effect as of July 1, 1941;

It is ordered that:

(A) The aforesaid rate schedule be and it is hereby allowed to take effect as of July 1, 1941;

(B) The aforesaid rate schedule shall be deemed to have been filed and published in compliance with the Federal Power Act;

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein;

(D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, by or against the applicant.

By the Commission.

LEON M. FUQUAY,
Secretary.

(Indorsed)—Filed June 3, 1947, Roy B. Marker, Clerk.

(Memorandum Opinion on Overruling of Motion of Defendant to Dismiss.)

A. Lee Wyman
District Judge

No. 241 W. D. Civil

United States District Court,
District of South Dakota

Deadwood, S. D., June 25, 1947.

Montana Dakota Utilities Co.,
vs
Northwest Public Service Co.
} Memo. Decision.

Messrs. Morrison & Skough,
Mobridge, S. D., Counsel for Plaintiff.

Messrs. Royhl & Longstaff,
Huron, S. D., Counsel for Defendant.

Gentlemen,

In considering the question presented by defendant's motion to dismiss the above entitled action, after a careful study of the briefs and authorities cited, I find myself unable to agree with the contentions presented in support of said motion. A discussion of the several points urged by defendant would extend this communication to an unreasonable length and serve no worthwhile purpose.

It is sufficient to say that the Federal Power Act specifies the method for the establishment of the lawful rate at which electric energy can be bought and sold at wholesale in interstate commerce and imposes a statutory duty upon those who thus deal in said commodity to buy or sell the same at the rate thus lawfully established. The imposition of this statutory duty creates a right in those who thus deal in electric energy to purchase or sell the same at the rate established pursuant to the provisions of the Act.

It appears by the complaint in this action that the same is based upon an alleged infringment of this right. It also

appears that there is at present a substantial controversy between the parties, the outcome of which depends upon the construction of the federal statute. The provisions made in the statute for affording administrative relief are not designed to remedy the wrongs upon which the instant case is based, and in my opinion, the allegations of the complaint are sufficient to bring the action within the jurisdiction of this Court. While the Power Act does not specifically authorize such a suit, in the absence of an adequate administrative remedy, the only relief remaining to those who have sustained damage by reason of such a breach of statutory duty as is set forth in the complaint, is in resort to the Court which, in my opinion, is vested with the necessary authority, as well as the duty to entertain such suit, by implication.

It follows that in my opinion the motion to dismiss must be denied. Therefore, upon presentation of the proper order to that effect, allowing the defendant the usual twenty days in which to answer, the same will be signed and entered of record.

I am returning to each of you the memorandum briefs which you submitted.

Yours very truly,

A. LEE WYMAN,
U. S. District Judge.

(Indorsed)—Filed June 25, 1947. Roy B Marker Clerk By Helen S Lambert Deputy

(Order denying Motion of Defendant to Dismiss and Fixing Time for Filing Answer.)

United States District Court
District of South Dakota
Western Division.

Montana-Dakota Utilities Co., a corporation,
Plaintiff,
—vs—
Northwestern Public Service Company, a corporation,
Defendant.

Civil No. 241 W. D.

The Defendant's Motion to Dismiss this action for want of jurisdiction over the subject matter, upon stipulation, coming on to be heard on June 3rd, 1947, each party appearing by its attorneys of record, the Court being fully advised in the premises, it is,

Ordered,

That Defendant's said Motion to Dismiss be and the same is hereby denied.

That defendant be and is hereby granted permission to serve and file answer within ten days from the date of the service of this Order.

Done in open Court at Deadwood, Lawrence County, South Dakota, this 3rd day of June, 1947.

By the Court:

A. LEE WYMAN,
Judge.

Attest:

ROY B. MARKER,
Clerk.

By HELEN S. LAMBERT (Seal of Court)
Deputy

(Indorsed)--Filed June 30, 1947 Roy B. Marker Clerk By Helen S Lambert Deputy

Answer of Defendant.

Now Comes Defendant, Northwestern Public Service Company, and in answer to the Complaint heretofore filed herein alleges as follows:

First Defense.

Defendant moves to dismiss the complaint of the Plaintiff and each and all of the causes of action contained therein, and herewith gives notice of said motion to dismiss, upon the ground that the claims and causes of action asserted by Plaintiff in its Complaint are not maintainable by Plaintiff because they were not assignable to Plaintiff for the reasons that:

(1) Said causes of action and claims are predicated and based upon tort liability and not upon contract, and

(2) Such purported assignment would be contrary to public policy in that said causes of action and claims are each based upon alleged fraudulent conduct and tort and therefore are not assignable by one corporation to another corporation, and

(3) That upon the purchase by Plaintiff of all of the capital stock of the Dakota Company,* Plaintiff became and then was the sole stockholder of the Dakota Company, and as such could have no right of action on fraud or tort claims in favor of the Dakota Company, either as assignee of the Dakota Company or as such sole stockholder of the Dakota Company.

Second Defense.

Defendant moves to dismiss the Complaint of Plaintiff and each and all of the causes of action contained therein, and herewith gives notice of such motion to dismiss, upon

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* For brevity the Northern Power and Light Company will be referred to herein as the Northern Company, the North Dakota Power and Light Company will be referred to as the North Dakota Company, and the Dakota Power and Light Company will be referred to as the Dakota Company.

the ground that this Court has no jurisdiction of the subject matter.

Third Defense.

Defendant moves to dismiss the Complaint of Plaintiff and each and all of the causes of action contained therein, and herewith gives notice of such motion to dismiss, upon the ground that said Complaint and each of the causes of action contained therein fail to state a claim upon which relief can be granted.

Fourth Defense.

Defendant, for answer to Plaintiff's Complaint, alleges:

First Cause of Action.

I.

Defendant denies the allegations contained in Paragraph I of the First Cause of Action of Plaintiff's Complaint, except that the Defendant admits that the amount in controversy, exclusive of interest and costs, exceeds $3,000.

II.

Defendant is without knowledge or information sufficient to form a belief as to the truth of any of the averments in Paragraph II of the First Cause of Action of Plaintiff's Complaint and, therefore, denies the same.

III, IV and V.

Defendant admits the allegations in Paragraphs III, IV, and V, respectively, of the First Cause of Action of Plaintiff's Complaint.

VI.

Defendant admits that on the first day of July 1939, Northern Company and North Dakota Company, pursuant to the laws of the State of Delaware, merged into one corporation, North Dakota Company being the surviving corporation pursuant to the terms of said merger and chang-

ing its name in said merger proceedings to Dakota Public Service Company, and that said Dakota Public Service Company thereafter operated the physical public utility properties formerly owned by Northern Company and North Dakota Company, but Defendant denies each of the other allegations contained in Paragraph VI of the First Cause of Action in Plaintiff's Complaint.

VII.

Defendant admits that the Northern Company and the North Dakota Company made and entered into an agreement of merger; Defendant is without knowledge or information sufficient to form a belief as to the truth of and, therefore, denies each of the other allegations contained in Paragraph VII of the First Cause of Action of Plaintiff's Complaint.

VIII.

Answering the allegations contained in Paragraph VIII of the First Cause of Action of Plaintiff's Complaint as supplemented by Exhibit "A" attached to and made a part of said Complaint, Defendant admits that F. E. Kreusi was the president and a director of said three corporations from January 1, 1935, to July 21, 1937, and that C. J. Strike was vice-president and a director of each of said three corporations from January 1, 1935, to July 21, 1937, and was the president and a director from July 21, 1937, to June 1, 1938; that W. R. Gazin was a vice-president and a director of said three corporations from January 1, 1935, to January 31, 1935; that C. L. Sandstedt was secretary-treasurer and a director of said three corporations from January 1, 1935, to June 7, 1938, and was vice-president, treasurer and a director of said three corporations from June 7, 1938, to July 1, 1939, and was vice-president, director and treasurer of the Dakota Company and Defendant from July 1, 1939, to June 28, 1944; that J. F. Buckmier was assistant secretary and assistant treasurer of the Northern Company, the North Dakota Company and defendant from January 1, 1935, to February 26, 1935, and a director of Defendant from January 1, 1935, through 1945, and a secretary of Defendant from June 7, 1938, through 1945; that R. L. Walsh was assistant

secretary and assistant treasurer of Defendant from February 26, 1935, to February 28, 1936; that G. R. McArthur was a director of Defendant from January 31, 1935, through 1945, and the vice-president and a director of the Northern Company, the North Dakota Company, the Dakota Company and this Defendant from July 21, 1937, through October 19, 1945; that Wm. M. Dunn was assistant secretary and assistant treasurer of Defendant from February 28, 1936, to November 27, 1936, and that he was treasurer and a director of Defendant and of the Dakota Company from July 24, 1944, through October 19, 1945; that E. W. Dempewolf was assistant secretary and assistant treasurer of Defendant from November 27, 1936, to April 21, 1941; that A. B. Sanborn was the president and a director of Defendant, the Northern Company, North Dakota Company and the Dakota Company continuously from July 1, 1938, to October 19, 1945, and that Ralph Mauch was assistant secretary and assistant treasurer of the Dakota Company and Defendant from April 12, 1941, to September 14, 1942.

The terms stated herein for which said offices were held are applicable to the several corporations mentioned only during such time as each was in existence. Defendant further alleges and admits that the directors of this Defendant for the times covered by the Complaint from 1935 through 1945 were as has been heretofore shown in the preceding paragraph, and that in addition thereto, B. L. Palm was a director from July 21, 1937, to April 18, 1939, and during the years 1939, 1940, 1941, 1942, 1943, 1944 and 1945, W. J. Allen, W. J. Fantle (deceased September 17, 1945) and O. C. Stokke were directors; that S. W. White was a director of the North Dakota Company and the Northern Company during the years 1935 to July 1, 1939, and of the Dakota Company from July 1, 1939, to October 19, 1945, and that to the best knowledge, information and belief of Defendant, J. F. Buckmier was a director of the Northern Company and the North Dakota Company from March 10, 1937, to July 1, 1939, and secretary of said companies from June 7, 1938, to July 1, 1939, and a director and secretary of the Dakota Company from July 1, 1939, to October 19, 1945.

Further answering the allegations contained in Paragraph VIII of the First Cause of Action of Plaintiff's Complaint, Defendant alleges that in each instance where any director or officer of Defendant also held the position of a director or officer in the Northern Company, the North Dakota Company or the Dakota Company, such fact was made known to the Federal Power Commission and the holding of such positions was authorized by order of the Commission issued pursuant to the provisions of Section 305 (b) of the Federal Power Act upon due showing in form and manner prescribed by the Commission that neither public nor private interests would be adversely affected thereby.

As to all other matters and things as alleged in said Paragraph VIII of the First Cause of Action and said Exhibit "A" attached to the Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth thereof (the said books and records of said corporations other than Defendant's being in the possession of the Plaintiff) and, therefore, Defendant denies the allegations of said Paragraph and said Exhibit "A" except as herein specifically admitted.

IX.

For answer to Paragraph IX of Plaintiff's First Cause of Action, Defendant admits that pursuant to Order No. 36 of the Federal Power Commission Defendant filed with said Commission its Northwestern Public Service Company Rate Schedule F. P. C. No. 1, a true and correct copy of which is attached to the Complaint herein marked Exhibit "A-1", but denies that said Rate Schedule was filed on February 7, 1937 and alleges the fact to be that said Rate Schedule was filed on February 7, 1936. Further answering the allegations contained in Paragraph IX of Plaintiff's First Cause of Action, Defendant admits that it entered into an agreement, dated October 7, 1936, with the Northern Company, a copy of which is attached to the Complaint as Exhibit "B", and that the corporate officers who executed the same on behalf of the respective parties were and held the respective offices shown by the contract, and that the directors of Defendant at that time were as

alleged in said Paragraph, but denies that the requirements of Section 205 (d) of the Federal Power Act were not complied with, and alleges the fact to be that the original of said Exhibit "B" was by Defendant filed with the Federal Power Commission on December 23, 1938, and thereafter and for good cause shown said Federal Power Commission, on February 23, 1939, entered its order that said Agreement, Exhibit "B", of October 7, 1936, and designated therein as Northwestern Public Service Company Rate Schedule No. 3, be allowed to take effect as of January 1, 1936, and that a true and correct copy of said order so entered by the Federal Power Commission is attached to this Answer and made a part hereof as Exhibit No. 1.

X.

Defendant admits those allegations contained in Paragraph X of the First Cause of Action of Plaintiff's Complaint that the portion of the Aberdeen interconnected substation and control equipment, the Gettysburg substation and the transmission lines referred to in said Exhibit "B" were constructed in 1930, but Defendant denies that said facilities were constructed for the sole use and benefit of the Defendant. On the contrary, Defendant alleges that the principal advantage and benefit of the installation of such facilities was for and inured to said North Dakota Company, the Northern Company and the Dakota Company, predecessors of Plaintiff.

Defendant alleges that at the time of the construction by Defendant of the interconnection and substation facilities referred to in Exhibit "B" to the Complaint, the only generating plants of Northern Company available for service to the South Dakota communities served by the Northern Company were four plants located at Mobridge, Gettysburg, and Lemmon, South Dakota, and at Ellendale, North Dakota; that such plants were each small, isolated and completely incapable of supporting the demands thereon from the areas served by the Northern Company; that the generating plants of the North Dakota Company available to supply the Northern Company were located at Beulah and Bismark, North Dakota, remote from the principal

service areas of the Northern Company, and in addition thereto North Dakota Company had small plants at Dickinson, Mott and Mandan, North Dakota; that because of this situation, the Northern Company was in dire need of either additional electric generating facilities or other additional sources of electric energy, so as to be able to carry its peak loads and to provide essential protection against the hazards of weather, poor transmission and of an inadequate and unreliable supply of energy; that this need was so great that the Northern Company's service had become precarious and there had developed threats of municipal ownership in several parts of its territory, which threats were satisfied by the promise of improved service to result from the construction of said interconnection facilities by Defendant; that at that time there was not an adequate reserve in the combined systems of the North Dakota Company the Northern Company, and that not one of the North Dakota Company, the Northern Company, or their then parent, United Public Utilities Company was financially circumstanced so as to be able to provide for the construction of the required additional generating capacity or any part of the cost of the interconnection facilities; that there was no means for procuring such reserve capacity other than by an interconnection with the system of Defendant and the construction of said interconnection facilities by Defendant; that there was no other electric utility company with which either the North Dakota Company or the Northern Company could have been connected in 1930 to provide comparable reserve capacity.

Defendant further alleges that the interconnection and substation facilities referred to in Exhibit "B" of the Plaintiff's Complaint and the purposes for which they were constructed and operated are as follows:

1. An interconnection consisting of a 38 kv transmission line from the Aberdeen substation of Defendant running northwards a distance of 20 miles to the town of Barnard, South Dakota; the purpose of such interconnection facility was to permit the Northern Company to protect its service area north, northwest and west of Barnard by access to the Aberdeen generating capacity of Defendant.

2. An interconnection consisting of a 38 kv transmission line from the same Aberdeen substation running westward a distance of 28½ miles to the town of Ipswich, South Dakota; the purpose of such interconnection facility was to protect the service of the Northern Company at Ipswich and the area of said company lying north and west of Ipswich, South Dakota.

3. A 62 mile 33,000 volt transmission line running from Highmore to Gettysburg, South Dakota; the purpose of such interconnection facility was to permit service at Gettysburg, which was then served by the Northern Company, to be tied into the generating capacity of Defendant to the southward, namely at Huron, and at Mitchell, South Dakota, and to the northward and eastward at Aberdeen, South Dakota.

4. A portion of the Aberdeen interconnected substation and control equipment used exclusively for interconnection with the system of the Northern Company; and

5. A substation at Gettysburg used exclusively for interconnection with the system of the Northern Company and serving Gettysburg.

Defendant further alleges that all of the aforesaid service areas are now part of the Plaintiff's system; that none of said interconnection facilities served any business purpose of the Defendant, either at the time of construction or any time thereafter, other than the purpose of service to the Northern Company or the performance of the agreements with Plaintiff and its predecessors, excepting that Defendant restrung a theretofore existing circuit on the new pole line constructed by it from Aberdeen to Barnard, and, since August 1934, served from such new pole line the Aberdeen wells; that said substation facilities at Aberdeen and Gettysburg, because of voltage differences, were of no use to Defendant other than as interconnection facilities with Plaintiff and its predecessors;

Defendant further alleges:

That the construction of such interconnection facilities afforded the Northern Company access to all of the prin-

cipal generating stations of Defendant, and afforded also a looping of such access by virtue of the fact that the service area of the Northern Company at and north of Gettysburg was, after the construction of such interconnection facilities, protected both by the interconnection facilities described in items 1 and 2 above and by the interconnection facilities described in item 3 above; that by reason of such looping and access to Defendant's generating capacity, not only were the immediate service areas of the Northern Company protected and benefited, but the entire systems of the then Northern Company and the North Dakota Company were protected and benefited;

That a further material benefit which flowed to Plaintiff and its predecessor companies from the construction of the interconnection facilities by Defendant was and is the ability of Plaintiff and its predecessors to dispose of surplus energy at an advantageous price; that if the surplus energy in question were not sold to Defendant it could not otherwise be disposed of profitably by Plaintiff; and that the sales of surplus energy to Defendant always have yielded a profit to Plaintiff and its predecessors based upon its or their incremental fuel cost of the energy so sold; and, further, that Plaintiff and its predecessors were enabled to operate the Beulah plant at capacity or near capacity at all times resulting in better operating efficiency and the production of energy for their other customers at a lower cost;

That another benefit realized by Plaintiff and its predecessors from the construction of said interconnection facilities flows from the fact that the Beulah plant, one of the principal plants, is a minemouth plant in that it obtains its fuel directly from the mines of the Knife River Coal Mining Company, which is located at the same point; Knife River Coal Mining Company at all times mentioned in Plaintiff's Complaint to and including October 19, 1945, was a wholly owned subsidiary of United Public Utilities Company and later of its successor, United Public Utilities Corporation, which companies also wholly owned the North Dakota Company and the Northern Company; that Defendant is informed and believes and upon such information and belief alleges that Plaintiff on October 19, 1945, also acquired

from United Public Utilities Corporation all of the outstanding capital stock of said Knife River Coal Mining Company;

That because of the proximity of the Beulah plant to the mine of said Knife River Coal Mining Company and of the ability of Plaintiff and its predecessors to operate the Beulah plant continuously at capacity or near capacity through the advantageous sale of the surplus energy to Defendant; Plaintiff and its precedessors were able to use and consume the screenings from said mine (which otherwise would not have been profitably disposed of) and more lignite was used at said plant than would otherwise have been the case; that Knife River Coal Mining Company thereby was enabled also to make a substantial profit through the disposition of its screenings and the sale of the additional lignite to Plaintiff and its predecessors at an advantageous price to Knife River Coal Mining Company.

XI.

Defendant admits the allegations of Paragraph XI of the First Cause of Action of Plaintiff's Complaint except that it denies the inference therein contained that it made no charge for energy delivered.

XII.

Defendant admits the allegations of Paragraph XII of the First Cause of Action of Plaintiff's Complaint.

XIII.

Defendant admits the allegations in Paragraph XIII of the First Cause of Action of Plaintiff's Complaint that it received Seventy Thousand Dollars ($70,000.00) from the Northern Company at the rate of $1,666.66 per month but denies each and every other allegation, matter and thing set forth in Paragraph XIII of Plaintiff's said First Cause of Action, and alleges the facts to be as follows:

That the Defendant was a subsidiary of the Middle West Corporation during all of the times covered in Plaintiff's Complaint. That the Northern Company was merged with the North Dakota Company on or about

July 1, 1939, the corporate name of which was then changed to Dakota Public Service Company, and that until said merger and at all times mentioned in the Complaint prior thereto, said Northern Company and said North Dakota Company were, and said Dakota Company after said merger continued to be until the sale by United Public Utilities Corporation of the securities of Dakota Company to Plaintiff, wholly owned subsidiaries of United Public Utilities Company or its successor, the present United Public Utilities Corporation; that United Public Utilities Company was in receivership or in bankruptcy from April 1932, to on or about January 1, 1935, as of which date its properties and assets were transferred to United Public Utilities Corporation, under the jurisdiction of the United States District Court for the Northern District of Illinois, Eastern Division; that during the receivership and bankruptcy proceedings referred to, Samuel W. White, who had had no previous connection with Defendant, Middle West Corporation or any of its subsidiaries, was the Receiver and later the Trustee of said United Public Utilities Company and upon said transfer of properties, became, has been and still is the President of its successor, the present United Public Utilities Corporation.

Further answering said Paragraph, Defendant alleges that the Board of Directors of said United Public Utilities Corporation has always been made up of persons independent of and having no connection with the Defendant, and Defendant further alleges that the individuals who served as common officers and directors of said Dakota Company and its predecessors and of Defendant were persons who were located on the properties of such companies, and that the relationships and contracts involved in this action were submitted for determination and decision on behalf of the Dakota Company and its predecessors to the Independent Board of Directors and officers of United Public Utilities Corporation, and on behalf of Defendant to representatives of the Middle West Corporation; and, further, that United Public Utilities Corporation

and the Middle West Corporation, each, had its own separate counsel in such matters.

Defendant further alleges that the contract set forth as Exhibit "B" to Plaintiff's Complaint was entered into after protracted negotiation, and extensive and independent arm's length bargaining between representatives of the Middle West Corporation, the parent of Defendant, on the one hand, and United Public Utilities Corporation, the parent of North Dakota Company and the Northern Company on the other hand; that said agreement was executed after independent study and investigation by the Middle West Corporation and United Public Utilities Corporation on behalf of their respective subsidiaries; and that said contract, and all charges and rate schedules therein provided for, were filed with the Federal Power Commission in accordance with the requirements of the Federal Power Act, as alleged and set forth in Paragraph IX of this Answer to Plaintiff's First Cause of Action, and that such rates and charges are fair, reasonable and equitable.

XIV.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XIV of Plaintiff's First Cause of Action, and, therefore, denies the same.

XV.

Defendant for further answer to Plaintiff's First Cause of Action and as a specific defense thereto, alleges: that the cause of action stated therein is barred by the provisions of Chapter 33.02 South Dakota Code, 1939, and in particular, subdivision 4 of Section 33.0232, and that more than six years have elapsed prior to the commencement of this action by the service of process herein upon the Defendant, and the said cause of action is barred by the said limitations named therein.

XVI.

Defendant, for further answer to Plaintiff's First Cause of Action and as a specific defense thereto, alleges:

That during all of the years covered in Plaintiff's Complaint the officers and directors of the United Public Utilities Company and its successor, United Public Utilities Corporation, visited the territory serviced by the Northern Company, the North Dakota Company and the Dakota Company, and were informed and had first hand information concerning the properties of said last named corporations and did observe the operations of said corporations in respect to and with regard for the interconnection facilities and the matters covered by Exhibit "B" to Plaintiff's Complaint; that by corporate reports and accountings, the said officers, owners and directors of United Public Utilities Company and its successor, United Public Utilities Corporation, sole owners of the Northern Company, the North Dakota Company and the Dakota Company, had full knowledge of the complete detailed operations under said contract (Exhibit "B") and at all times during the effective date of said contract said operations were fully considered, approved and confirmed by said owning companies; that said Exhibit "B" was executed at the direction of said United Public Utilities Corporation; that at a hearing before the Securities and Exchange Commission in certain proceedings on behalf of said United Public Utilities Corporation at which its officers and counsel were present and participating said United Public Utilities Corporation through its officers and counsel did submit and support said Exhibit "B", as well as submitting and supporting the interlocking officers and directors of Defendant, the Northern Company, the North Dakota Company and the Dakota Company and did contend in said proceedings that said contract and said relations were fair and reasonable and that said contract was made and entered into only after careful and protracted negotiation by and between said United Public Utilities Corporation and/or its predecessor, and with full knowledge by said companies through its officers and directors and other representatives of all of the facts and circumstances surrounding and incident to said contract.

Defendant further alleges that United Public Utilities Corporation and its predecessor company, United Public Utilities Company, in connection with and as a part of the relationships between Defendant, the Northern Company and the North Dakota Company referred to in the Complaint, and in order to make a further profit for Knife River Coal Mining Company (wholly owned by United Public Utilities Corporation and its predecessor) made arrangements whereby Defendant converted its Aberdeen generating station to the use of lignite produced by said Knife River Coal Mining Company (against defendant's prior use of Montana coal at said station) and purchased substantial amounts of such lignite from Knife River Coal Mining Company, all to the benefit of said Company and said United Public Utilities Corporation and its said predecessor.

Defendant further alleges that prior to the purchase by Plaintiff from United Public Utilities Corporation of the securities of the Dakota Company and of Knife River Coal Mining Company, Plaintiff made an exhaustive, complete and detailed study of the properties, plants and facilities of both the Dakota Company and Knife River Coal Mining Company, and of their books and records, and of their agreements and contractnal relations (including Exhibit "B" to the Complaint), and had complete access to all such books, records, agreements and properties; that Plaintiff caused an examination to be made by its engineers, accountants, officers and lawyers of said properties, books, accounts, records, agreements and contractual relations (including said Exhibit "B"); that Plaintiff questioned extensively officers and employees of Defendant prior to its purchase of said securities, particularly with respect to the agreements between the Dakota Company, Knife River Coal Mining Company and Defendant (including Exhibit "B") and the operations of the companies under and pursuant to said agreements and as to the interlocking officers and directors of said companies.

Defendant further alleges that at all times from 1930 to the present, Plaintiff and its various predecessor corporations, including Knife River Coal Mining Company, had full knowledge of the terms and conditions and relation-

ships and contracts (including Exhibit "B") operated under said contracts, and accepted and retained all of the benefits accruing therefrom.

Defendant further alleges that by virtue of the matters and things hereinabove stated, Plaintiff is estopped from recovering herein upon any of the claims and demands contained in the First Cause of Action of its Complaint.

Second Cause of Action.

I.

Answering Paragraph I of Plaintiff's Second Cause of Action, Defendant realleges and expressly by reference makes a part of its Answer to said Paragraph I of Plaintiff's Second Cause of Action the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and VIII set forth in its Answer to Plaintiff's First Cause of Action.

II.

Defendant denies the allegations contained in Paragraph II of Plaintiff's Second Cause of Action and alleges the facts to be that Defendant purchased from Plaintiff's predecessors 23,049,842 kilowatt hours of electric energy, which Defendant alleges was mostly "dump" or "surplus" energy, and Plaintiff's predecessors purchased from Defendant 10,499,461 kilowatt hours of electric energy, which Defendant alleges was mostly "peak" energy, during the period from September 1, 1935, to July 1, 1939; Defendant admits that the net exchange of electric energy amounted to 12,550,381 kilowatt hours from Plaintiff's predecessors to Defendant, during the aforesaid period, for which Defendant paid Plaintiff's predecessors the sum of $62,751.90; and Defendant denies that said 12,550,381 net kilowatt hours of electric energy was of the just and reasonable value of $94,127.86. Further answering the allegations contained in Paragraph II of Plaintiff's Second Cause of Action, Defendant admits that some of the electric energy exchanged between Defendant and Plaintiff's predecessors may have traveled over one or more of the transmission lines referred to in said Paragraph.

III.

Defendant denies each and every allegation contained in Paragraph III of Plaintiff's Second Cause of Action except such thereof as is hereinbefore admitted or qualified.

IV.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of Plaintiff's Second Cause of Action, and, therefore, denies the same.

V.

For further answer to Plaintiff's Second Cause of Action, Defendant realleges Paragraphs XV and XVI of Defendant's answer to Plaintiff's First Cause of Action and hereby incorporates said Paragraphs herein and makes them a part of Defendant's answer to Plaintiff's Second Cause of Action, and said allegations shall be deemed to apply to the appropriate corporations and agreements referred to in this Second Cause of Action.

Third Cause of Action.

I.

Answering Paragraph I of Plaintiff's Third Cause of Action, Defendant realleges and expressly by reference makes a part of its Answer to said Paragraph I of Plaintiff's Third Cause of Action the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and VIII set forth in its answer to Plaintiff's First Cause of Action.

II.

Defendant admits the allegations contained in Paragraph II of Plaintiff's Third Cause of Action except that Defendant alleges that no energy was exchanged between said corporations prior to May 1, 1930.

III.

For answer to Paragraph III of Plaintiff's Third Cause of Action, Defendant admits that pursuant to Order No. 36

of the Federal Power Commission Defendant filed with said Commission its Northwestern Public Service Company Rate Schedule F. P. C. No. 1, a true and correct copy of which is attached to the Complaint herein marked Exhibit "A-1", but denies that said Rate Schedule was filed on February 7, 1937 and alleges the fact to be that said Rate Schedule was filed on February 7, 1936. Further answering the allegations contained in Paragraph III of Plaintiff's Third Cause of Action, Defendant admits that it entered into an Agreement, dated January 1, 1938, with Northern Company and North Dakota Company; denies that said Agreement was entered into for the benefit of Defendant and to the detriment of the Northern Company and the North Dakota Company and alleges the fact to be that the primary benefit resulting from said Agreement was for the benefit of said Northern Company and North Dakota Company; and denies that the requirements of Section 205 (d) of the Federal Power Act were not complied with, and alleges the fact to be that said Agreement dated January 1, 1938 (Exhibit "C" to the Complaint) was by Defendant filed with the Federal Power Commission on December 23, 1938, and thereafter and for good cause shown said Federal Power Commission on February 23, 1939, entered its order that said Agreement, Exhibit "C", dated January 1, 1938, and designated therein as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, be allowed to take effect as of January 1, 1938 and that a true and correct copy of said order so entered by the Federal Power Commission is attached to this Answer and made a Part hereof as Exhibit No. 2.

IV.

Defendant denies each and every allegation contained in Paragraph IV of Plaintiff's Third Cause of Action, except that Defendant admits the execution of the Agreement therein referred to as "Exhibit 'C'", and that it received from the Northern Company as and for a reserve capacity charge the sum of $22,440 for the year 1938, and $9,068.40, for the period beginning January 1, 1939 and ending June 30, 1939. Further answering the allegations contained in Paragraph IV of Plaintiff's Third Cause of Action, De-

fendant states the fact to be that said Exhibit "C" was by Defendant filed with the Federal Power Commission on December 23, 1938, and thereafter and for good cause shown said Federal Power Commission, on February 23, 1939, entered its order that said Agreement, Exhibit "C", dated January 1, 1938, and designated therein as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, be allowed to take effect as of January 1, 1938, said order being Exhibit No. 2 to this answer, and states the fact to be that the rates and charges and the bases therefor set forth in said Exhibit "C" were fair and reasonable and the contract therefor, said Exhibit "C", was fairly arrived at as a result of arm's length dealing between the parties, their agents, owners and stockholders.

V.

Defendant specifically denies all of the allegations and matters alleged and set forth in Paragraph V of Plaintiff's Third Cause of Action.

VI.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VI of Plaintiff's Third Cause of Action and, therefore, denies the same.

VII.

For further answer to Plaintiff's Third Cause of Action Defendant realleges Paragraphs XV and XVI of Defendant's answer to Plaintiff's First Cause of Action and hereby incorporates said Paragraphs herein and makes them a part of Defendant's answer to Plaintiff's Third Cause of Action, except that in each instance where Exhibit "B" is mentioned or referred to therein it shall be deemed to be Exhibit "C", and the allegations shall be deemed to apply to the appropriate corporations referred to in this Third Cause of Action.

Fourth Cause of Action.

I.

Answering Paragraph I of Plaintiff's Fourth Cause of Action, Defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of Plaintiff's Fourth Cause of Action the allegations contained in Paragraphs I, II, III, and VIII set forth in its answer to Plaintiff's First Cause of Action.

II.

Defendant admits the allegations contained in Paragraph II of Plaintiff's Fourth Cause of Action.

III.

Defendant denies each and every allegation contained in Paragraph III of Plaintiff's Fourth Cause of Action, except that Defendant admits that pursuant to Order No. 36 of the Federal Power Commission Defendant filed with said Commission its Northwestern Public Service Company Rate Schedule F. P. C. No. 1, a true and correct copy of which is attached to the Complaint herein marked Exhibit "A-1", but denies that said Rate Schedule was filed on February 7, 1937 and alleges the fact to be that said Rate Schedule was filed on February 7, 1936. Further answering the allegations contained in Paragraph III of Plaintiff's Fourth Cause of Action, Defendant admits that it entered into an agreement, dated October 7, 1936, with the Northern Company, a copy of which is attached to the Complaint as Exhibit "B", but denies that the requirements of Section 205 (d) of the Federal Power Act were not complied with and alleges the fact to be that said Exhibit "B" was by Defendant filed with the Federal Power Commission on December 23, 1938, and thereafter and for good cause shown said Federal Power Commission, on February 23, 1939, entered its order that said Agreement, Exhibit "B", of October 7, 1936, and designated therein as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, be allowed to take effect as of January 1, 1936, and that a true and correct copy of said order so entered by the Federal Power Commission is at-

tached to this answer and made a part hereof as Exhibit No. 1.

Further answering the allegations contained in Paragraph III of Plaintiff's Fourth Cause of Action herein, Defendant realleges and expressly by reference makes a part of its answer to said Paragraph III of Plaintiff's Fourth Cause of Action the allegations contained in Paragraphs VI, VII, XI, XII and XIII set forth in its answer to Plaintiff's First Cause of Action.

Further answering the allegations contained in Paragraph III of Plaintiff's Fourth Cause of Action, Defendant admits it entered into an agreement dated July 1, 1939, with the Dakota Company, a copy of which is attached to the Complaint and marked Exhibit "D", and that the corporate officers who executed the same on behalf of the parties were and held the respective offices all as shown by said contract, and Defendant realleges and expressly by reference makes a part of its answer to Paragraph III of Plaintiff's Fourth Cause of Action the allegations contained in Paragraph XIII of its answer to Plaintiff's First Cause of Action herein, except that in each instance where Exhibit "B" is mentioned or referred to there, it shall be deemed to be Exhibit "D", and the allegations shall be deemed to apply to the appropriate corporations referred to in this Fourth Cause of Action. Defendant further alleges that the Agreement, Exhibit "D" to the Complaint, was filed with the Federal Power Commission on January 10, 1940 and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 5-A and the effective date of said contract declared by the Federal Power Commission to be July 1, 1939; said Rate Schedule No. 5-A was also designated by the Federal Power Commission to cancel Northwestern Public Service Company Rate Schedule F. P. C. No. 3.

IV.

Defendant in answer to the allegations set forth in Paragraph IV of Plaintiff's Fourth Cause of Action with reference to the interconnection facilities referred to in the contract attached to and made a part of Plaintiff's Complaint as Exhibit "D," realleges and expressly by

reference makes a part of its answer to said Paragraph IV of Plaintiff's Fourth Cause of Action the allegations contained in Paragraph X set forth in its answer to Plaintiff's First Cause of Action herein, except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "D."

V.

Defendant denies each and every of the allegations and legal conclusions in Paragraph V of Plaintiff's Fourth Cause of Action, and insofar as the conclusions therein refer to the purported meaning of said contract (Exhibit "D" to the Complaint), Defendant asks leave to refer to the instrument.

VI.

Defendant denies each and every allegation contained in Paragraph VI of Plaintiff's Fourth Cause of Action, except that Defendant admits the execution of the Agreement therein referred to as Exhibit "D", and further admits that some of the energy generated and transmitted by and between the parties to said Agreement may have traveled over the transmission lines referred to in said Paragraph VI.

Further answering the allegations contained in said Paragraph VI, Defendant admits that part of Paragraph VI of Plaintiff's Fourth Cause of Action wherein it is alleged that during the life of said contract the Dakota Company delivered to Defendant 15,961,599 kilowatt hours of electrical energy, which Defendant alleges was, in fact, mostly surplus or dump energy, and that the Defendant delivered to the Dakota Company 4,092,434 kilowatt hours of electric energy, which Defendant alleges was, in fact, mostly "peak" energy, and that the Dakota Company paid to Defendant for transmission line charges provided for by said contract $10,000 for the period of July 1, 1939, through December 31, 1939; $20,000 for the year 1940, and $10,000 for the period beginning January 1, 1941, and ending June 30, 1941, and further admits that Defendant paid to the Dakota Company for the net energy exchanged for the periods above shown the sum of $59,345.74, which was

the fair, reasonable and contract value thereof. Defendant denies each and every other thing, matter and allegation contained in said Paragraph VI of Plaintiff's Fourth Cause of Action.

VII.

Defendant denies each and every allegation contained in Paragraph VII of the Fourth Cause of Action of Plaintiff's Complaint.

VIII.

Defendant is without knowledge or information sufficient to form a belief and, therefore, denies all of the allegations of Paragraph VIII of Plaintiff's Fourth Cause of Action.

IX.

For further answer to Plaintiff's Fourth Cause of Action Defendant realleges Paragraphs XV and XVI of Defendant's answer to Plaintiff's First Cause of Action and hereby incorporates said Paragraphs herein and makes them a part of Defendant's answer to Plaintiff's Fourth Cause of Action, except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "D" and the allegations shall be deemed to apply to the appropriate corporations referred to in this Fourth Cause of Action.

Fifth Cause of Action.

I.

Answering Paragraph I of Plaintiff's Fifth Cause of Action, Defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of Plaintiff's Fifth Cause of Action the allegations contained in Paragraphs I, II, III and VIII set forth in its answer to Plaintiff's First Cause of Action.

II.

Admits the allegations contained in Paragraph II of Plaintiff's Fifth Cause of Action.

III.

Answering the first subparagraph of Paragraph III of Plaintiff's Fifth Cause of Action, Defendant realleges and expressly by reference makes a part of its answer to said first subparagraph of Paragraph III of Plaintiff's Fifth Cause of Action the allegations contained in Paragraphs III and IV set forth in its answer to Plaintiff's Third Cause of Action.

In answer to the allegations contained in the second subparagraph of Paragraph III of Plaintiff's Fifth Cause of Action, Defendant admits entering into an agreement dated July 1, 1939, with the Dakota Company, copy of which is attached to the Complaint marked Exhibit "E", and further admits that the corporate officers who executed same on behalf of the several parties were and held the respective offices all as shown by said contract, but this Defendant denies each and every other matter or thing alleged in said second subparagraph of Paragraph III of Plaintiff's Fifth Cause of Action and realleges and expressly by reference makes a part of its answer to said second subparagraph of Paragraph III of Plaintiff's Fifth Cause of Action the allegations contained in Paragraph XIII of its answer to Plaintiff's First Cause of Action herein, except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "E", and the allegations shall be deemed to apply to the appropriate corporations referred to in this Fifth Cause of Action.

Answering the allegations contained in the third subparagraph of Paragraph III of Plaintiff's Fifth Cause of Action, Defendant denies each and every allegation contained therein and asks leave to refer to the Contract, Exhibit "E" to the Amended Complaint, for the true terms thereof.

IV.

Defendant denies the allegations contained in Paragraph IV of Plaintiff's Fifth Cause of Action except that it admits that since May of 1930 it exchanged energy with predecessors of the Dakota Company.

V.

Defendant denies each and every allegation contained in Paragraph V of Plaintiff's Fifth Cause of Action, except that Defendant admits the execution of the agreement therein referred to as Exhibit "E", and further admits that the bulk of energy interchanged during the period was generated in the State of North Dakota and transmitted to the State of South Dakota but Defendant alleges that the energy so generated and transmitted was, in fact, mostly "dump" or "surplus" energy.

Further answering the allegations contained in Paragraph V, Defendant admits that portion of Paragraph V of Plaintiff's Fifth Cause of Action wherein it is alleged that during the life of said Agreement, Exhibit "E", the Dakota Company paid to Defendant: for the period January 1, 1939 to December 31, 1939, $9,068.40; for the year 1940, $12,685.20; for the year 1941 to June 30, 1941, $2,138.40; and Defendant alleges that the said charges so made and paid were fair and reasonable, and the agreed contract value thereof. Defendant further alleges that the Agreement, Exhibit "E" to the Complaint, was filed with the Federal Power Commission on January 10, 1940, and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 5-B, and the effective date of said contract declared by the Federal Power Commission to be July 1, 1939; said Rate Schedule No. 5-B was also designated by the Federal Power Commission to cancel Northwestern Public Service Company Rate Schedule F. P. C. No. 4.

VI.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI of Plaintiff's Fifth Cause of Action, and, therefore, denies the same.

VII.

For further answer to Plaintiff's Fifth Cause of Action Defendant realleges Paragraphs XV and XVI of Defendant's answer to Plaintiff's First Cause of Action and hereby incorporates said Paragraphs herein and makes

them a part of Defendant's answer to Plaintiff's Fifth Cause of Action except that in each instance where Exhibit "B" is mentioned or referred to therein it shall be deemed to be Exhibit "E", and the allegation shall be deemed to apply to the appropriate corporations referred to in this the Fifth Cause of Action.

Sixth Cause of Action.

I.

Answering Paragraph I of Plaintiff's Sixth Cause of Action, Defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of Plaintiff's Sixth Cause of Action the allegations contained in Paragraphs I, II, III and VIII set forth in its answer to Plaintiff's First Cause of Action.

II.

Admits the allegations contained in Paragraph II of Plaintiff's Sixth Cause of Action.

III.

Defendant admits it entered into an agreement dated July 1, 1941, with the Dakota Company, copy of which is attached to the Complaint and marked Exhibit "F", and that the corporate officers who executed the same on behalf of the contracting parties were and held the respective offices all as shown by said contract, but Defendant denies each and every other matter or thing contained in said Paragraph III of Plaintiff's Sixth Cause of Action and realleges and expressly by reference makes a part of its answer to Plaintiff's Sixth Cause of Action, Paragraph III, the allegations contained in Paragraph XIII of its answer to Plaintiff's First Cause of Action herein, except that in each instance where Exhibit "B" is mentioned or referred to therein it shall be deemed to be Exhibit "F", and the allegations shall be deemed to apply to the appropriate corporations referred to in this Sixth Cause of Action. Defendant further alleges that as a part of said Exhibit "F" there is included a supplemental contract dated March 13, 1943, by and between said Defendant and the

Dakota Company, which supplemental contract is attached to and made a part of Plaintiff's Complaint jointly with said Exhibit "F".

IV.

Defendant admits that since May of 1930, Defendant and the Dakota Company and its predecessors exchanged electrical energy, the largest amount thereof being generated by the Dakota Company and its predecessors, which Defendant alleges was, in fact, mostly "dump" energy, and Defendant further admits that no charge was made by either of the parties to said original of Exhibit "F", nor by the predecessors of the Dakota Company, on account of any so-called deficiency in generating capacity prior to January 1, 1939. Defendant denies each and every other allegation contained in said Paragraph IV of Plaintiff's Sixth Cause of Action.

V.

Defendant denies each and every allegation contained in Paragraph V of Plaintiff's Sixth Cause of Action, except that Defendant admits the execution of the agreement therein referred to as Exhibit "F", and further admits that the bulk of energy interchanged during the period was generated in the State of North Dakota and transmitted to the State of South Dakota but Defendant alleges that the energy so generated and transmitted was, in fact, mostly "dump" or "surplus" energy.

Further answering the allegations contained in Paragraph V, Defendant admits that portion of Paragraph V of Plaintiff's Sixth Cause of Action wherein it is alleged that during the life of said Agreement, Exhibit "F", the Dakota Company paid to Defendant: for the period July 1, 1941 to December 31, 1941, $2,138.40; for the year 1942, $17,199.60; for the year 1943, $8,514; for the year 1944, $9,992.40; and for the period from January 1, 1945 through October 19, 1945, $18,420.25; and Defendant alleges that the said charges so made and paid were fair and reasonable, and the agreed contract value thereof.

Further answering the allegations contained in Paragraph V of Plaintiff's Sixth Cause of Action, Defendant

alleges the fact to be that Defendant filed with the Federal Power Commission on February 28, 1942, its Northwestern Public Service Company Rate Schedule F. P. C. No. 6, and thereafter and for good cause shown said Federal Power Commission, on March 31, 1942, entered its order that said agreement, Exhibit "F", dated July 1, 1941, and designated therein as Northwestern Public Service Company Rate Schedule F. P. C. No. 6, be allowed to take effect as of July 1, 1941, and that a true and correct copy of said order so entered by the Federal Power Commission is attached to this answer and made a part hereof as Exhibit No. 3.

VI.

Defendant in answer to the allegations set forth in Paragraph VI of Plaintiff's Sixth Cause of Action with reference to the interconnection facilities referred to and made a part of Plaintiff's Complaint as Exhibit "F", realleges and expressly by reference makes a part of its answer to said Paragraph VI of the Plaintiff's Sixth Cause of Action, the allegations contained in Paragraph X set forth in its answer to Plaintiff's First Cause of Action herein except that in each instance where Exhibit "B" is mentioned or referred to therein it shall be deemed to be Exhibit "F", and the allegations shall be deemed to apply to the appropriate corporations referred to in this Sixth Cause of Action.

VII.

Defendant admits that from July 1, 1941, through October 19, 1945, it delivered to the Dakota Company 5,471,154 kilowatt hours of electric energy, which Defendant alleges was mostly "peak" energy, and that during the said period the Dakota Company delivered to Defendant 49,270,000 kilowatt hours of electric energy, which Defendant alleges was mostly "surplus" or "dump" energy. Defendant denies each and every other of the allegations and legal conclusions of Paragraph VII of Plaintiff's Sixth Cause of Action, and insofar as the conclusions are in reference to the purported meaning of said contract (Exhibit "F" to the Complaint) Defendant asks leave to refer to said instrument.

VIII.

Defendant admits the allegations contained in the first subparagraph of Paragraph VIII of Plaintiff's Sixth Cause of Action.

Defendant denies each and every allegation contained in the second subparagraph of Paragraph VIII of Plaintiff's Sixth Cause of Action. Further answering the allegations contained in said second subparagraph of Paragraph VIII of Plaintiff's Sixth Cause of Action, Defendant realleges and expressly by reference makes a part of its answer to said second subparagraph of Paragraph VIII of Plaintiff's Sixth Cause of Action the allegations contained in each and every Paragraph of its answer to Plaintiff's Third and Fifth Causes of Action.

Defendant denies the allegations contained in the third subparagraph of Paragraph VIII of Plaintiff's Sixth Cause of Action, except that it admits that Defendant received from the Dakota Company transmission line charges pursuant to the Agreement, Exhibit "F", (including the Supplemental Agreement of 1943) the sum of $10,000 covering July 1, 1941 through December 31, 1941 and the further sum of $20,000 for each year of the years 1942, 1943 and 1944, and the further sum of $16,021.51 for the period January 1, 1945, through October 19, 1945.

IX.

Defendant denies each and every allegation contained in Paragraph IX of Plaintiff's Sixth Cause of Action, except that Defendant admits that it paid to the Dakota Company the sum of $218,994.23 for the net energy sold to it by the Dakota Company for the term beginning July 1, 1941 through October 19, 1945, and alleges that said amount so paid was the fair and reasonable value of said electric energy and the agreed and contract price thereof which was fairly arrived at between the parties. Defendant further alleges that the energy sold to it by Dakota Company was, in fact, mostly "dump" or "surplus" energy.

X.

Defendant denies each and every allegation contained in Paragraph X of Plaintiff's Sixth Cause of Action.

XI.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XI of Plaintiff's Sixth Cause of Action and, therefore, denies the same.

XII.

For further answer to Plaintiff's Sixth Cause of Action, Defendant realleges Paragraph XVI of Defendant's answer to Plaintiff's First Cause of Action and hereby incorporates said Paragraph herein and makes it a part of Defendant's answer to Plaintiff's Sixth Cause of Action, except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "F", and the allegations shall be deemed to apply to the appropriate corporations referred to in the Sixth Cause of Action.

Fifth Defense.

Defendant, for further answer to Plaintiff's Complaint and the several causes of action contained therein, alleges:

That Plaintiff under date of August 12, 1946, filed a sworn complaint before the Federal Power Commission wherein Plaintiff alleged at the time of the execution of the originals of said agreements referred to in the Complaint filed herein, the management, operation and policies of all the parties to said agreements were controlled and dominated by the Middle West Corporation. A copy of said sworn complaint is attached hereto and made a part hereof as Defendant's Exhibit 4 to its answer to Plaintiff's Complaint (exhibits are not included inasmuch as Exhibit "A" of the Federal Power Commission case is identical with Exhibit "F" in the present case and Exhibit "B" and "C" are identical in both cases, and Exhibit "D" in the Federal Power Commission case is identical with Exhibit "E" in the present case, and Exhibit "E" in the Federal

Power Commission case is identical with Exhibit "D" in the present case). There is also attached hereto and made a part hereof as Defendant's Exhibit 5 to its answer to Plaintiff's Complaint a copy of an amendment to the aforesaid sworn Complaint (Defendant's Exhibit 4) dated February 19, 1947 and filed by Plaintiff with the Federal Power Commission.

Wherefore, Defendant demands judgment in its favor and against the Plaintiff herein for a dismissal of Plaintiff's Complaint, and the several causes of action contained therein upon the merits and that Plaintiff take nothing by virtue thereof, and for its costs and disbursements herein.

Dated this 17th day of July, 1947.

SYDNEY K. SCHIFF,
231 S. LaSalle Street,
Chicago 4, Illinois,
ROYHL & LONGSTAFF,
MAX ROYHL,
GEORGE E. LONGSTAFF,
National Bank of S. D. Bldg.,
Huron, South Dakota,
RALPH E. MAUCH,
Northwest Security Nat'l
Bank Bldg.,
Huron, South Dakota,
Attorneys for Northwestern
Public Service Company,
Defendant.

Exhibit 1

United States of America
Federal Power Commission

Commissioners:

Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

February 23, 1939

In the Matter of
Northwestern Public Service Company }

Order Allowing Rate Schedule to Take Effect Prior to Date of Filing

It appearing to the Commission that:

(a) On December 23, 1938, the Northwestern Public Service Company filed with the Federal Power Commission its agreement, dated October 7, 1936, with the Northern Power and Light Company, designated in the files of the Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, providing for the interchange of surplus electric energy and emergency service and the rendition of transmission service by the Northwestern Public Service Company for the Northern Power and Light Company;

(b) Northwestern Public Service Company has requested that the said agreement be accepted by the Commission for filing, effective as of January 1, 1936;

(c) Good cause has been shown for, and the public interest will be served by, allowing Northwestern Public Service Company Rate Schedule F. P. C. No. 3 to take effect as of January 1, 1936;

The Commission orders that:

The agreement of October 7, 1936, between the Northwestern Public Service Company and Northern Power and Light Company, as filed with the Commis-

sion on December 23, 1938, and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, be and the same is hereby allowed to take effect as of January 1, 1936.

By the Commission.

LEON M. FUQUAY,
Secretary.

(Seal)

Exhibit 2

United States of America
Federal Power Commission

100-2
R-Contracts

Commissioners:

Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

February 23, 1939.

In the Matter of
Northwestern Public Service Company }

Order Allowing Rate Schedule to Take Effect Prior to Date of Filing.

It appearing to the Commission that:

(a) On December 23, 1938, the Northwestern Public Service Company filed with the Federal Power Commission its agreement, dated January 1, 1938, with the Northern Power and Light Company and the North Dakota Power and Light Company, designated in the files of the Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, providing for the pooling of the generating facilities of these companies to make available to each of the said companies the spare or reserve power of the other companies, and also providing for the interchange of surplus electric

energy and the furnishing of emergency service when needed;

(b) Northwestern Public Service Company has requested that the said agreement be accepted by the Commission for filing, effective as of January 1, 1938;

(c) Good cause has been shown for, and the public interest will be served, by allowing Northwestern Public Service Company Rate Schedule F. P. C. No. 4 to take effect as of January 1, 1938;

The Commission orders that:

The agreement of January 1, 1938, between the Northwestern Public Service Company, the Northern Power and Light Company, and the North Dakota Power and Light Company, as filed with the Commission on December 23, 1938, and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, be and the same is hereby allowed to take effect as of January 1, 1938.

By the Commission.

LEON M. FUQUAY,
Secretary.

Exhibit 3

United States of America
Federal Power Commission

Commissioners:

Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

March 31, 1942.

In the Matter of
Northwestern Public Service Company

Order Allowing Rate Schedule to Take Effect

Upon consideration by the Commission of application filed by Northwestern Public Service Company, requesting

that Northwestern Public Service Company Rate Schedule FPC No. 6, providing for the interchange of electric energy with Dakota Public Service Company, be allowed to take effect as of July 1, 1941;

It is ordered that:

(A) The aforesaid rate schedule be and it is hereby allowed to take effect as of July 1, 1941;

(B) The aforesaid rate schedule shall be deemed to have been filed and published in compliance with the Federal Power Act;

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein;

(D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now [pendings], or hereafter instituted, by or against the applicant.

By the Commission.

LEON M. FUQUAY,
Secretary.

Exhibit No. 4.

Before the Federal Power Commission
Washington, D. C.

Montana-Dakota Utilities Co., a Delaware corporation, having its principal place of business at 831 Second Avenue South, Minneapolis, Minnesota,

Complainant,

vs.

Northwestern Public Service Company, a Delaware corporation,

Defendant.

(Federal Power Commission August 12, 1946 Received)

Complaint.

Dated August 10, 1946.

John C. Benson and
Armin H. Johnson,
Attorneys for Montana-Dakota Utilities Co., Applicant,
1260 Northwestern Bank Building,
Minneapolis 2, Minnesota.

Faegre & Benson,
Of Counsel.

Comes now the complainant and for its complaint herein alleges:

I.

The complainant is a corporation duly organized and existing under the laws of the State of Delaware and its principal office is located in the City of Minneapolis, Minnesota, and its Post Office address is 831 Second Avenue South, Minneapolis 2, Minnesota, and complainant is duly qualified as a foreign corporation in the States of North Dakota and South Dakota and has been so qualified in the

State of South Dakota ever since the 27th day of June, 1935, and has been so qualified in the State of North Dakota since the 2nd day of July, 1935.

II.

Defendant Northwestern Public Service Company is a corporation organized and existing under the laws of the State of Delaware and qualified to do business in the States of South Dakota and Nebraska and has been so qualified since some time in 1923.

III.

The energy heretofore sold by defendant to complainant and its predecessor under the terms of the original contract and amendment thereto, which original contract and amendment are hereinafter referred to and of which true and correct copies are to this complaint attached as Exhibit "A", and the electric energy to be sold and delivered under the terms of said originals of said Exhibit "A" were sold and transmitted and will be sold and transmitted by defendant to complainant in interstate commerce at wholesale, within the purview of the Federal Power Act, and the electric energy to be sold under the terms of the originals of said Exhibit "A" by complainant to defendant will be sold and transmitted by complainant to defendant in interstate commerce at wholesale, within the purview of the Federal Power Act.

IV.

From the 7th day of March, 1925, to July 1, 1939, Northern Power and Light Company, a Delaware corporation, was duly qualified as a foreign corporation in the State of South Dakota, and from the 22nd day of July, 1926, to July 1, 1939, said corporation was duly qualified as a foreign corporation in the State of North Dakota, and operated an electric public utility in said States, consisting of generating stations and transmission lines and other usual facilities of an electric public utility, and during said period said Northern Power and Light Company, in the operation of said public utility business in said State, had generating stations for the purpose of generating electric

energy at Mobridge, Lemmon and Gettysburg, South Dakota, and Ellendale, North Dakota, which were connected to and furnished electric energy to transmission lines by which said Northern Power and Light Company transmitted such electric energy and other electric energy hereinafter referred to to the following cities and villages in the State of South Dakota, viz., Mobridge, Eureka, Gettysburg, Ipswich, Lemmon, McIntosh, Selby, Akaska, Artas, Bowdle, Frederick, Glenham, Greenway, Herried, Hillsview, Hosmer, Hoven, Keldron, [Labanaon], Leola, McLaughlin, Morristown, Mound City, Onaka, Pollock, Roscoe, Seneca, Thunderhawk, Tolstoy, Watauga, Wetonka and Winship, and the following cities and villages in the State of North Dakota, viz., Ashley, Ellendale, Steele, Wishek, Braddock, Burnstad, Dawson, Driscoll, Forbes, Fredonia, Fullerton, Hague, Hazelton, Kintyre, Kulm, Lehr, Merricourt, Monango, Napoleon, Selfridge, Tappen, Venturia, Zelland and Strasburg, and such energy was during all of said time sold by said Northern Power and Light Company to the public at retail in said cities and villages.

V.

From the 29th day of December, 1925, to the 1st day of July, 1939, North Dakota Power & Light Company was Delaware corporation duly qualified as a foreign corporation in the State of North Dakota and operated an electric public utility, consisting of generating stations and transmission lines and other usual facilities of an electric public utility, having its generating stations in Beulah, Bismarck, Mandan, Dickinson and Mott, North Dakota, and serving by said generating stations, transmission lines and other facilities the cities and villages of Bismarck, Mandan, Beulah, Glen Ullin, Hazen, Mott, New Salem, Almont, Bentley, Burt, Carson, Center, Elgin, Heil, Judson, Leith, McKenzie, New Leipzig, Regent, Stanton, Sterling, Zap, Dickinson, Hebron, Belfield, Dodge, Dunn Center, Gladstone, Golden Valley, Halliday, Killdeer, Richardton, South Heart, Taylor and Werner in the State of North Dakota.

VI.

On the 1st day of July, 1939, the aforesaid Northern Power and Light Company and North Dakota Power & Light Company, pursuant to the laws of the State of Delaware, merged into one corporation, North Dakota Power & Light Company being the surviving corporation pursuant to the terms of said merger, and changing its name in said merger proceedings to Dakota Public Service Company. Pursuant to the terms of said merger, Dakota Public Service Company became the owner of all of the public utility business of said Northern Power and Light Company in addition to the properties on the date of said merger owned by North Dakota Power & Light Company, and thereafter said Dakota Public Service Company owned and operated as a public utility the properties formerly owned by it as hereinbefore alleged and the properties on the date of said merger owned by Northern Power and Light Company.

VII.

On the 19th day of October, 1945, Dakota Public Service Company aforesaid duly transferred, sold and assigned to complainant all of the generating stations, transmission lines, distribution systems, franchises, contracts and other assets then owned by Dakota Public Service Company and that certain contract and the amendment attached thereto, of which contract and amendment a true and correct copy is hereto attached, marked Exhibit "A" and by reference made a part hereof, and ever since said date complainant has been and still is the owner of the aforesaid property transferred to it by Dakota Public Service Company and the owner of said contract, and has been performing said contract as the assignee and successor of Dakota Public Service Company. Said contract, which will be hereinafter referred to as Exhibit "A", was filed with the Federal Power Commission on the 28th day of February, 1942, as Northwestern Public Service Company's Schedule F. P. C. No. 6.1. On the 22nd day of February, 1945 Dakota Public Service Company filed with the Federal Power Commission Dakota Public Service Company's Schedule F. P. C. No. 4, being its concurrence in Northwestern Public Service Company's Schedule F. P. C. No. 6, and on the 22nd day of

February, 1945, duly filed with the Federal Power Commission Dakota Public Service Company's Schedule Supplement No. 1 to F. P. C. No. 4, being a concurrence in the amendment to said Exhibit "A".

VIII.

On the 7th day of October, 1936, the defendant and Northern Power and Light Company made and entered into a contract denominated an interconnection contract, a true and correct copy thereof being hereto attached, marked Exhibit "B" and by reference made a part hereof. At the time of the execution of the original of said Exhibit "B", F. E. Kruesi, who executed said agreement for defendant as President of Defendant, and C. L. Sanstedt, who executed the original of Exhibit "B" as Secretary of Northwestern Public Service Company and Secretary of Northern Power and Light Company were respectively President and Secretary of Northern Power and Light Company, and C. J. Strike, who executed the original of said Exhibit "B" as Vice-President of Northern Power and Light Company, was Vice-President of Northwestern Public Service Company, and at said time the Directors of Northwestern Public Service Company were F. E. Kruesi, C. L. Sanstedt, C. J. Strike, J. F. Buckmier and G. R. McArthur, and at said time the Directors of Northern Power and Light Company were said Kruesi, Strike, Sanstedt and Buckmier, being the same individuals as the Directors of Northwestern Public Service Company. At the time of the execution of the original of said Exhibit "B", Northwestern Public Service Company was owned, controlled and dominated, directly or indirectly, by The Middle West Corporation, a holding company. through the ownership of stock by a subsidiary or subsidiaries of The Middle West Corporation and the domination of Northwestern Public Service Company's Directors, officers and employees by The Middle West Corporation, which also in essentially the same manner and method dominated and controlled the affairs of Northern Power and Light Company.

IX.

On the 1st day of January, 1938, defendant and North Dakota Power & Light Company aforesaid and Northern Power and Light Company aforesaid made and entered into a so-called interchange capacity agreement, of which a true and correct copy is hereto attached, marked Exhibit "C" and hereby made a part hereof.

At the time of the execution of the original of Exhibit "C", J. F. Buckmier, who executed said original of Exhibit "C", as Secretary on behalf of all three companies executing said agreement, was Secretary of each of said companies and was a Director of each of said companies, and A. B. Sanborn, who executed the original of Exhibit "C" as President of Northwestern Public Service Company, was at said time also President of said North Dakota Power & Light Company and was President of said Northern Power and Light Company, and at the time of the execution of the original of Exhibit "C", C. L. Sanstedt, who executed said original as Vice President of North Dakota Power & Light Company, was Vice-President of Northwestern Public Service Company and Vice President and Treasurer of Northern Power and Light Company, and said G. R. McArthur, who executed the original of Exhibit "C" as President of Northern Power and Light Company, was at said time Vice President of said Northwestern Public Service Company and Vice President of said North Dakota Power & Light Company, and at the time of the execution of the original of said Exhibit "C" the Directors of Northwestern Public Service Company were said A. B. Sanborn, G. R. McArthur, C. O. Sanstedt, J. F. Buckmier and B. L. Palm, and the Directors of said North Dakota Power & Light Company were A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier, and S. W. White and the Directors of Northern Power and Light Company were said A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier and S. W. White, and at the time of the execution of the original of said Exhibit "C" the management, operation and policies of all of the parties to said Exhibit "C" were controlled and dominated by a holding company, the aforesaid The Middle West Corporation, and continuously during the life of the original of

said Exhibit "C" the Committee on Operations referred to in said agreement was dominated and controlled and under the supervision and direction of the holding company, The Middle West Corporation.

X.

On the 1st day of July, 1939, said Northwestern Public Service Company and said Dakota Public Service Company made and entered into a so-called interchange capacity agreement, of which a true and correct copy is hereto attached, marked Exhibit "D" and by reference made a part hereof, and at the time of the execution of the original of said Exhibit "D" said A. B. Sanborn, who executed said original as President of Northwestern Public Service Company, was President of Dakota Public Service Company, and said C. L. Sanstedt, who executed said original as Vice President of Dakota Public Service Company was Vice President of Northwestern Public Service Company and at said time the Board of Directors of Northwestern Public Service Company was said A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier, W. J. Allen, W. S. Fantle and O. C. Stokke, and the Board of Directors of Dakota Public Service Company was the said Sanborn, McArthur, Sanstedt, Buckmier and S. W. White, and at said time both of the parties to said agreement were dominated and controlled and their directors, officers and employees were dominated and controlled by the said holding company, The Middle West Corporation. Said contract, the original of Exhibit "D", continued in force and effect until superseded by Exhibit "A" and during the time of said existence of said contract, the original of Exhibit "D", the Committee on Operations referred to in said agreement was dominated and controlled and under the supervision and direction of the holding company, The Middle West Corporation, and complainant is informed and believes that the said S. W. White never attended any of the meetings of the Board of Directors of said Dakota Public Service Company.

XI.

On the 1st day of July, 1939, said Northwestern Public Service Company and said Dakota Public Service Com-

pany made and entered into a so-called interconnection contract, of which a true and correct copy is hereto attached, marked Exhibit "E" and by reference made a part hereof, and at the time of the execution of the original of said Exhibit "E", A. B. Sanborn, who executed said original as President of Northwestern Public Service Company, was President of Dakota Public Service Company, and C. L. Sanstedt, who executed said original as Vice-President of Dakota Public Service Company, was Vice-President of Northwestern Public Service Company, and at said time the Board of Directors of Northwestern Public Service Company was A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier, W. J. Allen, W. S. Fantle and O. C. Stokke and the Board of Directors of the Dakota Public Service Company was the said Sanborn, McArthur, Sanstedt, Buckmier and S. W. White, and at said time both of the parties to said agreement were dominated and controlled and their directors, officers and employees were dominated and controlled by the said holding company, The Middle West Corporation.

XII.

On the 1st day of July, 1941, said Northwestern Public Service Company and said Dakota Public Service Company made and entered into an agreement cancelling the originals of Exhibits "D" and "E" and restating the charges to be made for the services and energy furnished by the parties thereto and changing and restating the obligations of Northwestern Public Service Company and Dakota Public Service Company as they heretofore existed under the originals of said Exhibits "D" and "E", and a true and correct copy of the said agreement made the 1st day of July, 1941, is hereto attached, marked Exhibit "A" and by reference made a part hereof. On said 1st day of July, 1941, A. B. Sanborn, who executed the original of Exhibit "A" as President of Northwestern Public Service Company, was also President of Dakota Public Service Company, and C. L. Sanstedt, who executed said original as Vice-President of Dakota Public Service Company, was also Vice-President of Northwestern Public Service Company and J. F. Buckmier, who attested said original as

Secretary of Northwestern Public Service Company, was also Secretary of Dakota Public Service Company, and Ralph Mauch, who attested said original as Assistant Secretary of Dakota Public Service Company, was also Assistant Secretary of Northwestern Public Service Company, and on said 1st day of July, 1941, the Board of Directors of Northwestern Public Service Company was said A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier, W. J. Allen, W. S. Fantle and O. C. Stokke, and the Board of Directors of Dakota Public Service Company was said Sanborn, McArthur, Sanstedt, Buckmier and S. W. White, and at said time both of the parties to said agreement were dominated and controlled and their directors, officers and employees were dominated and controlled by the said hoding company, The Middle West Corporation.

XIII.

At the time of the execution of the original of the supplemental agreement attached to said Exhibit "A" and made March 13, 1943, A. B. Sanborn, who executed said supplemental agreement as President of Northwestern Public Service Company, was also President of Dakota Public Service Company, and C. L. Sanstedt, who executed said supplemental agreement as Vice-President of Dakota Public Service Company, was also Vice-President of Northwestern Public Service Company, and J. F. Buckmier, who attested said supplemental agreement as Secretary of Northwestern Public Service Company, was also Secretary of Dakota Public Service Company, and Margaret Frost, who attested said supplemental agreement as Assistant Secretary of Dakota Public Service Company, was also Assistant Secretary of Northwestern Public Service Company, and on said 13th day of March, 1943, the Directors of Northwestern Public Service Company were the said A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier, W. J. Allen, W. S. Fantle and O. C. Stokke and the Board of Directors of Dakota Public Service Company was said Sanborn, McArthur, Sanstedt, Buckmier and S. W. White, and at said time both of the parties to said supplemental agreement were dominated and controlled and their directors, officers and employees were dominated and con-

trolled by the said holding company, The Middle West Corporation.

XIV.

During all of the times subsequent to July 1, 1941, and the date when complainant herein acquired the properties, assets and contracts of Dakota Public Service Company, as hereinbefore alleged, the operating committee provided for in the original of said Exhibit "A" was dominated and controlled and under the supervision and direction of the aforesaid holding company, The Middle West Corporation.

XV.

On the first day of July, 1939, said Dakota Public Service Company and defendant made and entered into a management contract, of which a true and correct copy is hereto attached, marked Exhibit "F" and by reference made a part hereof, and at the time of the execution of the original of said Exhibit "F" A. B. Sanborn, who executed said original as President of Northwestern Public Service Company, was President of Dakota Public Service Company, and C. L. Sanstedt, who executed said original as Vice-President of Dakota Public Service Company, was also Vice-President and Treasurer of Northwestern Public Service Company, and at said time the Board of Directors of Northwestern Public Service Company was said A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier, W. J. Allen, W. S. Fantle and O. C. Stokke, and the Board of Directors of Dakota Public Service Company was the said A. B. Sanborn, G. R. McArthur, C. L. Sanstedt, J. F. Buckmier and the aforesaid S. W. White, and at said time both of the parties to said agreement were dominated and controlled and their directors, officers and employees were dominated and controlled by the said holding company, The Middle West Corporation.

XVI.

At the time of the execution of all of the originals of the exhibits hereto attached and during the life of all of said agreements and until the time of the acquisition of the properties, assets and contracts of Dakota Public Service

Company by Montana-Dakota Utilities Co., as hereinabove alleged, all of the officers of defendant and of Dakota Public Service Company were identical and the dominating members of the Boards of Directors of the corporations, parties to the originals of said exhibits, were identical and said common officers and common directors received all their compensation for services from Northwestern Public Service Company.

XVII.

On the 28th day of February, 1946, Montana-Dakota Utilities Co. terminated the aforesaid management contract. On the 27th day of February, 1946, Montana-Dakota Utilities Co. served on the defendant notice of termination of said agreement Exhibit "A" and the supplement thereto attached and the said agreement will terminate on the 31st day of August, 1947.

XVIII.

On the 15th day of January, 1946, complainant, pursuant to the terms of said Exhibit "A", executed the supplement to the interchange capacity agreement as the basis for billing for the reserve capacity charges as provided in said Exhibit "A" and then for the first time since July 1, 1939, the following credit was given for generating capacity which was in existence at said time on properties conveyed by Dakota Public Service Company to the complainant, viz., 270 KW of steam generating capacity at Mandan, North Dakota, and 86 KW of steam generating capacity at Dickinson, North Dakota, although said generating capacity had been in existence and in the same or better condition during all previous years during the existence of the original of Exhibit "A".

XIX.

Complainant is informed and believes and on such information and belief alleges that the generating capacity of the Aberdeen generating station of the defendant is substantially below the figure used in computing the reserve generating capacity of the respective parties to said original of Exhibit "A".

XX.

The complainant is informed and believes and on such information and belief alleges that the transmission lines referred to in Exhibit "A" and for which monthly charge is made under the terms of said Exhibit "A" and toward the cost of which complainant is required under the terms of Exhibit "A" to pay a substantial portion were built by defendant in 1930, primarily for its own use, and have been continuously used by defendant in its business since said time.

XXI.

The average present cost to complainant of the generation of the current furnished and to be furnished to defendant by complainant is not less than 5.8 mills per kilowatt hour at its power plants, exclusive of depreciation, taxes and interest, whereas the rate therefor to be paid to complainant at its metering points under the terms of Exhibit "A" is only 5 mills.

XXII.

The rates and charges exacted from complainant by defendant pursuant to the terms of the original of said Exhibit "A" are unjust and unreasonable and complainant should not be required under the circumstances set forth in this complaint to pay to defendant anything on account of the transmission line amortization provided for in said Exhibit "A", or anything on account of the capacity of the Aberdeen generating station in excess of approximately 6,000 KW capacity, and should be paid by the defendant not less than 6½ mills per kilowatt hour for all energy furnished by complainant to defendant.

XXIII.

Complainant does not have access to the books and records of defendant and therefore cannot at this time advise this Commission of the cost of the transmission lines for which a charge is made to complainant under the terms of the original of Exhibit "A" and cannot at this time advise this Commission as to the true capacity of the

generating stations of defendant or furnish to this Commission the other data necessary to show the exact extent of the unjustness and unreasonableness of all of the charges made against complainant under the terms of the original of said Exhibit "A".

XXIV.

The defendant has each year since the making of the original of Exhibit "A" received many times more energy from complainant over the transmission lines referred to in Exhibit "A" than complainant has received from defendant, and complainant attaches hereto as Exhibit "G" a record of power transactions between Dakota Public Service Company and complainant on the one hand and Northwestern Public Service Company on the other for the years 1940 through the month of June, 1946.

XXV.

The terms of the Federal Power Act do not provide for reparations for unreasonable charges and rates paid by complainant prior to a decision herein and under the terms of said original of Exhibit "A" complainant is paying large amounts each month in excess of just and reasonable rates and charges.

Wherefore, complainant prays that defendant be immediately served with a copy of this complaint and that a hearing herein be held promptly after defendant's time for answer has expired, and that this Commission determine reasonable rates and charges to be made by the parties to said original of Exhibit "A" for the services rendered by them respectively, and make such final and inferim orders as may be required to secure to complainant just and reasonable rates for the energy and services contemplated by the original of Exhibit "A" to this complaint.

MONTANA-DAKOTA UTILITIES CO.,
By JOHN C. BENSON,
ARMIN M. JOHNSON,
Its Attorneys.
1260 Northwestern Bank Building,
Minneapolis 2, Minnesota.

State of Minnesota }
County of Hennepin } ss.

Cecil W. Smith, being first duly sworn, deposes and says that he is the Vice-President of Montana-Dakota Utilities Co., the complainant in the attached and foregoing complaint and that he has read the same and knows the contents thereof and that the same are true to the best of his knowledge and belief.

CECIL W. SMITH.

Subscribed and sworn to before me this 10th day of August, 1946.

MARGARET V. DOYLE,
Notary Public, Hennepin County, Minn.
Residing at Minneapolis, Minn.
My Commission Expires April 9, 1947.

(Notarial Seal)

Exhibit 5.

Before the Federal Power Commission
Washington, [C]. C.

Montana-Dakota Utilities Co., a Delaware corporation, having its principal place of business at 831 Second Avenue South, Minneapolis, Minnesota, Complainant, vs. Northwestern Public Service Company, a Delaware corporation, Defendant.	Docket No. IT-6004.

Amendment to and Supplement to Complaint.

Dated February 19, 1947.

John C. Benso : and
Armin M. Johnson,
Attorneys for Montana-Dakota
Utilities Co., Complainant,
1260 Northwestern Bank Building,
Minneapolis 2, Minnesota.

Faegre & Benson,
Of Counsel.

Comes now the complainant, Montana-Dakota Utilities Co., and amends and supplements its Complaint herein in the following particulars, to-wit:

By amending paragraph XXII of said Complaint so that, as amended, said paragraph will read as follows:

"XXII.

The rates and charges exacted from complainant by defendant pursuant to the terms of the original of said Exhibit 'A' are unjust and unreasonable and complainant should not be required to pay to defendant

anything on account of the transmission line amortization provided for in said Exhibit 'A' or anything on account of 'Company Reserve Capacity Charge' as provided in Section 1 of Article V of said Exhibit 'A', and should be paid by defendant not less than 6½ mills per kilowatt hour for all energy furnished by complainant to defendant."

By adding to said Complaint, after paragraph XXV thereof, the following paragraphs, to-wit:

"XXVI.

During the time the officers and directors of Northwestern Public Service Company managed the affairs of Northern Power and Light Company, North Dakota Power & Light Company and Dakota Public Service Company, as hereinbefore in this Complaint alleged, said officers and directors failed and neglected to install sufficient generating capacity on the systems of said companies to make the systems of said companies independent of defendant for energy required by said systems in times other than emergencies, and so handled the construction and installation of defendant's generating and distribution systems as to give defendant an excess of generating capacity over defendant's peak demands, all of said conduct resulting in making said properties of said Northern Power and Light Company, North Dakota Power & Light Company and Dakota Public Service Company dependent frequently on peak loads and frequently during emergencies on defendant for energy. Promptly after complainant acquired the aforesaid properties of Dakota Public Service Company, as hereinbefore in this Complaint alleged, complainant made plans for and ordered generating units to enable said properties to meet their then growing demand independent of defendant except in emergencies.

XXVII.

When defendant's officers and directors made and caused Dakota Public Service Company to make the agreement now filed with the Federal Power Commission as Northwestern Public Service Company

Supplement 1 to Rate Schedule F. P. C. No. 6, there was inserted in said supplement and is now contained therein, as shown by Exhibit 'A' attached hereto, the following paragraph:

> 'This Agreement will become effective on July 1, 1941, and shall continue thereafter unless and until terminated by written notice by registered mail from either party to the other party terminating the agreement. The Agreement may be terminated only at the end of a calendar month and the written notice shall precede the termination dated by not less than 18 months.'

XXVIII.

On the 27th day of February, 1946, complainant wrote defendant as follows:

> 'In accordance with the Agreement between Northwestern Public Service Company and Dakota Public Service Company, dated as of July 1, 1941, and a Supplemental Agreement dated March 13, 1943 between these two companies, as provided in Article II, Section 1, as amended, notice is hereby given by Montana-Dakota Utilities Co., as successor to Dakota Public Service Company, of the termination of that Agreement, such termination shall be effective as of August 31, 1947.'

but complainant has never applied to this Commission for any authority to make ~~said termination~~ effective.

XXIX.

Complainant is informed and believes that on about the 18th day of January, 1947, defendant filed with the aforesaid Commission a certain document entitled 'Notice of Cancellation', reading as follows:

> 'Notice is hereby given that effective the 31st day of August, 1947, Rate Schedule F. P. C. No. 6, together with Supplement No. 1 and Exhibits "C", "D", "E", and "F", effective date July 1, 1941 and filed with the Federal Power Commission by Northwestern Public Service Company, Huron, South Dakota is to be cancelled pursuant to Notice

of Termination dated February 27, 1946 signed by R. M. Heskett, President of Montana-Dakota Utilities Co., copy of which is hereto attached marked Exhibit "A", and which was served on the undersigned by Registered Mail on February 28, 1946.'

That the Notice of Termination referred to in said Notice of Cancellation is the letter hereinbefore set forth in paragraph XXVIII of this Complaint.

XXX.

To provide the generating capacity for the energy demands on the property of Dakota Public Service C apany, hereinbefore in this Complaint referred to, so that the failure of defendant and its officers and directors to install sufficient generating capacity therefor may be cured and to take care of the increasing energy demand by the consumers served by said property, complainant is now engaged in a program of installing generating capacity on said property as follows, to-wit: 3500 kw of diesel powered generators at Ellendale, North Dakota, and 3500 kw of diesel powered generators at Mobridge, South Dakota, and 5,000 kw of steam powered generators at Bismarck, North Dakota, and for the same purposes complainant is engaged in a program of constructing high tension power lines to make available to the aforesaid properties 5,000 kw of power to be purchased by complainant from the United States Bureau of Reclamation.

XXXI.

Complainant is advised and believes that the aforesaid installations and building of power lines referred to in paragraph XXX hereinbefore will not be completed before November 1, 1947, and complainant is informed and believes that it is to the interests of complainant and defendant and to the interest of the public served by complainant and defendant to have the existing or equally efficient and strategically located interconnections of facilities maintained between the properties of defendant and the property formerly owned by Dakota Public Service Company,

and that to sever said interconnections would be to the damage and detriment of the consumers on both of the properties in this paragraph referred to and would be against public interest inasmuch as the maintenance of said interconnection facilities will enable the interchange of power between said properties when line trouble or plant trouble or the installation of repairs or the reconditioning of generating units requires that one of said properties be supplied with energy from a source outside of such property, and it is not in the public interest or within the policy of the Federal Power Act under such conditions as these pleadings disclose to have existing interconnection facilities dismantled or otherwise made unavailable for emergency or other service.

During the last several months complainant has found it necessary to purchase from the defendant large amounts of electric energy in order to adequately serve the consumers on complainant's properties hereinabove referred to, and it will be necessary for complainant to purchase large amounts of electric energy for said purposes until at least the 1st day of November, 1947.

By amending the prayer for relief in said Complaint by adding thereto a second paragraph to read as follows:

'For an order of the Commission ordering the parties, until further order of the Commission, to maintain the interconnection facilities referred to in complainant's Complaint, or such portion thereof as the Commission shall find necessary in the public interest, and fixing the rates for power which may hereafter be interchanged by the parties during the maintenance of the aforesaid interconnection facilities between the parties mentioned in this Complaint.' "

MONTANA-DAKOTA UTILITIES CO.,
By JOHN C. BENSON and
ARMIN M. JOHNSON,
Its Attorneys.
1260 Northwestern Bank Building,
Minneapolis 2, Minnesota.

State of Minnesota }
County of Hennepin } ss.

Cecil W. Smith, being first duly sworn, deposes and says that he is the Vice President of Montana-Dakota Utilities Co., the complainant in the attached and foregoing Amendment to and Supplement to the Complaint herein, that he has read the same and knows the contents thereof and that the same are true to the best of his knowledge and belief.

CECIL W. SMITH,

Subscribed and sworn to before me this 19th day of February, 1947.

AGNES M. SMITH.

(Notarial Seal)

Agnes M. Smith,
Notary Public, Hennepin County, Minn.,
Residing at Minneapolis, Minn.,
My Commission Expires Aug. 10, 1950.

I hereby certify that I have this day served the foregoing Amendment To And Supplement To the Complainant's Complaint upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to Sydney K. Schiff, Esq., 231 South LaSalle Street, Chicago 4, Illinois, Max Royhl, National Bank of South Dakota Building, Huron, South Dakota, and Ralph Mauch, Security National Bank Building, Huron, South Dakota, Attorneys for Defendant, and to Messrs. Pam, Hurd & Reichmann, Querin P. Dorschel, Esq., Fredric H. Stafford, Esq., and John B. Robinson, Jr., Esq., 231 South LaSalle Street, Chicago 4, Illinois, of Counsel for Defendant.

Dated at Minneapolis, Minnesota, this 19th day of February, 1947.

JOHN C. BENSON,
Attorney for Montana-Dakota Utilities Co.,
1260 Northwestern Bank Building,
Minneapolis 2, Minnesota.

Faegre & Benson
Of Counsel.

(Indorsed)--Filed July 21, 1947. Roy B. Marker, Clerk. By Helen S. Lambert, Deputy.

Amendment to Answer of Defendant.

United States District Court
District of South Dakota
Western Division

Montana-Dakota Utilities Co., a corporation, Plaintiff,

vs.

Northwestern Public Service Company, a corporation, Defendant.

Civil Action File No. 241 W.

Now comes Defendant, Northwestern Public Service Company, and amends its Answer to the Complaint heretofore filed by it herein in the following respects:

I.

Paragraph III under the Third Cause of Action under the Fourth Defense contained in said Answer is hereby deleted and in lieu thereof the following paragraph is hereby substituted, to be and read as follows:

"III.

"For answer to Paragraph III of Plaintiff's Third Cause of Action, Defendant admits that pursuant to Order No. 36 of the Federal Power Commission Defendant filed with said Commission its Northwestern Public Service Company Rate Schedule F. P. C. No. 1, a true and correct copy of which is attached to the Complaint herein marked Exhibit "A-1", but denies that said Rate Schedule was filed on February 7, 1937, and alleges the fact to be that said Rate Schedule was filed on February 7, 1936. Further answering the allegations contained in Paragraph III of Plaintiff's Third Cause of Action, Defendant admits that it entered into an Agreement, dated January 1, 1938, with Northern Company and North Dakota Company; denies that Defendant caused the Northern Company and the North Dakota Company, or either of them, to make and enter into said Agreement, by and through the directors and officers of Defendant as alleged in said Paragraph III or otherwise or at all; further denies that said Agreement was entered into for the benefit of Defendant and to the detriment of the Northern

Company and the North Dakota Company and alleges the fact to be that the primary benefit resulting from said Agreement was for the benefit of said Northern Company and North Dakota Company; and further denies that the requirements of Section 205 (d) of the Federal Power Act were not complied with, and alleges the fact to be that said Agreement dated January 1, 1938 (Exhibit "C" to the Complaint) was by Defendant filed with the Federal Power Commission on December 23, 1938, and thereafter and for good cause shown said Federal Power Commission on February 23, 1939, entered its order that said Agreement, Exhibit "C", dated January 1, 1938, and designated therein as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, be allowed to take effect as of January 1, 1938 and that a true and correct copy of said order so entered by the Federal Power Commission is attached to this Answer and made a part hereof as Exhibit No. 2; except as hereinbefore in this Paragraph admitted, alleged or stated, denies each and all of the allegations contained in said Paragraph III of Plaintiff's Third Cause of Action."

II.

In the Fifth Defense contained in said Answer a new paragraph is hereby inserted as the third paragraph in said Fifth Defense, said paragraph to be and read as follows:

"On or about September 4, 1947, the Federal Power Commission entered and issued its order which provided, among other things, that the complaint and the amendment thereto filed by Plaintiff (Exhibits 4 and 5 to this Answer) be dismissed and which dismissed both said complaint and said amendment thereto."

SYDNEY K. SCHIFF,
ROYHL & LONGSTAFF,
MAX ROYHL,
GEORGE E. LONGSTAFF,
RALPH E. MAUCH,
Attorneys for Defendant.
By MAX ROYHL.

(Indorsed)—Filed Feb. 9, 1948. Roy B. Marker, Clerk.

Amendment No. 2 to Answer.

Defendant supplementing its answer herein and as a part thereof and as its Sixth Defense to plaintiff's complaint pleads as follows:

Sixth Defense.

Further answering and for further and separate defense defendant alleges that the plaintiff on or about the 2nd day of July, 1945, entered into an agreement in writing with United Public Utilities Corporation, a Delaware corporation, of Chicago, Illinois, for the purchase from that corporation of all of the stock and other securities of the Dakota Company and pursuant thereto on or about October 19, 1945, plaintiff did pay the consideration provided in said contract and acquire and accept delivery of all of the stock and securities of the Dakota Company, and on the same date plaintiff did surrender and exchange said stock and securities to be cancelled by the Dakota Company and received in consideration therefor from the Dakota Company in complete liquidation certain of its assets and property, and that it is by virtue of such procedure that plaintiff claims to have acquired rights and property made the basis of the claims and demands of the plaintiff herein, and that it is by virtue of said transactions that plaintiff claims under and relies upon said assignment alleged in the several causes of action in the complaint herein, and that said assignment was made in consideration of and for the purpose of carrying out the plan and scheme for liquidating the Dakota Company, and for the purpose and with the intent of acquiring its assets, and that plaintiff well knew of all of the contracts, agreements, arrangements and relationships of which it now complains and which it makes the basis of its claims herein, prior to the purchase of the said stock and securities of the Dakota Company and that plaintiff had no financial interest whatever in the Dakota Company prior to the said contract of purchase with United Public Utilities Corporation; and that the matters and things of which plaintiff complains all occurred and took place prior to the acquisition of any interest by plaintiff in the Dakota Company or its stock or securities; and that to permit the plaintiff to recover herein

would unjustly enrich the plaintiff and permit it to recover amounts reducing its purchase price paid for the said stock and securities contrary to the spirit and intent of the sale so made and would be unjust and inequitable for the reasons that plaintiff had and could acquire no rights on account of occurrences antedating plaintiff's purchase of said stock and could not be damaged thereby, and plaintiff after full knowledge of the facts, contracts and arrangements nevertheless purchased the said stock and securities to obtain the assets of the Dakota Company and did so obtain the same and may not now demand more than bargained for, and may not recover in this action.

Wherefore, defendant prays for the dismissal of plaintiff's complaint and the several causes of action contained therein upon the merits and that plaintiff take nothing by virtue thereof and for defendant's costs and disbursements herein.

Dated February 9, 1948.

MAX ROYHL,
Huron, South Dakota,
RALPH MAUCH,
Huron, South Dakota,
FREDRIC H. STAFFORD,
Chicago, Illinois,
JOHN B. ROBINSON, JR.,
Chicago, Illinois,
M. T. WOODS,
Sioux Falls, South Dakota,
Attorneys for Defendant.

(Indorsed)—Filed Feb. 9, 1948. Roy B. Marker, Clerk.

(Amendment to Complaint)

In the District Court of the United States
For the District of South Dakota
Western Division

Montana Dakota Utilities Co., a Corporation, Plaintiff, vs. Northwestern Public Service Company, a Corporation, Defendant.	Civil No. 241, W. D. Amendments to Complaint, Pursuant to Foregoing Stipulation.

Plaintiff alleges:

For a seventh cause of action:

I.

Realleges and expressly, by reference, makes parts of this cause of action the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, set forth in plaintiff's first cause of action.

II.

As of the 2nd day of January, 1936, the defendant, through its Board of Directors and officers then in office as in this complaint alleged, caused said Northern Power and Light Company to make a contract with the defendant entitled "Agreement for allocation of joint management expenses", of which a true and correct copy is hereto annexed, marked Exhibit "G" and expressly by reference made a part hereof. Said contract, of which Exhibit "G" is a copy, was never filed with the Federal Power Commission as a rate agreement or as an agreement affecting any rate or charge for electrical energy or the transmission thereof, although said agreement and the exaction by defendant of payments thereunder from said Northern Power and Light Company did affect the rates and charges collected by the defendant from said Northern Power and Light Company under Exhibit "B" to this complaint attached. Defendant, pursuant to the terms of the original

of said Exhibit "G", charged said Northern Power and Light Company and caused it to pay to defendant for the period from the 1st day of January, 1936, to the 1st day of July, 1939, the sum of Two Thousand, six hundred fifty-two and 25/100th Dollars, ($2,652.25) for dispatcher's salaries and expenses and during said period said dispatchers' services for which said charges were made consisted, among other things, of controlling the flow of energy exchanged under the terms of the original of Exhibit "B" to this complaint.

For an eighth cause of action:

I.

Realleges and expressly, by reference, makes part of this cause of action the allegations contained in Paragraph I of the second cause of action herein, and alleges that from the 1st day of September, 1935 to July 1, 1939, the defendant, through its officers and directors, who were officers and directors in common with Northern Power and Light Company and North Dakota Power & Light Company, caused said North Dakota Power and Light Company to generate in the State of North Dakota and transmit to Northern Power and Light Company at Keldron, South Dakota and at Driscoll, North Dakota, electrical energy that was in turn, by Northern Power and Light Company transmitted to defendant at Gettysburg, Barnard, Ipswich, and Aberdeen, South Dakota, and at said points purchased for resale by defendant, and that the amount of said energy that was so generated by North Dakota Power & Light Company was not less than 12,550,381 Kilowatt Hours.

II.

As of the 2nd day of January, 1936, defendant, through its Board of Directors and officers then in office as in this complaint alleged, caused said North Dakota Power & Light Company to make a contract with defendant entitled "Agreement for allocation of joint management expenses", of which a true and correct copy is hereto annexed, marked Exhibit "G" and expressly by reference made a part hereof. Said contract was never filed with the Federal Power Commission as a rate agreement or as an agreement affecting any rate or charge for electrical energy or

the transmission thereof, although said agreement and the exaction by defendant of payments thereunder from said North Dakota Power & Light Company did affect the rates and charges at which defendant had caused said North Dakota Power and Light Company to sell electrical energy to Northern Power and Light Company as in this cause of action alleged. Defendant, pursuant to the terms of the original of said Exhibit "G", charged said North Dakota Power & Light Company and caused it to pay to defendant for the period from January 1, 1938, to July 1, 1939, the sum of One Thousand Nine Hundred and 89/100ths Dollars, ($1900.89) for dispatchers' salaries and expenses and during said period said dispatchers' services for which said charge was made consisted, among other things, of controlling the flow of the energy from North Dakota Power & Light Company which this complaint alleges was sold by North Dakota Power & Light Company to Northern Power and Light Company and by that Company to defendant.

For a ninth cause of action,

I.

Realleges and expressly, by reference, makes parts of this cause of action the allegations contained in Paragraphs I, II, III, and IV of plaintiff's fourth cause of action, and alleges that pursuant to the terms of the contract dated July 1, 1939, alleged in said fourth cause of action, said Dakota Public Service Company paid to the defendant large sums of money as set forth in said fourth cause of action for the purposes therein alleged, and delivered to the defendant kilowatt hours of electrical energy as set forth in said cause of action.

II.

As of the 1st day of July, 1939, the defendant, through its Board of Directors and officers then in office as in this complaint alleged, caused Dakota Public Service Company to make a contract with defendant entitled "Agreement for allocation of joint management expenses", of which a true and correct copy is hereto annexed, marked Exhibit "H" and expressly by reference made a part hereof. Said contract was never filed with the Federal Power Commission as a rate agreement or as an agreement affecting any rate or charge for electrical energy or the transmission

thereof, although said agreement and the exaction by defendant of payments thereunder from said Dakota Public Service Company did affect the rates and charges collected by the defendant from said Dakota Public Service Company under the original of said Exhibit "D" to this complaint. Defendant, pursuant to the terms of the original of said Exhibit "H", charged said Dakota Public Service Company and caused it to pay to defendant for the period from July 1, 1939 to July 1, 1941, the sum of Four Thousand, Four Hundred and Twenty-three and 88/100 Dollars ($4,423.88) for dispatchers' salaries and expenses and during said period said dispatchers' services for which said charge was made consisted, among other things, of controlling the flow of energy exchanged under the terms of said Exhibit "D" to this complaint.

For a tenth cause of action herein,

I.

Realleges and expressly, by reference, makes parts of this cause of action the allegations contained in Paragraphs I, II and III of the sixth cause of action herein alleged, and alleges that pursuant to the terms of Exhibit "F" attached to the complaint herein said Dakota Public Service Company delivered to the defendant 49,270,000 kilowatt hours of electrical energy, and during said period paid to defendant large sums of money as alleged in Paragraph VIII of plaintiff's sixth cause of action.

II.

As of the 1st day of July, 1939, defendant, through its Board of Directors and officers then in office as in this complaint alleged, caused said Dakota Public Service Company to make a contract with defendant entitled "Agreement for Allocation of joint management expenses" of which a true and correct copy is hereto annexed and marked Exhibit "H" and expressly by reference made a part hereof. Said contract was never filed with the Federal Power Commission as a rate agreement or as an agreement affecting any rate or charge for electrical energy or the transmission thereof, although said agreement and the exaction by defendant of payments thereunder from said Dakota Public Service Company did affect the rates and

charges collected by the defendant from said Dakota Public Service Company under the original of Exhibit "F" to this complaint. Defendant, pursuant to the terms of the original of said Exhibit "H", charged said Dakota Public Service Company and caused it to pay to defendant for the period from July 1, 1941 to October 19, 1945, the sum of Ten Thousand, Two Hundred and Thirty-seven and 74/100 Dollars ($10,237.74) for dispatchers' salaries and expenses and during said period said dispatchers' services for which said charge was made consisted, among other things, of controlling the flow of energy exchanged under the terms of the original of Exhibit "F" to this complaint.

Amended Prayer.

Wherefore, plaintiff demands judgment against the defendant

(1) Declaring each of the contracts pleaded in plaintiff's complaint be void;

(2) Declaring that the aforesaid charges for interconnection facilities and transmission line charges and for dispatchers' salaries and expenses to be unjust, and unreasonable and unlawful in their entirety;

(3) Determining the fair and just and reasonable amounts owing to plaintiff on account of the aforesaid electrical energy purchased by defendant;

(4) Requiring defendant to account to the plaintiff for all funds received by defendant from Northern Power and Light Company, North Dakota Power & Light Co. and Dakota Public Service Company, as set forth in plaintiff's complaint and amendments thereto, or as may be shown by such accounting.

(5) For the sum of Four Hundred Ninety Seven Thousand, Four Hundred Forty Seven and 24/100th Dollars ($497,447.24) with interest at the rate of six per cent per annum from the date of each payment of each portion thereof, by North Dakota Power & Light Co., Northern Power and Light Company and Dakota Public Service Company, to the defendant.

(6) For such other and further relief as is just and equitable.

(7) For plaintiff's costs and disbursements herein.

Exhibit "G"

Agreement for Allocation of
Joint Management Expenses.

This agreement made in the City of Huron, State of South Dakota, on January 2nd, 1936, by Northwestern Public Service Company, a corporation, duly created, organized and existing under and by virtue of the laws of the State of Delaware, (herein called the "First Party") and North Dakota Power & Light Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, (herein called the "Second Party") and Northern Power & Light Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, (herein called the "Third Party") and Knife River Coal Mining Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota, (herein called the "Fourth Party"),

Witnesseth:

Whereas, the First, Second and Third Parties hereto own and operate electric, gas and steam utilities and the Fourth Party owns and operates a lignite coal mine in Mercer County, North Dakota; and

Whereas, the parties hereto jointly maintain a central office in the City of Huron, South Dakota, with an executive staff and a central organization to carry on the business of the respective companies including the following functions:

1. Executive: Members of the executive staff serve as President and Vice-President of each of the companies, and formulate the plans and policies of each company.

2. Secretary and Treasury: Members of this department serve as Secretary and Treasurer of each of the companies.

This department keeps all corporate records, prepares and files reports for all State and Federal governmental bodies; supervises the credit and collection activities of all companies; maintains relations with and furnishes necessary information to, investment bankers, insurance companies and financial and statistical agencies; prepares reports for, and maintains contact with, all state and local taxing units; assists in the preparation of annual reports for all companies; handles banking and finances; handles all insurance matters; arranges for meetings of stockholders and directors.

3. General Accounting and Auditing Department: A member of this department serves as Auditor for all companies. This department formulates and puts into effect the accounting policies and procedures, keeps all general records, prepares operating and financial reports, audits all invoices, assists in the accounting and preparation and distribution of construction, retirement and maintenance work orders, analyzes financial statements, makes researches and studies of other public utility accounting forms and practices, provides one or more traveling auditors for auditing the local accounting records of each company, prepares and files Federal income tax reports.

4. Engineering Department: This department consisting of a Transmission and Distribution engineer and a Combustion engineer, with the necessary assistants, analyzes and supervises expenditures for construction, investment, maintenance and retirements of each company, supervises all engineering practices and formulates operating and construction policies designed to improve operating efficiency.

5. Purchasing Department: Negotiates for all the companies both joint and individual purchasing agreements, controls the investment in material and supplies and disposes of idle or surplus equipment.

6. Commercial Department: Formulates and develops sales programs of each company.

7. Rate Department: Formulates, revises and co-ordinates rate policies and schedules: handles rate proceedings before regulatory bodies; analyzes the service needs of various classes of customers and the conditions and costs

with respect thereto; assists in negotiations of power contracts.

8. Central Billing Department: Prepares and checks all customers' bills.

9. Load Dispatchers: The generating stations are interconnected with a transmission system and the load dispatchers direct the operation of generating units in order that the utmost efficiency for the system can be obtained. This plan also keeps to a minimum interruptions to service by reason of the failure of generating units or transmission lines.

In consideration of the advantages and economies accruing to each of the parties hereto from the arrangement for joint management organization, Now, Therefore, be it Mutually Agreed as follows:

1. The parties hereto agree that the joint management expenses in the central office including expenses of the several departments as above outlined shall be allocated to each of the parties hereto as follows:

During each calendar year:

(a) The salaries and expenses of the Engineering Department, Commercial Department, Central Billing Department and Load Dispatchers, will be allocated monthly to the first three parties hereto in the same ration that the gross operating revenues of each of the first three parties for the preceding calendar month bears to the combined gross operating revenues of said three parties for said preceding calendar month. In the event any service is performed by these departments for the fourth party a charge will be made on a time sheet basis for the actual cost to the central office.

(b) All other joint expenses, including salaries, rent, telephone and telegraph, traveling expenses, stationery, printing, and office supplies, etc., will be allocated monthly to the four parties hereto in the same ratio that the gross operating revenues of each of the said four parties for the preceding calendar month bears to the combined gross operating revenues of said four parties for said preceding calendar month.

(c) In the determination of expense allocation ratios, gross operating revenues shall not include inter-company sales between any of the parties hereto.

This agreement shall remain in effect until ninety days after any of the parties hereto shall have mailed to each of the other parties hereto written notice of desire to terminate.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By C. J. STRIKE,

Attest: Vice-President.

C. L. SANDSTEDT,
Secretary.

NORTH DAKOTA POWER & LIGHT COMPANY,

By F. E. KRUESI,

Attest: President.

C. L. SANDSTEDT,
Secretary.

NORTHERN POWER & LIGHT COMPANY,

By F. E. KRUESI,

Attest: President.

C. L. SANDSTEDT,
Secretary.

KNIFE RIVER COAL MINING COMPANY,

By F. E. KRUESI,

Attest: President.

C. L. SANDSTEDT,
Secretary.

Exhibit "H"

Agreement for Allocation of Joint Management Expenses.

This agreement made in the City of Huron, State of South Dakota, on July 1, 1939, by Northwestern Public Service Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, (herein called the "First Party") and Dakota Public Service Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, (herein called the "Second Party") and Knife River Coal Mining Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota, (herein called the "Third Party").

Witnesseth:

Whereas, the First and Second parties hereto own and operate electric, gas and heating utilities and the Third Party owns and operates a lignite coal mine in Mercer County, North Dakota; and

Whereas, the parties hereto maintain a central office in the City of Huron, South Dakota, with an executive staff and a central organization to carry on certain functions in connection with the business of each of the parties hereto including the following:

1. Executive: Members of the executive staff serve as President and Vice-President of each of the companies, and formulate the plans and policies of each company.

2. Secretary and Treasury: Members of this department serve as Secretary and Treasurer of each of the companies. This department on behalf of each party hereto keeps all corporate records, prepares and files reports for all State and Federal governmental bodies; supervises the credit

and collection activities; maintains relations with, and furnishes necessary information to, investment bankers, insurance companies and financial statistical agencies; prepares reports for, and maintains contact with, all state and local taxing units; assists in the preparation of annual reports for all companies; handles banking and finances; handles all insurance matters; arranges for meetings of stockholders and directors; and in general performs the duties ordinarily performed by the Secretary and the Treasurer of such companies.

3. General Accounting and Auditing Department. A member of this department serves as Auditor for all companies. This department on behalf of each party hereto formulates and puts into effect all accounting policies and procedure; keeps all general records; prepares operating and financial reports; audits all invoices; assists in the accounting preparation and distribution of construction, retirement and maintenance work orders; analyzes financial statements; makes researches and studies of public utility accounting forms and practices; provides one or more traveling auditors for auditing the local accounting records of each company; and prepares and files Federal income tax reports.

4. Engineering Department: This department consisting of a Transmission and Distribution Engineer and a Combustion Engineer, with the necessary assistants, analyzes and supervises expenditures for construction, investment, maintenance and retirements of each company, supervises all engineering practices and formulates operating and construction policies designed to improve operating efficiency.

5. Purchasing Department: On behalf of each party hereto negotiates all purchasing agreements, controls the investment in material and supplies and disposes of idle or surplus equipment.

6. Commercial Department: On behalf of each party hereto formulates and develops sales programs.

7. Rate Department: On behalf of each company formulates, revises and co-ordinates rate policies and schedules; handles rate proceedings before regulatory bodies; analyzes the service needs of various classes of customers and the conditions and costs with respect thereto; assists in negotiations of power contracts.

8. Central Billing Department: Prepares and checks all customers' bills rendered by each of the companies parties hereto.

9. Load Dispatchers: The generating stations of the companies parties hereto are interconnected with a transmission system and the load dispatchers direct the operation of generating units with a view to obtaining the greatest efficiency for the system and reducing to a minimum interruptions to service by reason of the failure of generating units or transmission lines.

Now, therefore, in consideration of the premises and of the economies accruing to each of the parties by the maintenance of a central office and organization, the parties hereto mutually agree as follows:

(1) The expenses of the central office, including the expenses and salaries of the several departments as hereinabove outlined, shall be allocated to and paid by each of the parties hereto as follows:

During each calendar year:

(a) The salaries and expenses of the Engineering Department, Commercial Department, Central Billing Department and Load Dispatchers, will be allocated monthly to the first two parties hereto in the same ratio that the gross operating revenues of each of the first two parties for the preceding calendar month bears to the combined gross operating revenues of said two parties for said preceding calendar month. The Third Party shall pay actual costs on a time sheet basis to the extent it utilizes these departments of the central office as its share of the expense under this paragraph.

(b) All other joint expenses, including salaries, rent, telephone and telegraph, traveling expenses, stationery, printing, and office supplies, etc., will be allocated monthly to the three parties hereto in the same ratio that the gross operating revenues of each of the said three parties for the preceding calendar month bears to the combined gross operating revenues of said three parties for said preceding calendar month.

(c) In the determination of expense allocation ratios, gross operating revenues shall not include intercompany sales between any of the parties hereto.

(2) Each member of the central organization, in acting on behalf of, or in connection with the business of, any of the parties hereto shall be deemed to be exclusively the employee of such party; and none of the parties hereto shall be liable by virtue of this agreement to either of the other parties on account of any action or non-action of any member of the central organization in connection with the business or affairs of such other party.

(3) It is understood and agreed that this agreement cancels and supersedes the agreement for allocation of expenses dated July 2, 1936 between Northwestern Public Service Company, North Dakota Power & Light Company, Northern Power and Light Company, and Knife River Coal Mining Company, Northern Power and Light Company and North Dakota Power & Light Company having been merged, effective as of this date, under the corporate name of "Dakota Public Service Company."

Nothing in this agreement shall affect any rights or liabilities accrued under the previous agreement prior to July 1, 1939.

(4) This agreement shall remain in effect until ninety days after any of the parties hereto shall have mailed to each of the other parties hereto written notice of desire to terminate.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,
President.

Attest:

J. F. BUCKMIER,
Secretary,

(Seal)

DAKOTA PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,
Vice President.

Attest:

J. F. BUCKMIER,
Secretary.

(Seal)

KNIFE RIVER COAL MINING COMPANY,

By C. L. SANDSTEDT,

Attest:

J. F. BUCKMIER,
Secretary.

(Seal)

(Indorsed)—Filed Feb. 10, 1948, Roy B. Marker, Clerk

Supplemental Answer No. 3.

(Answer to Seventh, Eighth, Ninth and Tenth Causes of Action in the Complaint, as Amended).

United States District Court
District of South Dakota
Western Division.

Montana-Dakota Utilities Co., a corporation,
Plaintiff,
vs.
Northwestern Public Service Company, a corporation,
Defendant.

Civil Action
File No. 241 W. D.

Seventh Cause of Action.

I.

Answering Paragraph I of plaintiff's Seventh Cause of Action, defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of plaintiff's Seventh Cause of Action the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and VIII set forth in its answer to plaintiff's First Cause of Action.

II.

Answering Paragraph II of plaintiff's Seventh Cause of Action, defendant admits that it entered into a contract dated January 2, 1936, with the Northern Company, to which the North Dakota Company and Knife River Coal Mining Company were also parties, and that Exhibit "G" annexed to and made a part of the complaint as amended, is a true and correct copy of said contract; denies that defendant, through its Board of Directors and officers then in office as alleged in the complaint or otherwise, caused the Northern Company to make said contract; admits that said contract was never filed with the Federal Power Commis-

sion; denies that said agreement or the payments made thereunder by the Northern Company affected the rates and charges collected by defendant from the Northern Company under Exhibit "B" to the complaint, as alleged in said Paragraph II or otherwise; denies that defendant exacted any payments under said contract from the Northern Company; admits that defendant charged the Northern Company and that the Northern Company reimbursed defendant for the period stated in said Paragraph II the sum of money therein stated for dispatchers' salaries and expenses; denies that defendant caused the Northern Company to pay said sum of money or any part thereof; admits that during the period stated in said Paragraph II the dispatchers' services for which the charges were made consisted, among other things, of controlling the flow of energy inter-changed under the terms of the original of Exhibit "B" to the complaint; except as hereinabove in this answer to said Paragraph II expressly admitted or otherwise stated, defendant denies each and all of the allegations contained in said Paragraph II.

III.

Further answering said Paragraph II, defendant alleges that the arrangement by which joint management expenses, including salaries and expenses of the load dispatchers, were apportioned between the four companies who were parties to such joint management arrangement on a gross operating revenue basis was initiated during the period of the receivership of United Public Utilities Company and such basis of apportionment went into effect for the first time on November 1, 1932; that Samuel W. White, the receiver of said United Public Utilities Company, approved of and consented to said apportionment arrangement and reported the same to the United States District Court of which he was an officer as such receiver and obtained therefor the approval of said court; that during the period from January 1, 1935, to and including October 19, 1945, during all of which said Samuel W. White was the President and a director of United Public Utilities Corporation, the successor to all of the properties and assets of said United Public Utilities Company, and which during such

period was the sole stockholder of the Northern Company and of the Dakota Company, its successor, said apportionment arrangement on the basis of gross operating revenues was continued by and with the consent and approval of said Samuel W. White and United Public Utilities Corporation.

IV.

For further answer to plaintiff's Seventh Cause of Action defendant realleges Paragraphs XV and XVI of defendant's answer to plaintiff's first Cause of Action and hereby incorporates the same herein and makes them a part of defendant's answer to plaintiff's Seventh Cause of Action; except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "G" and the allegations shall be deemed to apply to the appropriate corporations referred to in this Seventh Cause of Action.

V.

Defendant expressly adopts, reaffirms and realleges, as fully as though set forth herein at length, as defenses to said Seventh Cause of Action the First Defense, the Second Defense, the Third Defense and the Fifth Defense contained in the answer of defendant heretofore served and filed in this action.

Eighth Cause of Action.

I.

Answering Paragraph I of plaintiff's Eighth Cause of Action, defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of plaintiff's Eighth Cause of Action the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and VIII set forth in its answer to plaintiff's First Cause of Action; denies each and all of the allegations in said Paragraph I other than those as to reallegation and reference (answered in the preceding part of this sentence); alleges that during the period from September 1, 1935, to July 1, 1939, defendant purchased from plaintiff's predecessors 23,049,842

kilowatt hours of electric energy, which was mostly "surplus" or "dump" energy, and during said period plaintiff's predecessors purchased from defendant 10,499,461 kilowatt hours of electric energy, which was mostly "peak" energy; and admits that the net exchange of electric energy during said period was 12,550,381 kilowatt hours from plaintiff's predecessors to defendant.

II.

Answering Paragraph II of plaintiff's Eighth Cause of Action, defendant admits that it entered into a contract dated January 2, 1936, with the North Dakota Company, to which the Northern Company and Knife River Coal Mining Company were also parties, and that Exhibit "G" annexed to and made a part of the complaint as amended, is a true and correct copy of said contract; denies that defendant, through its Board of Directors and officers then in office as alleged in the complaint or otherwise, caused the North Dakota Company to make said contract; admits that said contract was never filed with the Federal Power Commission; denies that said agreement or the payments made thereunder by the North Dakota Company affected the rates and charges at which the North Dakota Company sold electrical energy to the Northern Company, as alleged in said Paragraph II or otherwise; denies that defendant exacted any payments under said contract from the North Dakota Company; denies that defendant caused the North Dakota Company to sell electrical energy to the Northern Company as in the Eighth Cause of Action alleged or otherwise; admits that defendant charged the North Dakota Company and that the North Dakota Company reimbursed defendant for the period stated in said Paragraph II the sum of money therein stated for dispatchers' salaries and expenses; denies that defendant caused the North Dakota Company to pay said sum of money or any part thereof; admits that during the period above stated the dispatchers' services for which the charges were made consisted, among other things, of controlling the flow of energy from the North Dakota Company and alleged to be sold by that company to the Northern Company and by the latter to defendant; except as hereinabove in this answer to

said Paragraph II expressly admitted or otherwise stated, defendant denies each and all of the allegations contained in said Paragraph II.

III.

Further answering said Paragraph II, defendant alleges that the arrangement by which joint management expenses, including salaries and expenses of the load dispatchers, were apportioned between the four companies who were parties to such joint management arrangement on a gross operating revenue basis was initiated during the period of the receivership of United Public Utilities Company and such basis of apportionment went into effect for the first time on November 1, 1932; that Samuel W. White, the receiver of said United Public Utilities Company, approved of and consented to said apportionment arrangement and reported the same to the United States District Court of which he was an officer as such receiver and obtained therefor the approval of said court; that during the period from January 1, 1935, to and including October 19, 1945, during all of which said Samuel W. White was the President and a director of United Public Utilities Corporation, the successor to all of the properties and assets of said United Public Utilities Company, and which during such period was the sole stockholder of the North Dakota Company, said apportionment arrangement on the basis of gross operating revenues was continued by and with the consent and approval of said Samuel W. White and United Public Utilities Corporation.

IV.

For further answer to plaintiff's Eighth Cause of Action, defendant realleges Paragraphs XV and XVI of defendant's answer to plaintiff's First Cause of Action and hereby incorporates the same herein and makes them a part of defendant's answer to plaintiff's Eighth Cause of Action; except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "G" and the allegations shall be deemed to apply to the appropriate corporations referred to in this Eighth Cause of Action.

V.

Defendant expressly adopts, reaffirms and realleges, as fully as though set forth herein at length, as defenses to said Eighth Cause of Action the First Defense, the Second Defense, the Third Defense, and the Fifth Defense contained in the answer of defendant heretofore served and filed in this action.

Ninth Cause of Action.

I.

Answering Paragraph I of plaintiff's Ninth Cause of Action, defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of plaintiff's Ninth Cause of Action the allegations contained in Paragraphs I, II, III, and IV set forth in its answer to plaintiff's Fourth Cause of Action; denies each and all of the allegations in said Paragraph I other than those as to reallegation and reference (answered in the preceding part of this sentence) except that defendant admits that the Dakota Company paid to defendant $40,000.00 for transmission line charges provided for by the contract dated July 1, 1939, and delivered to defendant the number of kilowatt hours of electric energy stated in Paragraph VI of plaintiff's Fourth Cause of Action, which defendant alleges was mostly "surplus" or "dump" energy.

II.

Answering Paragraph II of plaintiff's Ninth Cause of Action, defendant admits that it entered into a contract dated July 1, 1939, with the Dakota Company, to which Knife River Coal Mining Company was also a party, and that Exhibit "H" annexed to and made a part of the complaint, as amended, is a true and correct copy of said contract; denies that defendant, through its Board of Directors and officers then in office as alleged in the complaint or otherwise, caused the Dakota Company to make said contract; admits that said contract was never filed with the Federal Power Commission; denies that said agreement or the payments made thereunder by the Dakota

Company affected the rates and charges collected by defendant from the Dakota Company under Exhibit "D" to the complaint, as alleged in said Paragraph II or otherwise; denies that defendant exacted any payments under said contract from the Dakota Company; admits that defendant charged the Dakota Company and that the Dakota Company reimbursed defendant for the period stated in said Paragraph II the sum of money therein stated for dispatchers' salaries and expenses; denies that defendant caused the Dakota Company to pay said sum of money or any part thereof; admits that during the period stated in said Paragraph II the dispatchers' services for which the charges were made consisted, among other things, of controlling the flow of energy inter-changed under the terms of Exhibit "D" to the complaint; except as hereinabove in this answer to said Paragraph II expressly admitted or otherwise stated, defendant denies each and all of the allegations contained in said Paragraph II.

III.

Further answering said Paragraph II, defendant alleges that the arrangement by which joint management expenses, including salaries and expenses of the load dispatchers, were apportioned between the four companies who were parties to such joint management arrangement on a gross operating revenue basis was initiated during the period of the receivership of United [Publis] Utilities Company and such [bais] of apportionment went into effect for the first time on November 1, 1932; that Samuel W. White, the receiver of said United Public Utilities Company, approved of and consented to said apportionment arrangement and reported the same to the United States District Court of which he was an officer as such receiver and obtained therefor the approval of said court; that during the period from January 1, 1935, to and including October 19, 1945, during all of which said Samuel W. White was the President and a director of United Public Utilities Corporation, the successor to all of the properties and assets of said United Public Utilities Company, and which during such period was the sole stockholder of the Dakota Company and of its two predecessors, said apportionment arrangement on the basis of gross

operating revenues was continued by and with the consent and approval of said Samuel W. White and United Public Utilities Corporation.

IV.

For further answer to plaintiff's Ninth Cause of Action, defendant realleges Paragraphs XV and XVI of defendant's answer to plaintiff's First Cause of Action and hereby incorporates the same herein and makes them a part of defendant's answer to plaintiff's Ninth Cause of Action; except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "H" and the allegations shall be deemed to apply to the appropriate corporations referred to in this Ninth Cause of Action.

V.

Defendant expressly adopts, reaffirms and realleges, as fully as though set forth herein at length, as defenses to said Ninth Cause of Action the First Defense, the Second Defense, the Third Defense and the Fifth Defense contained in the answer of defendant heretofore served and filed in this action.

Tenth Cause of Action.

I.

Answering Paragraph I of plaintiff's Tenth Cause of Action, defendant realleges and expressly by reference makes a part of its answer to said Paragraph I of plaintiff's Tenth Cause of Action the allegations contained in Paragraphs I, II and III set forth in its answer to plaintiff's Sixth Cause of Action; denies each and all of the allegations in said Paragraph I other than those as to reallegation and reference (answered in the preceding part of this sentence) except that defendant admits that the Dakota Company delivered to defendant 49,270,000 kilowatt hours of electric energy, which defendant alleges was mostly "surplus" or "dump" energy, and further admits that during the period stated in Paragraph VIII of plain-

tiff's Sixth Cause of Action, the Dakota Company paid to defendant the sums of money therein stated.

II.

Answering Paragraph II of plaintiff's Tenth Cause of Action, defendant admits that it entered into a contract dated July 1, 1939, with the Dakota Company, to which Knife River Coal Mining Company was also a party, and that Exhibit "H" annexed to and made a part of the complaint, as amended, is a true and correct copy of said contract; denies that defendant, through its Board of Directors and officers then in office as alleged in the complaint or otherwise, caused the Dakota Company to make said contract; admits that said contract was never filed with the Federal Power Commission; denies that said agreement or the payments made thereunder by the Dakota Company affected the rates and charges collected by defendant from the Dakota Company under Exhibit "F" to the complaint, as alleged in said Paragraph II or otherwise; denies that defendant exacted any payments under said contract from the Dakota Company; admits that defendant charged the Dakota Company and that the Dakota Company reimbursed defendant for the period stated in said Paragraph II the sum of money therein stated for dispatchers' salaries and expenses; denies that defendant caused the Dakota Company to pay said sum of money or any part thereof; admits that during the period stated in said Paragraph II the dispatchers' services for which the charges were made consisted, among other things, of controlling the flow of energy inter-changed under the terms of the original of Exhibit "F" to the complaint; except as hereinabove in this answer to said Paragraph II expressly admitted or otherwise stated, defendant denies each and all of the allegations contained in said Paragraph II.

III.

Further answering said Paragraph II, defendant alleges that the arrangement by which joint management expenses, including salaries and expenses of the load dispatchers, were apportioned between the four companies

who were parties to such joint management arrangement on a gross operating revenue basis was initiated during the period of the receivership of United Public Utilities Company and such basis of apportionment went into effect for the first time on November 1, 1932; that Samuel W. White, the receiver of said United Public Utilities Company approved of and consented to said apportionment arrangement and reported the same to the United States District Court of which he was an officer as such receiver and obtained therefor the approval of said court; that during the period from January 1, 1935, to and including October 19, 1945, during all of which said Samuel W. White was the President and a director of United Public Utilities Corporation, the successor to all of the properties and assets of said United Public Utilities Company, and which during such period was the sole stockholder of the Dakota Company and of its two predecessors, said apportionment arrangement on the basis of gross operating revenues was continued by and with the consent and approval of said Samuel W. White and United Public Utilities Corporation.

IV.

For further answer to plaintiff's Tenth Cause of Action, defendant realleges Paragraphs XV and XVI of defendant's answer to plaintiff's First Cause of Action and hereby incorporates the same herein and makes them a part of defendant's answer to plaintiff's Tenth Cause of Action; except that in each instance where Exhibit "B" is mentioned or referred to therein, it shall be deemed to be Exhibit "H" and the allegations shall be deemed to apply to the appropriate corporations referred to in this Tenth Cause of Action.

V.

Defendant expressly adopts, reaffirms and realleges, as fully as though set forth herein at length, as defenses to said Tenth Cause of Action the First Defense, the Second Defense, the Third Defense and the Fifth Defense contained in the answer of defendant heretofore served and filed in this action.

Wherefore, defendant prays judgment as prayed by it in its original answer filed herein.

Dated February 13, 1948.

MAX ROYHL,
Huron, South Dakota,
RALPH MAUCH,
Huron, South Dakota,
FREDRIC H. STAFFORD,
Chicago, Illinois,
JOHN B. ROBINSON, JR.,
Chicago, Illinois,
M. T. WOODS,
Sioux Falls, South Dakota,
Attorneys for Defendant.

Due Service of the within answer admitted Feb. 13th, 1948.

JOHN C. BENSON,
Attorney for Plaintiff.

(Indorsed)—Filed Feb. 13, 1948, Roy B. Marker, Clerk.

(Transcript of Testimony and Proceedings.)

(Filed in U. S. District Court on May 21, 1948.)

In the District Court of the United States,
For the District of South Dakota,
Southern Division.

Montana Dakota Utilities Co., a Corporation,
Plaintiff,
vs.
Northwestern Public Service Co., a Corporation,
Defendant.
No. 241–W. D.–Civil.

Before Hon. A. Lee Wyman, District Judge.

Messrs. John C. Benson, of Minneapolis, Minn., H. F. Fellows, of Rapid City, S. D., and Pat Morrison, of Mobridge, S. D., appeared as counsel for plaintiff.

Messrs. Fredric H. Stafford and John B. Robinson, Jr., of Chicago, Ill., Max Royhl, of Huron, S. D., and M. T. Woods, of Sioux Falls, S. D., appeared as counsel for the defendant.

Proceedings were had as follows:

Mr. Fellows: If Your Honor please, my opening statement is brief and it will show the Court the division of the issues that are going to be tried. I have boiled this down to a brief statement of the nature and origin of our demands without going into the details of the evidence. Much of the evidence will necessarily consist of the results or findings from skilled witnesses, or computations of skilled or expert witnesses, from examination of the records that were made by the common directors of the companies which formerly operated these utilities, and prior to our purchase of these properties.

The Northern Power & Light Co. and the North Dakota Power & Light Co. were North Dakota concerns, and they may be called the northern companies during the trial,

were on July 1, 1939, merged into Dakota Public Service Co., which was also a North Dakota company. These three companies were northern companies.

The Court: Just a minute. The first two companies you mentioned there were merged into the third company, so after that there was but the one?

Mr. Fellows: The one company, and the plaintiff became the successor of this last named company, to-wit: The Dakota Public Service Company, in October, 1945, and acquired all of the causes of action that we sue under here by due assignment from this last Dakota Public Service Co.

The contracts and the rates involved in this action will be shown to be without compliance with the requirement of the Federal Power Commission. All of the [corporation] had identical and dual officers or directors at the time of all of the acts charged here. The first cause of action is what might be called the inter-connection contract. We will prove that the defendant, The Northwestern Public Service Company, by fraudulent or otherwise unlawful contracts, contracts that were not only fraudulent by reason of active effort but by reason of concealment and constructive effort, but were unlawful by reason of non-compliance with the laws of the United States, they were unlawful contracts; that by such contracts for rental of transmission lines between January 1, 1936 and June 30, 1939, the contracts for rental which we had to pay for transmission lines, which transmission lines were built back in 1930 by the defendant and for its sole benefit, took from our assignors, Dakota Public Service Co., the sum of $1666.66 a month or a total of $70,000.00 on the first cause of action.

The second cause of action, we will show to you, the common and identical officers and directors of all of these companies, by fraudulent and otherwise unlawful contracts, not only actually fraudulent but unlawful in many respects, permitted the defendant, through common and dual officers and directors, permitted the defendant corporation, from September 1, 1935, to July 1, 1939, to purchase from our assignor, the North Dakota company, electric energy of the value of $94,127.00, for which the defendant was required to pay, by these same dual officers and direc-

tors, only the sum of $62,750.00, making an underpayment of $31,377.00. We are suing for that amount they owe us, the underpayment. This energy was purchased by the defendant, through the manipulations of these common and dual directors, for five mills per kilowatt hour, when the cost, the actual cost, was known to them, for generating it, was seven and one-half mills per kilowatt hour.

The third cause of action is of a different form. We will show you that for eight years prior to January 1, 1938, our assignor, the northern companies, and the defendant company, with these same dual officers and directors, had exchanged electric energy across the North Dakota-South Dakota state line, the bulk of which was generated in North Dakota, without any charge at all. In other words, they just exchange whatever they had to exchange for eight years. We will show you that, however, during 1938 and 1939, by such fraudulent and unlawful contracts, the defendant collected from the northern companies the sum of $32,508.00 for so-called firm demand or reserve capacity charge for anticipated use of transmission lines built by the defendant for its own benefit. That the charge was at the rate of $13.20 per kilowatt, under a contract signed, Your Honor, by these common officers and directors, in which there was no obligation to furnish any energy, but charged for just the same, and where it was known to them that there was no reserve capacity energy which could be furnished, the charge being for ability to furnish energy which did not exist and for which the northern companies—for which they had received and already paid the fixed transmission charge for all energy furnished and for which the Northern companies had already paid five mills per kilowatt hour charged for energy furnished to them over that line, and it will appear that this charge was for the purpose of offsetting charges of the northern companies for electrical energy they sold to the defendant. In other words, the plaintiff sold more to the defendant and didn't get paid for it, and by this ruse the defendant corporation attempted to recapture or recoup or offset the claim. The item in this cause of action is for $32,500.00. That is the third cause of action.

The fourth cause of action is that through the same fraudulent and unlawful contracts, from July 1, 1939, to July 1, 1941,—we cover different periods as we go along—

and in the same manner complained of in the first cause of action, but during a different period, the defendant took from the northern companies a so-called interconnection charge of $40,000.00, for the two years involved in the fourth cause of action for rental of transmission lines, and in addition the defendant purchased from the northern companies electrical energy in the manner complained of in the second cause of action—that is the underpayment—of the value of $89,018.00, for which they were required to pay only the sum of $59,345.00, making the underpayment or shortage in payment of $29,672.00 during these two years. That the energy so purchased by the defendant was purchased through these connivances of the general officers and directors for less than it cost to make. The total sought in this cause of action is $69,672.00.

In the fifth cause of action we will show you that by the same kind of contracts and same kind of dealings and in the same manner complained of in the third cause of action, but during a different period of time, the defendant collected from the northern companies and the so-called firm demand or reserve capacity charge in 1939, 1940 and 1941, in the sum of $23,092.00. That this charge was at the rate of $13.20 per kilowatt per year, for anticipated use of transmission lines when it was then known to all of those officers and directors there was no reserve energy capacity which could be furnished, and if operated to peak, this potential ability to furnish energy did not exist.

The sixth cause of action we will show you by means of this same kind of contracts and in the same manner complained of in the third, fourth and fifth causes of action, but for a different period, the defendant took from the northern companies during 1941 to 1945, inclusive,—the 1945 charge for the year was up to the time we acquired by assignment and purchase the rights of the claim of Dakota Public Service Co. For a different period the defendant took from the northern companies the sum of $56,264.00 for this same so-called firm demand charge at the rate of $13.20 per kilowatt for anticipated use of transmission lines where it was known that no reserve energy existed or could be furnished. And in addition, during the same period, they took from the northern companies the sum of $56,021.00 for transmission line rentals in the manner complained of in the first cause of action for a different

period at the rate of $1666.66 a month. That is for lines they had built years before for their own use and for which, we will show the Court, they had made a bad investment building those lines, and one of the purposes, of building, the evidence will show, was to go into the city of Pierre when they tried to get a franchise and fell down on the franchise and were left with a stub end of line. From there the correspondence and letters will show they then conceived the idea of getting their investment back by sticking the northern companies on what they called the interconnection charge. That they collected during this period $86,021.00 for transmission line rentals, as I said, in the manner complained of in the first cause of action but for a different period, at the same rate, $20,000.00 a year. We will show during the same period the defendant purchased energy from the northern companies in the same manner complained of in the second and fourth causes of action worth $328,491.00 and paid for it only $218,994.00, making a short or underpayment of $109,497.00. The recovery asked in this cause of action totals $251,783.00.

Now, Your Honor, for those reasons and upon the proof which will show the invalidity of the contracts, that all of the charges I have mentioned are unjust, unreasonable, unlawful and fraudulent in their entirety, the plaintiff to this action asks for a judgment declaring all of the contracts under which the charges were made to be void, and the charges be declared to be unjust, unreasonable, fraudulent and unlawful in their entirety, and the fair, just and reasonable amount due the plaintiff for electric energy furnished by it be determined and defendant be required to account to plaintiff for all of the funds actually and wrongfully received by it from the northern companies; for a total judgment against the defendant for, with a number of items, as we feel, still in these accounts, for the sum of $478,232.00, with legal interest from the date of each payment.

I think, Your Honor, without going into any evidence, that outlines simply the nature of the claims and how they originated and the amount.

Mr. Royhl: May it please the Court: I assume counsel spoke [georgraphically] when he spoke of the North Dakota Power & Light Co. and Northern Power & Light Co. as being North Dakota companies. They were Delaware companies. Geographically they operated, they operated largely in North Dakota, although not entirely.

Now, it seems to me we should briefly state the nature of our proof insofar as these corporations are concerned. The North Dakota Power & Light Co. and the Northern Power & Light Co. were separately owned sometime prior to 1929, and separately operated companies. Approximately 1929, those two companies, together with the Knife River Coal Mining Co., became the property of United Public Utilities Company, which was a holding company. These companies about that time, in 1929, under one control with the Northwestern Public Service Co., were placed in the operating charge of the then officers of the Northwestern Public Service Co., which operates not in North Dakota but in South Dakota. At the time they were taken over in 1929 in that manner and operated for approximately a year or so before bankruptcy, it was found that transmission lines in North Dakota were in bad shape; they had insufficient generating capacity, and were having much trouble up there in a municipal way. Assuming that because of the fact that they were then under one control and ownership, which was the Middle West Utilities Company, that they would be merged and operated as one company following 1929 and because of the urgent need of additional generating capacity, certain connections were made by and between Northwestern Public Service Co. and these companies, coming to their aid in supplying over peak periods and in emergencies such additional generating capacity as they needed.

Now, these interconnections, which the Court will find very early in the testimony, consisted of a transmission line running up from Blunt, which was then a Northern Power & Light Co. station, and owned by the Northern Power & Light Co. It ran up to Gettysburg, which was then and is now the property of the Northern Power & Light Co. and its successors. That is, Northwestern Public Service Co. had nothing in Blunt and they had no interest in Gettysburg. The sole purpose of making this interconnection was to feed this Northern Power & Light Co. which

extended from Lemmon, South Dakota, to Ellendale, North Dakota, with only three small generating units, one in Mobridge and one in Lemmon and one in Ellendale, and also a small unit in Gettysburg. All small and wholly inadequate to supply the needed generation. In addition to that, facility to stabilize the business of the circuits of the Northern Power & Light Co., a transmission line was extended north from Aberdeen to Barnard, a distance of some twenty miles. I think the Gettysburg transmission line was some sixty-six miles. From Aberdeen to Barnard they put in a transmission line which fed the juice into the eastern part of the Northern Power & Light Co. line and could be reached over into the North Dakota system from that point. Also they built a transmission line and substation between Aberdeen and Ipswich. The cost, etc., will be shown in the evidence. The sole purpose of the transmission line at Aberdeen was, of course, for the purpose of stabilizing the circuit there of the Northern Power & Light Co. and feeding juice in at that point as emergency or demand required it to be supplied. A portion of the substation at Aberdeen was charged to the cost of the interconnection facility. Not all of it. Approximately $300,000.00 was invested by the Northwestern Public Service Co. in the creating and building of these facilities. Mind you, that was done in 1930, and then this holding company who owned the North Dakota Company, the Northern Company and the Knife River Coal Mining Co. went into receivership to begin with and later into bankruptcy. A man by the name of White was appointed receiver and trustee from 1932 to 1935, at which time, in 1935, under the Bankruptcy Act, there was a reorganization in which a new corporation was formed, the United Public Utilities Corporation, taking over these three companies, not the Northwestern Public Service Co., and changing the general interest that the owner of the Northwestern Public Service Co. might have had in the bankrupt holding company. About the same time the holding company that owned indirectly the Northwestern Public Service Co. went into bankruptcy. That was in 1932, and receivers and trustees were appointed there. So the idea, as the evidence will show, and Mr. Strike tells that very graphically, that they were apprised definitely, that these three [corporation], the North-

west Public Service Co., and the two utilities in South Dakota and North Dakota, would be ever merged, that that was dissipated because, by these bankruptcy proceedings, ownership had been changed in such a manner that it was not to be contemplated. So Mr. Strike, interlocking director, said to these companies, now Northwestern Public Service Co. has $300,000.00 here invested of its own funds in facilities which are a protection and stabilization of your system, and there must be some arrangement made whereby contracts be made to help carry that load. Some time about the same time a five mill deal had been made with the receiver and trustee, later the president of the North Dakota Company only, whereby five mills was to be fixed and stabilized of the value of energy to be exchanged between the inter-company connection. That is, if Northwestern Public Service Co. sold a kilowatt hour to North Dakota, North Dakota and Northern later merged as Dakota Public Service Co., they were to receive five mills for it. And the reverse was true if those companies sold to Northwestern Public Service Co. Insofar as the five mills charge, the evidence will show that the energy that came from North Dakota into South Dakota to the Northwestern Public Service Co. [ia] a pure energy charge, and was almost wholly dump or surplus energy. That [it], it was furnished to Northwestern Public Service Co. to be sold here as the demand of the companies in North Dakota did not call for it, and was surplus, to them, power. The evidence will show that the incremental fuel cost and miscellaneous cost of this energy to those companies in North Dakota, because of mine mouth generating station at Beulah, North Dakota, was in the neighborhood of some 2.65 mills. Under that arrangement, at its inception, the North Dakota Company, owner of the company, owner of the mine mouth generator station, which was the base station and the cheapest generator on all three of these systems, that energy was sold to Northern Company, at 3.5 mills by the North Dakota Company, and then such as was passed to Northwestern Public Service Co., if it was not used by Northern, was sold to Northwestern Public Service Co. at five mills. The evidence will show that this made a profit to the North Dakota Corporation in both transactions and that it was beneficial to a certain extent to Northwestern Public Service Co., because their lowest

cost generating station, as the evidence will show, was over 5 mills, less than 6 mills. I am speaking now of the incremental fuel cost. They got generally this surplus power, at least, at a cost of less than 6 mills. And those profits will be shown by proper study, showing the arrangement to be beneficial to all three of these companies. Also it will be shown that on any cost basis in excess of 5 mills the Northwestern Public Service Co. would not have purchased this power because they could generate it for only slightly more than that amount. The evidence will also show that during all of these times the Northwestern Public Service Co. had ample and excess generating capacity. That is, they were not dependent at peak or emergency times on these North Dakota companies in any sense. It was a "force bid" insofar as they were concerned.

Eventually these receiverships were cleaned up and organizing operating corporations were again under way, and Sam White, president of the company that owned the North Dakota utilities companies, which were later merged into Dakota Public Service Co., and with the Northwestern Public Service Co. operating under the same management.

The first contract that was made was made, and I am speaking now of the written contract and which is Exhibit B in the complaint, that was made in the year of 1936 and was retroactive to January 1 of that year, and it covered, pursuant to negotiations, both an energy charge at 5 mills, which continued during the entire relationship of these companies from 1933 to 1945 when this plaintiff purchased it. That 5 mill charge never changed. This 1936 contract included again one other feature and that was the interconnection facility rental charge of $20,000.00 a year. In other words at a cost, of about $300,000.00 it was figured the rental of $20,000.00 to the North Dakota companies was a fair and reasonable charge in view of the fact of their absolute necessity in their use and protection, and the cost of maintenance, the original cost of construction, etc. Now, these contracts were signed by the interlocking board out here in the field. The same claim of overreaching in this law suit is contained in the allegation in each cause of action, of fraud on the part of the individuals who were at that time here in the field as interlocking board members and as interlocking officers. Speak-

ing of each contract they say, after stating the rates and charges made, they say it was fixed by the aforesaid common officers and directors, purporting to act for both of said corporate parties thereto, and was without consideration, unjust, unreasonable and unlawful in its entirety. That is the basis upon which they predicate the fraud. The fraud of individuals who were out here in the field as directors. The evidence will show that none of these individuals had any interest except a job. They were not investment bankers. They were not holding corporations. They were men out here in the field who were trying to furnish service to the localities that were served by these various companies. And the evidence will show that in every instance where a contract was made it was not a contract made, dictated or controlled by these men out here in the field but it was dictated and controlled and was not signed or completed except on instructions from the stockholders and owners of these several utilities companies. There was a joint management agreement on which I think there will be some comments hereafter, but it is not now in the pleadings and I will not touch upon that at the present time.

We have now mentioned one contract that covered the energy rate and the rental charge for the interconnection facilities. In 1938 and after considerable study the corporations entered into what they called a reserve capacity arrangement whereby each company paid to the other in accordance with the relationship of their generating capacity, firm, reliable generating capacity, in its relationship to the load that it carried on their systems and in relationship to what was known as common peak load between the three companies, coincidental peak load. This contract as well was made, as the evidence will show, by the owners of these corporations and not by the men out here in the field as is alleged in this case. The stockholders of the predecessor companies to the plaintiff, through their officers and agents, dictated and controlled these contracts, and none was made without their direction. Now, the evidence will show that at least in one or more years this reserve capacity was paid by Northwestern Public Service Co. to the North Dakota corporation, and no allegations of willingness to pay these back

has appeared in the pleadings or in the statement of counsel, assuming that what they say is correct.

We will show also, and I think under the memo decision of the Court on the jurisdictional question it is important to prove, we will also show that all of these rates and charges and the contracts that created them were filed with the Federal Power Commission, which was created, as the Court recalls, in 1935, and set up in working order sometime in 1936. They were all by that body marked as rate schedules and pursuant to those rate schedules and for a period of some nine years or more, the rates were paid in accordance with those rate schedules. We will show that in each instance those rates and rate schedules were fixed and determined by proceedings which fully complied with the rules and regulations of the Federal Power Commission, and we assume, of course, upon that proof, if we read the memo correctly, that will dispose of the jurisdiction of the Court.

I repeat that there was no fraud committed by these officers. That each rate, each charge, each contract was dictated by their predecessor companies and owners of those predecessor companies, and not by these men out in the field who were operating and trying to furnish service to the locality that they covered.

One other factor that will be submitted to the Court as an added feature of proof of the fact is that the predecessor company of the plaintiff owned this Knife River Coal Mining Co. By this arrangement they created a market not only for the surplus energy that was created by the mine mouth generating station, but they also created a market for their coal and as part of that situation the Northwestern Public Service Co. purchased its coal thereafter on a competitive market basis, and it stepped up and increased the load factor both in the mine and in the generating station, both of which were profitable to the common owner of those two North Dakota northern companies.

These companies, as counsel has said, were merged in July, 1939, and as merged the name was amended to Dakota Public Service Co., that company being the successor to North Dakota Power & Light Co. and Northern Power & Light Co.

I think the evidence will also show, Your Honor, that at all time Mr. White and his board of directors were kept advised and informed not only by monthly operating reports and monthly financial reports of each of these companies, but also by personal contact of the several men and the officers of this interlocking arrangement. That at least once or twice a year Mr. White and other members of his board of directors, came out here and went over the field and actually investigated the [the] operations of the company generally and also in connection with the contracts that were outstanding.

The proof will also show that the plaintiff made a full and complete investigation of all of these contracts and the relationship of these companies before purchasing and was fully advised and informed concerning them. The testimony will show that Mr. White and his board of directors maintained an independent legal department. That is, it was independent from the legal department of the Northwestern Public Service Co. and its owner, and that also Mr. White, and prior to entering into the 1936 contract and the 1938 contract, was advised by independent engineers who had no connection with Northwestern Public Service Co. or its parent whatsoever, and that based upon those independent investigations the contracts were made. That the engineers, in particular a man by the name of Lakin, visited these properties as direct agent for the owner before entering into the 1936 contract and that Mr. Lakin shortly following that became a member of the board of directors of the owner of the North Dakota Company and thereafter not only had personal knowledge that came from his own investigation, but he kept and maintained close touch with the original contract and workings of those contracts, and also with the development of the several companies.

We also contend that there has been no fraud or overreaching in the contracts and rates and charges that were made.

Plaintiff's evidence was as follows:

Plaintiff is, and was at all times material to this litigation, a duly organized Delaware corporation, duly qualified in the States of North Dakota and South Dakota.

On the 1st day of July, 1939, Northern Power and Light Company and North Dakota Power & Light Company, pursuant to the laws of the State of Delaware, merged into one corporation, North Dakota Power & Light Company, being the surviving corporation pursuant to the terms of said merger and changing its name in said merger proceedings to Dakota Public Service Company. Pursuant to the terms of said merger, Dakota Public Service Company became the owner of all of the properties and business of Northern Power and Light Company in addition to the properties on the date of the merger owned by North Dakota Power & Light Company and thereafter Dakota Public Service Company owned and operated as a public utility the properties formerly owned by it and the properties on the date of said merger owned by Northern Power and Light Company.

Plaintiff offered in evidence:

Plaintiff's Exhibit 4, consisting of a certified copy of Sections 59 and 60 of the Delaware Corporation Law, which read as follows:

Plaintiff's Exhibit 4.

Delaware Corporation Law Annotated 1937.

"Section 59. Consolidation or Merger; Proceedings for:—Any two or more corporations organized under the provisions of this Chapter, or existing under the laws of this State, for the purpose of carrying on any kind of business, may consolidate or merge into a single corporation which may be any one of said constituent corporations or a new corporation to be formed by means of such consolidation or merger as shall be specified in the agreement hereinafter required; the directors, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms

and conditions of consolidation or merger, the mode of carrying the same into effect, and stating such other facts required or permitted by the provisions of this Chapter to be set out in Certificates of Incorporation, as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, as well as the manner of converting the shares of each of the constituent corporations into shares of the consolidated corporation, with such other details and provisions as are deemed necessary.

"Said agreement shall be submitted to the stockholders of each constituent corporation, at a meeting thereof, called separately for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such corporation either has its principal office or conducts its business, and a copy of such notice shall be mailed to the last known postoffice address of each stockholder of each such corporation, at least twenty days prior to the date of such meeting, and at said meeting said agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote; and if the votes of stockholders of each such corporation representing two-thirds of the total number of shares of its capital stock shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the Secretary of each such corporation, under the seal thereof; and the agreement so adopted and certified shall be signed by the President and Secretary of each of such corporations under the corporate seals thereof and acknowledged by the President of each such corporation before any officer authorized by the laws of this State to take acknowledgments of deeds to be the respective act, deed and agreement of each of said corporations, and the agreement so certified and acknowledged shall be filed in the office of the Secretary of State, and shall thence be taken and deemed to be the agreement and act of consolidation or merger of the said corporations; and a copy of said agreement and act of con-

solidation or merger, duly certified by the Secretary of State under the seal of his office, shall also be recorded in the offices of the Recorders of the Counties of this State in which the respective corporations so consolidating or merging shall have their original Certificates of Incorporation recorded, or if any of the corporations shall have been specially created by a public Act of the Legislature, then said agreement shall be recorded in the county where such corporation shall have had its principal place of business, and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger.

"Any one or more corporations organized under the provisions of this Chapter, or existing under the laws of this State, may consolidate or merge with one or more other corporations organized under the laws of any other State or States of the United States of America, if the laws under which said other corporation or corporations are formed shall permit such consolidation or merger. The constituent corporations may merge into a single corporation, which may be any one of said constituent corporations, or they may consolidate to form a new corporation, which may be a corporation of the State of incorporation of any one of said constituent corporations as shall be specified in the agreement hereinafter required. All the constituent corporations shall enter into an agreement in writing which shall prescribe the terms and conditions of the consolidation or merger, the mode of carrying the same into effect, the manner of converting the shares of each of said constituent corporations into shares of the corporation resulting from or surviving such consolidation or merger and such other details and provisions as shall be deemed necessary or proper. There shall also be set forth in said agreement such other facts as shall then be required to be set forth in certificates of incorporation by the Laws of the State, which are stated in said agreement to be the laws that shall govern said resulting or surviving corporation and that can be stated in the case of a consolidation or

merger. Said agreement shall be authorized, adopted, approved, signed and acknowledged by each of said constituent corporations in accordance with the laws under which it is formed and, in the case of a Delaware corporation, in the manner provided in the two immediately preceding paragraphs. The agreement so authorized, adopted, approved, signed and acknowledged shall be filed in the office of the Secretary of State and said agreement shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said constituent corporations for all purposes of the laws of this State. A copy of said agreement, duly certified by the Secretary of State under the seal of his office, shall also be recorded as provided in this Section with respect to the consolidation or merger of corporations of this State.

"If the corporation resulting or surviving such consolidation or merger is to be governed by the Laws of any State other than the laws of this State, it shall agree that it may be served with the process in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, including any amount fixed by appraisers pursuant to the provisions of Section 61 of this Chapter, and shall irrevocably appoint the Secretary of State as its agent to accept service of process in an action for the enforcement of payment of any such obligation or any amount fixed by appraisers as aforesaid and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Service of such process shall be made by personally delivering to and leaving with the Secretary of State duplicate copies of such process. The Secretary of State shall forthwith send by registered mail one of such copies to such resulting or surviving corporation at its address so specified, unless such resulting or surviving corporation shall thereafter have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated."

Plaintiff's Exhibit 4 Continued.

Delaware Corporation Law Annotated 1937.

"Sec. 60. Consolidation or Merger; Status of Old and New Corporations:—When an agreement shall have been signed, acknowledged, filed and recorded, as in the preceding Section is required, for all purposes of the laws of this State the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so consolidated or merged, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this State, vested in any of such constituent corporations, shall not revert or be in any way impaired by reason of this Chapter; provided, however, that all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts,

liabilities and duties had been incurred or contracted by it."

(End of Plaintiff's Exhibit 4)

Mr. Fellows: We offer in evidence Plaintiff's Exhibit 6, which is a stipulation.

Plaintiff's Exhibit 6 reads as follows:

Plaintiff's Exhibit 6.

United States District Court,
District of South Dakota,
Western Division.

Montana-Dakota Utilities Co., a corporation, Plaintiff, v. Northwestern Public Service Company, a corporation, Defendant.	Civil Action File No. 241 W. D. Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action for the purposes of this action only and subject to the reservations hereinafter contained that:

1. There is set forth in the schedule attached hereto, made a part hereof, and marked Schedule 1, a list of officers and directors of the corporation shown in Schedule 1 and the persons so listed were in each case the duly appointed and acting officers or the duly elected and acting directors or both, as the case may be, for the times and in the companies set forth in such Schedule 1.

2. There is set forth in the schedule attached hereto, made a part hereof, and marked Schedule 2, a true and correct description of the securities issued and outstand-

ing by the companies described in such Schedule 2; the aforesaid securities so outstanding were issued by the companies or owned by the companies, as the case may be, in the amounts and for the times set forth in Schedule 2 and the percentages of ownership stated therein for the securities issued by each such compar correctly reflects the proportionate ownership interest of such securities by the companies shown as owning the same.

The parties expressly reserve the right and privilege to object at the trial: (a) to the relevancy or materiality of all or any part of the matters and things in this stipulation and in Schedules 1 and 2 hereof set forth, including all appendices referred to in such Schedules; and (b) to the receipt in evidence of all or any part of the same on the ground of relevancy or materiality. The parties do not, by making this stipulation, admit the relevancy or materiality of the matters and things so set forth.

Dated this 3d day of December, 1947.

PAT MORRISON,
JULIUS SKAUG,
JOHN C. BENSON,
H. F. FELLOWS,
Attorneys for Plaintiff.

SYDNEY K. SCHIFF,
ROYHL & LONGSTAFF,
MAX ROYHL,
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RALPH E. MAUCH,
Attorneys for Defendant.

Schedule 1, page 1.

1936

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Green	Zech	Bard	White	Green
Vice Pres.	Barber	Herrmann	Belden	Kynett	Barber
Vice Pres.	Freeman		Zech	Nichols	Moon
Vice Pres.					Olsen
Vice Pres.					Wilson
Secretary	Belden	Coulter	Coulter	Welsh	Belden
Treasurer	McCormick	McCormick	Bard	Peale	McCormick
Asst. Sec.	Dendtler		Dendtler	Peale	
Asst. Sec.			Evers	McCoy	
Asst. Treas.	Hermann	Dinges	Dinges	Welsh	Dinges
Controller	Zech				Zech
Auditor	Packman	Packman			Packman
Counsel	R. Stevenson				
Director	Dewey	Barber	Green	Barroll	Boissevain
Director	Green	Belden [1]	Bard	Erhard	Dewey
Director	Boissevain	Green	Ross	Kynett	Golding
Director	Golding	Herrmann		Nichols	Green
Director	Porter	McCormick		Welsh	McGee
Director	Shaw	Olsen		White	Porter
Director	Walling	Zech		Zech	Shaw
Director	McGee				Walling
Director	Adams				Adams

Ass't. Cont. Latimer

1. Elected and acted as President for a portion of the year

Schedule 1, page 2.

1937

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Zech	Kruesi	White	Green [1]
Vice Pres.	Barber	Herrmann	Zech	Kynett	Barber
Vice Pres.	Freeman			Nichols	Kruesi [2]
Vice Pres.					Moon [4]
Vice Pres.					Olsen [3]
Secretary	Belden	Coulter	Coulter	Welsh	Belden
Treasurer	McCormick	McCormick	Dinges	Peale	McCormick
Asst. Sec.	Dendtler		Dendtler	McCoy	Dendtler
Asst. Sec.				Peale	
Asst. Treas	Herrmann	Dinges	Herrmann	Welsh	Dinges
Asst. Treas	Dinges				
Controller	Zech				Zech
Auditor	Packman	Packman			Packman
Counsel	R. Stevenson				
Director	Boissevain	Barber	Bard [1]	Barroll	Boissevain
Director	Dewey	Belden	Kruesi	Erhard	Dewey
Director	Golding	Dinges	McCormick	Kynett	Golding
Director	Lindsay	Hermann	Moon	Nichols	Green [1]
Director	McGee	McCormick	Ross	Welsh	Lindsay
Director	Porter	Zech		White	McGee
Director	Smith	Green	Green	Zech	Porter
Director	Wilmers	Olsen	Olsen [1]		Olsen [3]
Director	Green [1]				Wilmers
Director	Shaw				Smith [5]
Director	Olsen				

1. Elected and acted as President for a portion of the year.

1. Elected and acted as President for a portion of the year.

1. Resigned 12/1/37.
2. Designated Exec. V. P. Oct. 1937.
3. Resigned Oct. 1937.
4. Resigned Dec. 1937.
5. Elected 12/1/37.

Note: Vennard elected V. P. in Aug. 1937.

Schedule 1, page 3.

1938

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden [1]	White	Kruesi [1]
Vice Pres.	Belden	B. Stevenson	B. Stevenson	Kynett	Barber
Vice Pres.	Barber				Vennard
Vice Pres.	Freeman	Herrmann	Zech	Nichols	McCormick [3]
Secretary	Belden	Rill	Rill [1]	Welsh	McCormick [3]
Treasurer	McCormick	B. Stevenson	B. Stevenson	Peale	Dinges [4]
Asst. Sec.	B. Stevenson		Dendtler	McCoy	Dendtler
Asst. Sec.	Dendtler			Peale	
Asst. Treas.	B. Stevenson	Dinges	Herrmann	Welsh	Dinges [5]
Asst. Treas.	Dinges				
Controller	Zech				Zech
Auditor	Packman	Packman			Packman
Counsel	R. Stevenson				
Director	Boissevain	Belden	Belden	Barroll	Boissevain
Director	Dewey		Moon		Dewey [2]
Director	Golding	Boissevain	Boissevain	Erhard	Golding
Director	Lindsay	B. Stevenson	Wood	Kynett	Lindsay
Director	McGee	Wood	B. Stevenson	Nichols	McGee
Director	Porter	Barber	Kruesi [1]	Welsh	Porter
Director	Smith	Herrmann	Bard	Zech	Smith
Director	Wilmers	McCormick [2]	McCormick	White	Wilmers
Director		Zech [1]	Ross		

1. Elected and acted as President for a portion of the year.
2. Elected and acted as Treasurer for a portion of the year.

Note: Coulter elected and acted as Secretary for a portion of the year.

1. Messrs. Kruesi, Dinges, and Coulter were elected and acted as President, Treasurer, and Secretary respectively for a portion of the year.

1. Elected May 1938, formerly Exec. V. P.
2. Resigned Feb. 1938.
3. Elected Apr. 1938, having resigned as Treasurer in Apr. 1938.
4. Elected Apr. 1938.
5. Resigned Apr. 1938.

Note: Belden resigned as Secretary Apr. 1938.

11/21/47

Schedule 1, page 4.

1939

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden	White	Kruesi
Vice Pres.	Belden	B. Stevenson	B. Stevenson	Nichols	Vennard
Vice Pres.	Freeman			Kynett	Barber
Vice Pres.					McCormick
Secretary	Belden	Rill	Rill	Welsh	McCormick
Treasurer	McCormick	B. Stevenson	B. Stevenson	Peale	Dinges
Asst. Sec.	B. Stevenson	Scheuerman	Scheuerman	McCoy	Dendtler
Asst. Sec.				Peale	
Asst. Treas.	B. Stevenson	Scheuerman	Scheuerman	Welsh	
Controller	Zech				Zech
Auditor					Packman
Counsel	R. Stevenson				
Director	Boissevain	Belden	Belden	Barroll	Boissevain
Director	Golding	Boissevain	Boissevain	Nichols	Golding
Director	Lindsay	Scheuerman	Scheuerman	White	Lindsay
Director	McGee	B. Stevenson	B. Stevenson	Zech	McGee
Director	Porter	Wood	Wood	Lakin	Porter
Director	Smith				Smith
Director	Wilmers				Wilmers

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Schedule 1, page 5.

1940

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden	White	Kruesi
Vice Pres.	Freeman	B. Stevenson	B. Stevenson	Nichols	Barber
Vice Pres.	Belden			Belden	Vennard
Vice Pres.					McCormick
Secretary	Belden	Rill	Rill	Barroll	McCormick
Treasurer	McCormick	B. Stevenson	B. Stevenson	Peale	Dinges
Asst. Sec.	B. Stevenson	Scheuerman	Scheuerman	Peale	Dendtler
Asst. Sec.				B. Stevenson	
Asst. Sec.				McCoy	
Asst. Treas.	B. Stevenson	Scheuerman	Scheuerman	B. Stevenson	
Controller	Zech			McClanahan	Zech
Auditor					Packman
Counsel					
Director	Boissevain	Belden	Belden	Barroll	Boissevain
Director	Golding	Boissevain	Boissevain	Lakin	Golding
Director	Lindsay	Scheuerman	Scheuerman	Nichols	Lindsay
Director	McGee	B. Stevenson	B. Stevenson	White	McGee [2]
Director	Smith			Zech	Porter [1]
Director	Wilmers				Smith
Director	Porter				Wilmers

1. Resigned Nov. 1940.

2. Resigned Dec. 1940.

Schedule 1, page 6.

1941

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden	White	Kruesi
Vice Pres.	Freeman	B. Stevenson	B. Stevenson	Nichols	Barber
Vice Pres.	Belden			Belden	Vennard
Vice Pres.					McCormick
Secretary	Belden	Rill	Rill	Barroll	McCormick
Treasurer	McCormick	B. Stevenson	B. Stevenson	C. McC. Peale	Dinges
Asst. Sec.	B. Stevenson [1]	Scheuerman	Scheuerman	McCoy	Dendtler
Asst. Sec.				Peale	
Asst. Sec.				B. Stevenson	
Asst. Treas.	B. Stevenson	Scheuerman	Scheuerman	B. Stevenson	
Controller	Zech			McClanahan	Zech
Auditor					Packman
Counsel	R. Stevenson				
Director	Boissevain	Belden	Belden	Barroll	
Director	Freeman	Boissevain	Boissevain	Lakin	Kruesi [1]
Director	Golding	Scheuerman	Scheuerman	Nichols	Lane [1]
Director	Lindsay	B. Stevenson	B. Stevenson	White	Lieberman [1]
Director	McGee			Zech	Magraw [1]
Director	Wilmers				Neff [1]
Director	Smith				Smith [1]

1. Elected and acted as Treasurer for a portion of the year.

1. Directors after Special Shareholders Meeting of 3/27/41.

Note: Messrs. Boissevain and Wilmers in Jan. 1941, and Lindsay and Golding in March, 1941 resigned as directors.

11/21/47

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1942

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden	White	Kruesi
Vice Pres.	Belden	B. Stevenson	B. Stevenson	Belden	Vennard
Vice Pres.	Freeman			Nichols	Barber
Vice Pres.					McCormick
Secretary	Belden	Scheuerman [1]	Scheuerman [1]	Barroll	McCormick
Treasurer	B. Stevenson	B. Stevenson	B. Stevenson	Peale	Dinges
Asst. Sec.	B. Stevenson	O'Donnell		B. Stevenson	Dendtler
Asst. Sec.				McCoy	
Asst. Sec.		Scheuerman		Peale	
Asst. Treas.		Scheuerman	Scheuerman	B. Stevenson	
Controller				McClanahan	Packman [1]
Auditor					Higley [2]
Counsel	R. Stevenson				
Director	Boissevain	Belden	Belden	Nichols	Campbell [3]
Director	Golding	Boissevain	Boissevain	White	Kruesi
Director	Lindsay	Long	Scheuerman	Barroll	Lane
Director	McGee	Scheuerman	B. Stevenson	Lakin	Magraw
Director	Smith	B. Stevenson		Zech	Neff
Director	Wilmers				Smith
Director					Watt [3]

1. Rill elected and acted as Secretary for a portion of the year.

1. Rill elected and acted as Secretary for a portion of the year.

1. Elected 3/1/42 to succeed Zech who resigned 3/1/42.
2. Elected Mar. 1942.
3. Elected Mar. 1942.

Note: Carpenter elected Ass't to President Sept. 1942, Lieberman, a director, died during year.

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1943

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden	White	Kruesi
Vice Pres.	Belden	B. Stevenson	B. Stevenson	Belden	Barber
Vice Pres.	Freeman				Vennard
Vice Pres.					McCormick [1]
Secretary	Belden	Scheuerman	Scheuerman	Barroll	McCormick [2]
Treasurer	B. Stevenson	B. Stevenson	B. Stevenson	Peale	Dinges
Asst. Sec.	B. Stevenson	Mitchell	Mitchell	B. Stevenson	Dendtler
Asst. Sec.		O'Donnell	O'Donnell	McCoy	
Asst. Sec.				Peale	
Asst. Treas.		Scheuerman	Scheuerman	B. Stevenson	Gass [3]
Controller				McClanahan	Packman
Auditor					Higley
Counsel	R. Stevenson				
Director	Boissevain	Beasley	Belden	Barroll	Campbell
Director	Golding	Belden	Boissevain	Briggs	Kruesi
Director	Lindsay	Boissevain	Scheuerman	Lakin	Lane
Director	McGee	Scheuerman	B. Stevenson	Nichols	Magraw
Director	Smith	B. Stevenson		White	Neff
Director	Wilmers	Long			Smith
Director					Watt

1. Died during year.
2. Died during year and succeeded by Carpenter, Ass't. to Pres. in Nov. 1943.
3. Elected Nov. 1943.

Schedule 1, page 9.

1944

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Smith	Belden	Belden	White	Kruesi
Vice Pres.	Freeman		B. Stevenson	McClanahan	Barber
Vice Pres.	Belden	B. Stevenson		Belden	Vennard
Secretary	Belden	Scheuerman	Scheuerman	Barroll	Carpenter [1]
Treasurer	B. Stevenson	B. Stevenson	B. Stevenson	Peale	Dinges
Asst. Sec.	B. Stevenson	Mitchell	Mitchell	B. Stevenson	Dendtler
Asst. Sec.				Peale	
Asst. Treas.	Scheuerman	Scheuerman	Scheuerman	B. Stevenson	Gass
Controller					Packman
Auditor					Higley
Counsel	R. Stevenson				
Director	Boissevain	Beasley	Belden	Barroll	Campbell
Director	Golding	Belden	Boissevain	Belden	Kruesi
Director	Lindsay	Boissevain	Scheuerman	Lakin	Lane
Director	Smith	Scheuerman	B. Stevenson	Nichols	Magraw
Director	Wilmers	B. Stevenson		White	Neff
Director	McGee			Briggs	Smith
Director					Watt

1. Also Ass't. to President.

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1945

	Middle West Corporation	North West Utilities	United Public Service	United Public Utilities	Middle West Service Company
President	Freeman [1]	Belden	Belden	White	Kruesi
Vice Pres.	Belden	B. Stevenson	B. Stevenson	Belden	Vennard
Vice Pres.	Freeman [1]				Barber [1]
Secretary	Belden	Scheuerman	Scheuerman	Barroll	Carpenter [4]
Treasurer	B. Stevenson	B. Stevenson	B. Stevenson	Oakley	Dinges
Asst. Sec.	B. Stevenson	Mitchell	Mitchell	B. Stevenson	Dendtler
Asst. Sec.				O'Leary	
Asst. Treas.	Scheuerman	Scheuerman	Scheuerman	B. Stevenson	Gass
Controller					Packman
Auditor					McClanahan [2]
Counsel	R. Stevenson				
Director	Boissevain	Beasley	Belden	Barroll	Campbell
Director	Freeman	Belden	Boissevain	Belden	Kruesi
Director	Golding	Boissevain	Scheuerman	Briggs	Lane
Director	Lindsay	Scheuerman	B. Stevenson	Lakin	Magraw
Director	R. Stevenson	B. Stevenson		Nichols	Neff
Director	Smith			White	Watt
Director	Wilmers				Smith [3]
Director	McGee				

1. Succeeded Smith as President during year.

1. Resigned 12/15/45.
2. Elected Mar. 1945 to succeed Higley who resigned Feb. 1945
3. Resigned 7/31/45.
4. Also Ass't. to Pres.

11/21/47

Schedule 1, Page 11.

The full names of the persons above listed as officers or directors of the foregoing corporations, and the places in or about which they now reside or now have their respective offices or have resided or have had their offices during the period from 1935 through 1945, or some part thereof, are as follows:

Daniel C. Green	Chicago, Ill.
J. E. Barber	" "
William C. Freeman	" "
Gail Belden	Wilmington, Del.
Ove. B. Dendtler	Winnetka, Ill.
C. V. Dinges	Chicago, Ill.
Oliver E. McCormick	" "
C. C. Herrmann	" "
Nicholas P. Zech	" "
C. A. Packman	" "
Charles S. Dewey	" "
Adolphe Boissevain	New York, N. Y.
Robert N. Golding	Chicago, Ill.
Irving L. Porter	" "
W. A. Shaw	" "
W. G. Walling	" "
Hugh McGee	New York, N. Y.
A. C. Coulter	Chicago, Ill.
E. A. Olsen	" "
Ralph Bard	" "
Thompson Ross	" "
Samuel W. White	" "
Gerald P. Kynett	Philadelphia, Pa.
Herbert L. Nichols	Dallas, Texas
Herbert S. Welch	Philadelphia, Pa.
Clifford McChesney Peale	Chicago, Ill.
Lee Barroll	Huntindon Valley, Pa.
Henry Alker Erhard	Wenham, Mass.
V. H. Moon	Chicago, Ill.
J. B. Wilson	" "
Purcell L. Smith	" "
Ralph D. Stevenson	" "

Martin Lindsay	Chicago, Ill.
C. K. Wilmers	" "
Frank E. Kruesi	Evanston, Ill.
Helen McCoy	Chicago, Ill.
Edwin Vennard	Kenilworth, Ill.
B. P. Stevenson	Wilmington, Del.
T. M. Rill	" "
R. R. Wood	" "
L. J. Scheuerman	" "
C. E. Lakin	Greenville, Ohio
K. D. Carpenter	Evanston, Ill.
R. K. Lane	Chicago, Ill.
A. Lieberman	" "
L. A. Magraw	" "
G. C. Neff	" "
James H. Buell	" "
G. E. Long	Milwaukee, Wis.
E. K. Higley	Chicago, Ill.
R. M. Watt	" "
P. B. Campbell	" "
G. H. Beasley	Huntington, Ind.
L. H. Mitchell	Wilmington, Del.
K. E. Oakley	Chicago, Ill.
Jane O'Leary	" "
J. T. Gass	" "
Rodman McClanahan	Evanston, Ill.

Schedule 1, Page 12.

The complete name, state, and year of incorporation of each of the corporations referred to on preceding pages 1 to 10 of this schedule is as follows:

The Middle West Corporation (Delaware, 1935)
North West Utilities Company (Delaware, 1918)
United Public Service Corporation (New Jersey, 1934)
United Public Utilities Corporation (New Jersey, 1934)
Middle West Service Company (Illinois, 1936)

[Conclusion of Schedule 1]

Schedule 2.

1. Northwestern Public Service Company (Delaware, 1923) had issued and outstanding during the period 1932 to 1945, the securities listed in the appendix attached hereto, made a part hereof, and marked Appendix A, in approximately the amounts stated therein. Of those securities listed in Appendix A hereto North West Utilities Company (Delaware, 1918) owned those securities listed in the appendix attached hereto, made a part hereof, and marked Appendix B, in approximately the amounts and in the years set forth therein. Of those securities listed in Appendix A hereto, The Middle West Corporation, or its predecessor, Middle West Utilities Company, owned those securities listed in the appendix attached hereto, made a part hereof, and marked Appendix C, in approximately the amounts and in the years set forth therein.

Neither issue of preferred stock listed in Appendix A hereof was entitled to vote except upon twelve months' default in dividend payments. From December 31, 1932, to December 1, 1934, the owners and holders of such preferred stock were not entitled to vote and the owners and holders of the common stock had all of the voting control. From December 1, 1934 to September 3, 1940, the owners and holders of the preferred stock issues had the right to vote (because of a twelve months' default in dividend payments) and during such period the owners and holders of the common stock possessed 54.9% voting control of the corporation. From September 3, 1940, to December 31, 1945, the owners and holders of the preferred stock issues were not entitled to vote and the owners and holders of the common stock had 100% of the voting control.

Northwestern Public Service Company became a subsidiary of North West Utilities Company on or about October 1, 1929.

North West Utilities Company under date of March 29, 1946 sold and transferred all its shares of Common Stock (being all of the shares of Common Stock then outstanding in Northwestern Public Service Company to Bear, Stearns & Co., an investment banking partnership having offices in New York, Chicago and other cities. The shares

of capital stock so acquired by Bear, Stearns & Co. were subsequently reclassified as and changed into 300,000 shares of Common Stock of the par value of $3 per share. Under date of February 18, 1947, the 300,000 shares of Common Stock owned by Bear, Stearns & Co., together with 110,000 additional shares of Common Stock then issued by Northwestern Public Service Company, were sold by Bear, Stearns & Co. and Northwestern Public Service Company, respectively, to an underwriting syndicate which distributed to the public the 410,000 shares of Common Stock so acquired. From and after March 29, 1946, neither North West Utilities Company nor The Middle West Corporation or any of its subsidiaries owned or held any of the shares of capital stock of Northwestern Public Service Company.

2. North West Utilities Company (Delaware, 1918) had issued and outstanding on December 31, 1932, and during the period following that date through and including December 31, 1945, the following securities in approximately the amounts stated:

7% Cumulative Prior Lien $100 par Preferred Capital Stock	44,000 shares
7% Cumulative $100 par Preferred Capital Stock	60,755 shares
$ 6 Cumulative no par Preferred Capital Stock	24,000 shares
Common $1 par Capital Stock	260,531 shares

Of the securities of North West Utilities Company so issued and outstanding during the period 1932 to 1945, The Middle West Corporation or its predecessor Middle West Utilities Company owned not less than 9,997 shares nor more than 26,133 shares from 1932 through 1940 and 26,573 shares from December 31, 1941 to December 31, 1945 of the 7% Cumulative Prior Lien $100 par Preferred Capital Stock; not less than 19,697 shares beginning in 1932, nor more than 21,687 shares from December 31, 1937 to December 31, 1945 of the 7% Cumulative $100 par Preferred Capital Stock; all of the $6 Preferred Capital Stock; and all of the Common $1 par Capital Stock. All classes of North West's capital stock, both preferred and common,

are and were at all material times entitled to vote. The Middle West Corporation and its predecessor had, as a result of their holdings, voting control of North West aggregating 80.72% as of December 31, 1932. This percentage was at no time lower. It gradually increased to 85.49% as of December 31, 1945.

North West Utilities Company became a subsidiary of Middle West Utilities Company on or about January 3, 1919.

3. United Public Utilities Company (New Jersey, 1927) was in receivership during the period 1932 to 1935. During that period all of its outstanding Common Stock (181,000 shares) was owned by United Public Service Company (New Jersey, 1927), which company was also in receivership. The Common Stock and the Preferred Stock after default, were entitled to vote. United Public Service Company had, as a result of its holdings, voting control of United Public Utilities Company aggregating not less than 51%, as of December 31, 1931, and continuing thereafter until the dissolution of United Public Utilities Company.

Pursuant to a reorganization proceeding in the United States District Court for the Northern District of Illinois, Eastern Division, United Public Utilities Corporation was organized in New Jersey in 1934 and became the successor of United Public Utilities Company.

Allied Service Company (a subsidiary of Middle West Utilities Company) owned $22,000 of United Public Utilities Company First Lien 6% Gold Bonds and $429,000 of that company's First Lien 5½% Gold Bonds as collateral security for a $470,000 note of the latter company, which note was cancelled. Middle West Utilities Company owned $89,300 of United Public Utilities Company First Lien 6% Gold Bonds, $151,000 of that company's First Lien 5½% Gold Bonds, 1,512 shares of that company's $6 Preferred Stock (no par value), and 39 shares of that company's $5.75 Preferred Stock (no par value).

Under the aforesaid plan of reorganization of United Public Utilities Company, Allied Service Company re-

ceived in exchange for the securities of United Public Utilities Company, which it owned, the following securities of United Public Utilities Corporation:

6% Collateral Trust Bonds in the principal amount of	$ 11,000.00
5½% Collateral Trust Bonds in the principal amount of	214,500.00
10-year 5% Interest Scrip due 1945 in the amount of	31,143.75
Preferred Stock (no par value) $3 Series	220 shares
Preferred Stock (no par value) $2.75 Series	4,290 shares
Class A Common Stock ($1 par value)	4,510 shares

Under said plan of reorganization Middle West Utilities Company received in exchange for the securities of United Public Utilities Company, which it owned, the following securities of United Public Utilities Corporation:

6% Collateral Trust Bonds in the principal amount of	$44,650.00
5½% Collateral Trust Bonds in the principal amount of	75,500.00
10-year 5% Interest Scrip due 1945 in the amount of	17,078.75
Preferred Stock (no par value) $3 Series	893 shares
Preferred Stock (no par value) $2.75 series	1,510 shares
Class A Common Stock ($1 par value)	2,403 shares
Class B Common Stock ($1 par value)	2,326½ shares

The securities received by Middle West Utilities Company were, in turn, delivered to its successor, The Middle West Corporation. Under date of November 30, 1935, The Middle West Corporation acquired from Allied Public Service Company the securities of United Public Utilities Corporation, owned by Allied, as described above.

In the year 1937 The Middle West Corporation sold all of the 10-year 5% Interest Scrip due 1945 which it owned; in the year 1938 it sold all of the 6% Collateral Trust

Bonds which it owned and also sold $18,000 in principal amount of the 5½% Collateral Trust Bonds which it owned; and in the year 1939 The Middle West Corporation sold all of the remaining securities of United Public Utilities Corporation which it owned.

4. United Public Utilities Corporation (New Jersey, 1934) had issued and outstanding during all or a portion of the period from December 31, 1934, through December 31, 1945, the securities described as follows and the amounts thereof did not exceed those shown for December 31, 1934, and were not less than those shown for December 31, 1945:

	Dec. 31, 1934	Dec. 31, 1945
Collateral Trust Bonds (Convertible) 6% Series A	$3,986,000.00	None
Collateral Trust Bonds (Convertible) 5½% Series B	3,492,400.00	None
10-year 5% Interest Scrip due 1945	1,078,105.00	None
$3 Preferred No Par Capital Stock	79,720 shares	79,441 shares
$2.75 Preferred No Par Capital Stock	69,848 shares	69,479 shares
Class A Common $1 Par Capital Stock	149,568 shares	148,920 shares
Class B Common $1 Par Capital Stock	224,352 shares	221,380 shares

The Collateral Trust Bonds, Series A, which had been reduced to $2,250,200 at the end of 1944, and the Collateral Trust Bonds Series B, which had been reduced to $3,241,800 at the end of 1944 were all paid and cancelled at the beginning of July, 1945. The 10-year Interest Scrip, which had been reduced to $348,557 at the end of 1942, was retired in full during the year 1943. The Class A and Class B Common Stock constituted a single class of Common Stock without distinction after July 1, 1945, and as of December 31, 1945, there were 370,300 shares of said stock outstanding.

Of these securities, United Public Service Corporation (New Jersey, 1934) at all times from 1935 to 1945 owned 148,055 shares of the Class B Common Stock representing 40%, within a fraction, of the total Common Stock of both Classes A and B. After July 1, 1945, these shares constituted 28.5% of all shares entitled to vote. From 1935 to July 1, 1945, the Class B Common Stock, as a class, was entitled to elect only one of the directors of United Public Utilities Corporation. The Class B Common Stock was not otherwise entitled to vote except at such time as 50% of the total of the company's Collateral Trust Bonds and of its Preferred Capital Stock had either been converted or paid and retired and said Collateral Trust Bonds were retired shortly prior to July 1, 1945. The Preferred Capital Stock of United Public Utilities Corporation was not entitled to vote except on default in payment of eight consecutive quarterly dividends and then it was entitled to equal vote with the Class A Common Stock. Such default occurred in 1938 and has since continued.

5. United Public Service Corporation (New Jersey, 1934) had issued and outstanding at all times from 1935 to 1945 not less than 305,992 shares of its Common Capital Stock having a par value of $1 per share, reduced to 25¢ per share in 1942.

Of these shares The Middle West Corporation (Delaware, 1935) owned at all times from 1935 to 1945 not less than 153,519 shares. The number of shares so owned increased from time to time and aggregated, in 1946, 172,393 shares. From 1935 to 1945 The Middle West Corporation owned not less than 48.65% nor more than 56.34% of the voting shares of United Public Service Corporation.

6. The Middle West Corporation (Delaware, 1935) at all times from 1936 to 1945 owned all of the issued and outstanding Capital Stock consisting of 100 shares of no par Common of Middle West Service Company (Illinois, 1936); and at all times from 1935 to 1945 owned all of the issued and outstanding Capital Stock consisting of 350 shares of no par Common of Illinois Stock Transfer Company (Illinois, 1936).

The Middle West Corporation (Delaware, 1935) was the successor to Middle West Utilities Company, a Delaware Corporation, reorganized under Section 77B of the Bankruptcy Act in the United States District Court for the Northern District of Illinois, Eastern Division. Said reorganization followed the institution of receivership proceedings in the same court on April 15, 1932.

From 1932 to 1935 Middle West Utilities Company owned 430,439 shares, or 96.4% of the outstanding Common Capital Stock of United Public Service Company (New Jersey, 1927), which company was in receivership. The Common Stock, and the Preferred Stock after default, were entitled to vote. Middle West Utilities Company had, as a result of its holdings, voting control of United Public Service Company aggregating not less than 51% as of December 31, 1931 and continuing thereafter until the dissolution of United Public Service Company.

Appendix A.

* List of Securities of Northwestern Public Service Company Issued and Outstanding as of December 31 of Each of the Years Indicated

Year	1	2	3	4	5	6	7
1932	$8,570,000	$ 222,000	$	$	24,682	18,359	52,150
1933	8,570,000	155,000			24,567	18,314	52,150
1934	8,504,000				24,567	18,314	52,150
1935	8,171,000				24,567	18,314	52,150
1936	7,962,000				24,567	18,314	52,150
1937	7,962,000				24,567	18,314	52,150
1938	7,807,000				24,567	18,314	52,150
1939	7,758,500				24,531	18,314	52,150
1940			500,000	6,000,000	24,389	18,254	52,150
1941			400,000	6,000,000	23,966	18,128	52,150
1942			300,000	5,276,000	23,725	17,829	52,150
1943				5,276,000	23,069	17,829	52,150
1944				5,276,000	22,518	17,829	52,150
1945				5,276,000	22,023	17,829	52,150
					22,023	17,829	52,150

* Explanation of Information Contained in Columns 1 to 7, Both Inclusive:

1—Amount in dollars of First Mortgage 5% Series A Bonds maturing January 1, 1957.

2—Amount in dollars of Huron Light & Power Company First Mortgage 6% Bonds maturing May 1, 1937.

3—Amount in dollars of 2½% Serial Bank Notes.

4—Amount in dollars of First Mortgage 4% Series A Bonds maturing August 1, 1970.

5—Amount in shares of 7% Preferred Capital Stock.

6—Amount in shares of 6% Preferred Capital Stock.

7—Amount in shares of Common no par Capital Stock.

Appendix B.

* Securities Issued by Northwestern Public Service Company and Owned by North West Utilities Company

Year	1	2
1932	45,000	52,150
1933	45,000	"
1934	45,000	"
1935	25,000	"
1936	15,000	"
1937	5,000	"
1938		"
1939		"
1940		"
1941		"
1942		"
1943		"
1944		"
1945		"

* Explanation of Information contained in Columns 1 and 2:

1—Amount in dollars of First Mortgage 5% Series A Bonds maturing January 1, 1957.

2—Amount in shares of Common no par Capital Stock.

Appendix C.

* Securities Issued by Northwestern Public Service Company and Owned by The Middle West Corporation or by Middle West Utilities Company, Its Predecessor

Year	1	2	3
1932	200,000		
1933	200,000		
1934	200,000		
1935	203,000		
1936	203,000		
1937	116,000		
1938	116,000		
1939	116,000		
1940			
1941		315	105
1942		315	105
1943		315	105
1944		315	105
1945		315	105

* Explanation of Information contained in Columns 1, 2 and 3:

1—Amount in dollars of First Mortgage 5% Series A Bonds maturing January 1, 1957.

2—Amount in shares of 7% Preferred Capital Stock.

3—Amount in shares of 6% Preferred Capital Stock.

(End of Plaintiff's Exhibit 6.)

Mr. Rohyl: To which the defendant objects as incompetent, irrelevant and immaterial, and not binding upon this defendant, and not within the issues in this case; all dealing with holding company stock or holding company directorates, the sole fraud or overreaching in the instant action, as having been claimed and alleged as having been done by individuals that composed the interlocking boards of directors and officers.

The Court: I assume the schedules refer to officers and companies named in this action?

Mr. Benson: This stipulation goes to the ownership of subsidiary companies by the Middlewest Utilities Co., and later by the Middlewest Corporation, when that came out of receivership, and it shows the lines of ownership had been through acquisition of Northwestern Public Utilities Co. in one direction, and lines of ownership and control down through finally United Public Service Co. in the other direction, down to the property that we bought. Then it goes to the point of showing in this instance where were common officers, running down through from the top of the defendant, common officers running down through from the top to the holding company that owned the companies that the plaintiff in this case bought. I don't understand the objection.

The Court: It will be received.

Plaintiff's Exhibit 7 was received, consisting of a copy of the same tabulation which is Exhibit A to the complaint (R. p. 28, supra).

Plaintiff's Exhibit 8, which was received in evidence, consists of an original of the general conveyance by Dakota Public Service Company to plaintiff, dated October 19, 1945, portions of which are as follows:

Whereas Montana-Dakota Utilities Co. is the owner of all of the issued and outstanding stock and other securities of Dakota Public Service Company consisting of 8,370 shares of Common Stock without par value, $1,000,000 of First and Refunding Mortgage Bonds due October 1, 1946, $2,500,000 of Notes Payable due July 1, 1949

and a $1,335,794 Income Note Payable due July 1, 1949, and

Whereas it has been deemed advisable in the judgment of the Board of Directors of Dakota Public Service Company and most for the benefit of that corporation and of Montana-Dakota Utilities Co. as the holder of all of its outstanding securities that it would be dissolved, and Montana-Dakota Utilities Co. as the holder of all of the outstanding stock and other securities of Dakota Public Service Company has consented in writing that a dissolution of Dakota Public Service Company shall take place on this date, and the Board of Directors of Dakota Public Service Company has by resolution adopted a plan of liquidation of that Company providing that it shall be completely liquidated on this date and that all the property and assets of Dakota Public Service Company, of every kind and nature, shall on this date be transferred and distributed to Montana-Dakota Utilities Co., subject to and charged with all debts and liabilities of Dakota Public Service Company of every kind and nature other than the outstanding stock and other securities held by Montana-Dakota Utilities Co. which shall be cancelled.

Now, Therefore, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to it in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and in complete cancellation of all of the outstanding stock and other securities of Dakota Public Service Company hereinbefore referred to as held by Montana-Dakota Utilities Co. and in accordance with said plan of liquidation, Dakota Public Service Company, the party of the first part, does hereby grant, quitclaim, convey, assign, transfer and set over unto Montana-Dakota Utilities Co., party of the second part, its successors and assigns, forever, all of its properties and assets of every kind and nature, whether real, personal or mixed, both tangible and intangible, subject to and charged with all debts and liabilities of Dakota Public Service Company of every kind and nature, except the stock and other securities of Dakota Public Service Company heretofore held by Montana-Dakota Utilities Co. which are to be cancelled.

To have and to hold the same to the said party of the second part, its successors and assigns, forever.

The party of the first part hereby covenants that upon written request by the party of the second part it will forthwith execute, acknowledge and deliver all such deeds, assignments and other instruments and will take all such further action as may, in the opinion of the counsel for the party of the second part, be necessary or advisable for better securing and confirming unto the second party the property and assets hereby conveyed.

Plaintiff's Exhibit 9 to 9-Q, which was received, consists of minutes of action of the plaintiff as sole stockholder of Dakota Public Service Company and of the directors of Dakota Public Service Company on October 19, 1945. It shows in part that plaintiff had purchased all of the stock of Dakota Public Service Company from United Public Utilities Corporation on October 19, 1945; that plaintiff as such sole stockholder accepted the resignations of Messrs. Samuel W. White, A. B. Sanborn, G. R. McArthur, William M. Dunn and J. F. Buckmier as directors of Dakota Public Service Company and designated Messrs. R. M. Heskett, C. W. Smith, F. R. Gamble, W. L. Hayes and H. N. Elvig as directors of Dakota Public Service Company, and that plaintiff as such sole stockholder directed said new board of directors to meet immediately for the purposes, among other things, of appointing new officers of Dakota Public Service Company and proposing a plan for the liquidation of said Company and transferring all of its assets, subject to liabilities, to the plaintiff and proposing the dissolution of Dakota Public Service Company; and said Exhibit shows that the newly elected directors of Dakota Public Service Company accepted the resignations of the former officers of Dakota Public Service Company, being A. B. Sanborn, G. R. McArthur, William M. Dunn, J. F. Buckmier and Margaret Frost, and duly elected new officers and adopted a plan of liquidation of Dakota Public Service Company providing that said Company should be completely liquidated on October 19, 1945, and that all

property and assets of Dakota Public Service Company of every kind and nature should be transferred and distributed to Montana-Dakota Utilities Co., subject to and charged with all the debts and liabilities of Dakota Public Service Company other than the securities of Dakota Public Service Company on October 19, 1945, owned by Montana-Dakota Utilities Co., and that the transfer of the property of Dakota Public Service Company to Montana-Dakota Utilities Co. should be made in complete cancellation of all the issued and outstanding stock and other securities of Dakota Public Service Company, and that

> "Dakota Public Service Company shall be legally dissolved after October 19, 1945, by the filing of an appropriate certificate of dissolution with the Secretary of State of Delaware before December 31, 1945, in accordance with the applicable provisions of the Delaware Corporation Law",

and providing that the officers of Dakota Public Service Company, or any of them, be authorized and instructed to execute all conveyances, deeds, assignments and other legal documents and do all other acts necessary or convenient fully to consummate the foregoing plan of liquidation, and instructing the officers of Dakota Public Service Company to execute and file in the office of the Secretary of State of the State of Delaware the certificate of dissolution hereinabove referred to, and to do all other acts necessary to consummate the liquidation and dissolution of Dakota Public Service Company, and said Exhibit contains the following document executed by Montana-Dakota Utilities Co., viz.:

> "Consent to Liquidation and Dissolution of Dakota Public Service Company.
>
> Montana-Dakota Utilities Co. as the holder of record of all of the issued and outstanding stock and other securities of Dakota Public Service Company does hereby consent to and approve of all resolutions adopted by the Board of Directors of Dakota Public Service Company at the meeting thereof held October 19, 1945, including the resolutions proposing the liq-

uidation and dissolution of [illegible] Service Company, and Montana-Dakota [illegible] does hereby consent to and approves of the [illegible] Dakota Public Service Company on October [illegible] and does hereby consent that the dissolution of [illegible] Public Service Company shall take place after [illegible] ber 19, 1945, and before December 31, 1945.

MONTANA-DAKOTA UTILITIES CO.,

By R. M. HESKETT,
President."

Plaintiff offered the following Exhibits, which were received:

Plaintiff's Exhibit 10, consisting of certified copy of an order of the Federal Power Commission authorizing plaintiff to acquire the securities of Dakota Public Service Company, to merge plaintiff's facilities with the electric utility facilities of Dakota Public Service Company, and to issue securities, and reciting that Montana-Dakota Utilities Co., referred to in said order of said Commission as Applicant,

> "proposes * * * to acquire by purchase from United Public Utilities Corporation, all of the outstanding securities of Dakota, consisting of 8,370 shares of common stock without par value, $1,000,000 of First and Refunding Mortgage Bonds due October 1, 1946, $2,500,000 of Notes Payable due July 1, 1949, and a $1,335,794 Income Note Payable due July 1, 1949, for a base price of $6,521,060.74. Applicant further proposes, immediately following its purchase of such securities, to cause the liquidation of Dakota; and to acquire all of the electric utility and other properties, and to assume the liabilities, of Dakota."

Among other things, the order recites the following:

* * * * * * *

> "It appears to the Commission from the verified application, as amended and supplemented, the record

thereon and the Annual Reports (F. P. C. Form No. 1) and Power System Statements (F. P. C. Form No. 12) for 1944 of Applicant and Dakota, that:

"(a) Applicant proposes, pursuant to a contract dated July 2, 1945, between United Public Utilities Corporation and Applicant (a copy of which is made a part of the application as a portion of Exhibit K-1 thereto), to acquire by purchase from United Public Utilities Corporation, all of the outstanding securities of Dakota, * * * for a base price of $6,321,060.74. Applicant further proposes, immediately following its purchase of such securities, to cause the liquidation of Dakota; and to acquire all of the electric utility and [illegible] properties, and to assume the liabilities, of

* * * * * * *

"(d) The [illegible] through holding [illegible] intercorporate relationships, between Applicant and [illegible] or ownership of securities, [illegible] holding [illegible] Dakota. Applicant is neither Dakota [illegible] wholly-owned [illegible] a subsidiary of one. Utilities [illegible]. The [illegible] United Public presently [illegible] by Dakota co[illegible] properties transmission and distribution facilities [illegible] an electric utility system in north central South [illegible] and adjacent territory in southern North Dakota. The service areas of Applicant and Dakota are contiguous and upon acquisition of Dakota's properties, Applicant proposes to interconnect the two systems.

* * * * * * *

"(i) Written notice of the aforesaid application has been given to the Board of Railroad Commissioners of Montana, the Public Service Commission of North Dakota, the Public Utilities Commission of South Dakota, the Public Service Commission of Wyoming, the Railroad and Warehouse Commission of Minnesota, and to the Governor of each of those States. Notice of the application was also published on July 26, 1945, in Volume 10, Federal Register, at page 9282, stating that any person desiring to be heard or to make any

protest with reference to the application should file a petition or protest on or before August 10, 1945. No protest or petition or request to be heard in opposition to the granting of such application has been received."

Among the findings of the Commission are the following:

"The proposed acquisition of securities and merger of facilities should result in improvement in efficiency

and economy of operations; and, upon the conditions hereinafter provided, will be consistent with the public interest."

Plaintiff's Exhibit 11, consisting of certified copy of an order of the Securities and Exchange Commission authorizing the sale by United Public Utilities Corporation to plaintiff of all of the stock and securities of Dakota Public Service Company and of Knife River Coal Mining Company.

Plaintiff's Exhibit 12, consisting of certified copy of an order of the Public Service Commission of the State of North Dakota authorizing plaintiff to purchase the securities of Dakota Public Service Company, to acquire its utility properties by liquidation and to issue securities.

Plaintiff's Exhibits 13 and 14, consisting of certified copies of Historical and Cost of Reproduction Appraisals as of December 31, 1937 made for the Board of Railroad Commissioners for the State of North Dakota relating to Northern Power and Light Company and North Dakota Power & Light Company. These reports show Overhead Construction Costs of 10% to 12%, both for Historical Cost and for Cost Reproduction.

DAN S. HELMICK was called as a witness by the plaintiff and being duly sworn, testified as follows:

Direct Examination, by Mr. Fellows.

Q. Is your name Dan S. Helmick? A. Yes.

Q. Where do you live? A. Minneapolis, Minnesota.

Q. What is your occupation?

A. I am a member of a firm of private consulting engineers.

Q. In what line of business?

A. In the design of various types of power plants, and engineering service in connection with the generation and use of electric power.

Q. How old are you? A. 55.

Q. What has been your professional education?

A. I graduated in 1915, College of Engineering, University of Minnesota.

Q. And your experience along the lines of that education?

A. On graduation I became junior engineer, U. S. Government. I was then in the corps of engineers for about two years. I came back to the states and was again an engineer with the U. S. government. In 1920 I went with the St. Anthony Falls Water Power Co., a Minneapolis mill company located in Minneapolis, as an engineer. I left there in 1922 to become associated with a gentleman by the name of Ralph T. Thomas. From 1922 we ran a consulting engineering practice which constituted about the same lines that I am doing with my present firm. In other words, plans and specifications for power plants, for various utilities in the middle west, principally for private corporations in the middle west, such as Minnesota Light and Power Co., Green Bay and Mississippi Canal Co. I could go on.

Q. Name some in South Dakota, and this general territory.

A. About 1926 we made appraisal of the then properties of the Northern Power and Light Co. A year or so later we were the engineers on the installation of this turbine and two boilers at Mobridge. In 1937 I became senior member of our firm of consulting engineers in Minneapolis. Since that time we have been consultants of power plants for practically all of the independent packing plants in the middle west, including John Morrell & Co. at Topeka, Ottumwa and here in Sioux Falls. We have done a lot of power plant work for paper mills. We have done a considerable amount of power plant work for municipalities and utilities. Among them I might mention we are doing work for Minneapolis Gas Light Co., Ottertail Power Co., University of Minnesota. Marshville, Wisconsin, and also right here in the city of Sioux Falls.

Q. Of what professional societies are you a member?

A. American Society of Civil Engineers. I am registered engineer in my native state of Minnesota. In Iowa. I am also registered with the National Registration of Engineers in South Carolina. If you are registered there it is on examination. There is reciprocity in engineering services in most of the states.

Q. Did you hold a commission in the army? A. Yes.

Q. What was that? A. I was captain of engineers.

Q. In your experience have you become familiar with the construction and generating costs of electric systems?

A. Yes.

Q. Familiar with operating details and problems of such systems? A. Yes.

Q. Both hydraulic, steam and Diesel power? A. Yes.

Q. Is Exhibit 15 a map which was drawn by you?

A. The map was not drawn by me personally but was drawn under my supervision by Mr. Gravenger.

Plaintiff's Exhibit 15 was received, which is the following map:

Plaintiff's exhibit 15
(Page 245) is shown on
Card 11

Q. Will you state what it purports to be a map of?

A. The map shows the properties consisting of the various transmission lines, showing the mileage, the size of wire, the voltage, existing as of 1937, for the North Dakota Power & Light Co. This is shown in red on the map. It shows the same information in yellow for the properties of Northern Power & Light Co. It shows in green, in general, the transmission lines of the Northwestern Public Service Co. I specify lines that are shown in green and designated as property of the Northwestern Public Service Co., are specifically from Aberdeen to Barnard, Aberdeen to Ipswich, from Highmore to Gettysburg. Information is given as to the voltage, size of copper, etc.

Q. Does that show these details exactly and faithfully as shown in the records and exhibits?

A. They are direct copies from the exhibits.

Mr. Fellows: We offer in evidence Exhibit 15.

The Court: With the understanding that it will be connected up the exhibit will be received.

Mr. Fellows: Plaintiff offers in evidence the deposition of Leon M. Fuquay, taken in this action pursuant to stipulation on file, the deposition consisting of three parts, one part taken the 29th of October, 1947, another part taken the 30th day of October, 1947, and the third part taken on the 17th day of November, 1947. Appearances being made by all parties.

Mr. Fellows: I am going to read first from the deposition of October 29, 1947, pages 3 and 4.

LEON M. FUQUAY testified by deposition that he was the Secretary of the Federal Power Commission (hereinafter called "FPC") and had been such since July 8, 1937. Said witness identified certain papers and documents, certified copies of which were received in evidence as plaintiff's exhibits 16 to 51, both inclusive. Certain of these exhibits are as follows:

Plaintiff's Exhibit 16, consisting of a certified copy of defendant's rate schedule FPC No. 1, which is the same document as Exhibit A-1 to the complaint (R. page 34, supra).

Plaintiff's Exhibit 18, consisting of a certified copy of defendant's rate schedule FPC No. 3, which is the same document as Exhibit B to the complaint (R. page 35, supra).

Plaintiff's Exhibit 19, consisting of a certified copy of defendant's rate schedule FPC No. 4, which is the same document as Exhibit C to the complaint (R. page 43, supra).

Plaintiff's Exhibit 20, consisting of a certified copy of defendant's rate schedule FPC No. 5-A, which is the same document as Exhibit D to the complaint (R. page 61, supra).

Plaintiff's Exhibit 21, consisting of a certified copy of defendant's rate schedule FPC No. 5-B, which is the same document as Exhibit E to the complaint (R. page 68, supra).

Plaintiff's Exhibit 22, consisting of a certified copy of defendant's rate schedule FPC No. 6, and Supplement No. 1 and Supplement No. 2 to defendant's rate schedule FPC No. 6 (also sometimes referred to as defendant's rate schedules FPC No. 6.1 and FPC No. 6.2, respectively). The portions of said exhibit which are defendant's rate schedules FPC No. 6 and 6.1 are together the same document as Exhibit F to the complaint (R. page 87, supra). Exhibit 22 also contains six (6) sheets of supplements to interchange capacity agreement covering the years 1942 through 1946 and the period January 1, 1947 to August 31, 1947. They are as follows:

Supplement No. 2
Effective Date: August 31, 1947
Filing Date: January 21, 1947
to
Rate Schedule FPC No. 6
(Cancels FPC No. 6 and Supp. 1 thereto)

Blank Pages: 250, 252, 254, 256, 258, 262, 264, 268, 270

JAN 21 '47
FEDERAL POWER COMMISSION

NOTICE OF CANCELLATION

Notice is hereby given that effective the 31st day of August 1947, Rate Schedule F.P.C. No. 6, together with Supplement No. 1 and Exhibits "C", "D", "E", and "F", effective date July 1, 1941 and filed with the Federal Power Commission by Northwestern Public Service Company, Huron, South Dakota is to be cancelled pursuant to Notice Of Termination dated February 27, 1946 signed by R. M. Heskett, President of Montana-Dakota Utilities Co., copy of which is hereto attached marked Exhibit "A", and which was served on the undersigned by Registered Mail on February 28, 1946.

NORTHWESTERN PUBLIC SERVICE COMPANY

BY A. B. Sanborn

A. B. Sanborn, President

Dated January 15, 1947
Huron, South Dakota.

JAN 23 1947
RATE FILINGS & CONTRACT
ANALYSIS SECTION

EXHIBIT "B"

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

SUPPLEMENT TO INTERCHANGE CAPACITY AGREEMENT

To be attached to and become a part of said Agreement for billing purposes for the period January 1, 1942 to December 31, 1942.

	Northwestern Public Service Company	Dakota Public Service Company	Total
Company generating capacity (kilowatts)	20,290	13,955	34,245
Company system maximum demand (kilowatts)	15,990	12,850	28,840
Company reserve capacity (kilowatts)	4,300	1,105	5,405
Per cent Company reserve capacity	26.89%	8.60%	18.74%
Required reserve (kilowatts)	2,997	2,408	5,405
Company excess or deficiency in reserve capacity (kilowatts)	+ 1,303	-1,303	
Firm power charge @ $13.20 per kilowatt per year		$17,199.60	

RATING OF GENERATING STATIONS

Northwestern Public Service Company

Station	Rating Kw
Aberdeen	6,250
Webster	760
Redfield	900
Faulkton	110
Huron	1,130
Highmore	140
Mitchell	7,500
Armour	980
Yankton	2,340
Clark	180
Total	20,290

Dakota Public Service Company

Station	Rating Kw
Beulah	6,000
Bismarck	5,250
Dickinson	700
Mott	230
Hebridge	1,000
Ellendale	400
Lemmon	235
Gettysburg	140
Total	13,955

COMPANY SYSTEM MAXIMUM DEMAND (One Hour)

Northwestern Public Service Company	15,990
Dakota Public Service Company	12,850
Total	28,840

The above demand is the generation for one hour between 5:00 P.M. and 6:00 P.M. on December 15, 1941, and constitutes the highest demand established during the year 1941.

The above was determined and agreed to by the undersigned Operating Committee and will become the basis of billing under the Interchange Capacity Agreement for the period January 1, 1942 to December 31, 1942.

Dated January 15, 1942

OPERATING COMMITTEE
Northwestern Public Service Company
By O. C. STOKES

Dakota Public Service Company
By J. W. CHESIRE

Blank Pages: 250, 252, 254, 256, 258, 262, 264, 268, 270

Northwestern Public Service Co.
Exhibit C to
Rate Schedule FPC No. 6

NORTHWESTERN PUBLIC SERVICE C
DAKOTA PUBLIC SERVICE COMP

FEB 1? 19..

SUPPLEMENT TO INTERCHANGE CAPACITY AGREEMENT

To be attached to and become a part of said Agreement for billing purposes for the period January 1, 1943 to December 31, 1943.

	Northwestern Public Service Company	Dakota Public Service Company	Total
Company generating capacity (kilowatts)	20,290	13,955	34,245
Company system maximum demand (kilowatts)	14,240	11,680	25,920
Company reserve capacity (kilowatts)	6,050	2,275	8,325
Per cent Company reserve capacity	42.4%	19.47%	32.11%
Required reserve (kilowatts)	4,574	3,751	8,325
Required reserve for billing purposes 25%		2,920	
Company deficiency in reserve capacity (kilowatts)		645	
Firm power charge @ $13.20 per kilowatt per year		$ 8,514.00	

RATING OF GENERATING STATIONS

Northwestern Public Service Company		Dakota Public Service Company	
Station	Rating Kw	Station	Rating Kw
Aberdeen	6,250	Beulah	6,000
Webster	760	Bismarck	5,250
Redfield	900	Dickinson	700
Faulkton	110	Mott	230
Huron	1,130	Mobridge	1,000
Highmore	140	Ellendale	400
Mitchell	7,500	Lemmon	235
Armour	980	Gettysburg	140
Yankton	2,340		
Clark	180		
Total	20,290	Total	13,955

COMPANY SYSTEM MAXIMUM DEMAND (One Hour)

Northwestern Public Service Company	14,240 K.W.H.
Dakota Public Service Company	11,680 K.W.H.
	25,920 K.W.H.

The above demand is the generation for one hour between 6:00 P.M. and 7:00 P.M. on January 7, 1942, and constitutes the highest demand established during the year 1942.

The above was determined and agreed to by the undersigned Operating Committee and will become the basis of billing under the Interchange Capacity Agreement for the period January 1, 1943 to December 31, 1943.

Dated January 15, 1943

OPERATING COMMITTEE
Northwestern Public Service Company
By

Dakota Public Service Company
By

64C

SUPPLEMENT TO INTERCHANGE CAPACITY AGREEMENT

To be attached to and become a part of said Agreement for billing purposes for the period January 1, 1944 to December 31, 1944.

	Northwestern Public Service Company	Dakota Public Service Company	Total
Company generating capacity (kilowatts)	21,790	13,955	35,745
Company system maximum demand (kilowatts)	14,260	11,770	26,030
Company reserve capacity (kilowatts)	7,530	2,185	9,715
Per cent Company reserve capacity	52.6%	18.56%	37.32%
Required reserve (kilowatts)	5,322	4,393	9,715
Required reserve for billing purposes 25%		2,942	
Company deficiency in reserve capacity (kilowatts)		757	
Firm power charge @ $13.20 per kilowatt per year		$ 9,992.40	

RATING OF GENERATING STATIONS

Northwestern Public Service Company		Dakota Public Service Company	
Station	Rating KW	Station	Rating KW
Aberdeen	7,750	Beulah	6,000
Webster	760	Bismarck	5,250
Redfield	900	Dickinson	700
Faulkton	110	Mott	230
Huron	1,130	Mobridge	1,000
Highmore	140	Ellendale	400
Mitchell	7,500	Lemmon	235
Armour	980	Gettysburg	140
Yankton	2,340		
Clark	180		
Total	21,790	Total	13,955

COMPANY SYSTEM MAXIMUM DEMAND (One Hour)

Northwestern Public Service Company	14,260 K.W.H.
Dakota Public Service Company	11,770 K.W.H.
	26,030 K.W.H.

The above demand is the generation for one hour between 6:00 P.M. and 7:00 P.M. on December 22, 1943, and constitutes the highest demand established during the year 1943.

The above was determined and agreed to by the undersigned Operating Committee and will become the basis of billing under the Interchange Capacity Agreement for the period January 1, 1944 to December 31, 1944.

Dated January 8, 1944

OPERATING COMMITTEE
Northwestern Public Service Co.
By

Dakota Public Service Co.
By

164d

SUPPLEMENT TO INTERCHANGE CAPACITY AGREEMENT

FEDERAL POWER COMMISSION
FEB 3 - 1945
RECEIVED

To be attached to and become a part of said Agreement for billing purposes for the period January 1, 1945 to December 31, 1945.

	Northwestern Public Service Company	Dakota Public Service Company	Total
Company generating capacity (kilowatts)	20,940	13,955	34,895
Company system maximum demand (kilowatts)	16,180	13,230	29,410
Company reserve capacity (kilowatts)	4,760	725	5,485
Per cent Company reserve capacity	29.4%	5.5%	18.65%
Required reserve (kilowatts) @ 18.65%	3,018	2,467	5,485
Company deficiency in reserve capacity (kilowatts)		1,742	
Firm power charge @ $13.20 per kilowatt per year		$22,994.40	

RATING OF GENERATING STATIONS

Northwestern Public Service Company

Station	Rating KW
Aberdeen	6,900
Webster	760
Redfield	900
Faulkton	110
Huron	1,130
Highmore	140
Mitchell	7,500
Armour	980
Yankton	2,340
Clark	180
Total	20,940

Dakota Public Service Company

Station	Rating KW
Beulah	6,000
Bismarck	5,250
Dickinson	700
Mott	230
Mobridge	1,000
Ellendale	400
Lemmon	235
Gettysburg	140
Total	13,955

COMPANY SYSTEM MAXIMUM DEMAND (One Hour)

Northwestern Public Service Company - - - 16,180 K.W.H.
Dakota Public Service Company - - - - - - 13,230 K.W.H.
Total - - - - 29,410 K.W.H.

The above demand is the generation for one hour between 6:00 P.M. and 7:00 P.M. on December 21, 1944, and constitutes the highest demand established during the year 1944.

The above was determined and agreed to by the undersigned Operating Committee and will become the basis of billing under the Interchange Capacity Agreement for the period January 1, 1945 to December 31, 1945.

Dated January 9, 1945.

OPERATING COMMITTEE
Northwestern Public Service Co.

By C. E. [illegible]

Dakota Public Service Co.

By [illegible]

Finance & Statistics

1642

No. P & L Co

Dakota Public Service Company
Rate Schedule FPC No. 1
Effective date - February 7, 1936
Filing date - January 31, 1936
Effective ....., 1936

NPLCo

NORTHERN POWER AND LIGHT COMPANY

GENERAL OFFICE
HURON, SOUTH DAKOTA

FPC No. 1

FEDERAL POWER COMMISSION
JAN 31 1936
RECEIVED

January 28, 1936

Federal Power Commission
Washington, D. C.

Gentlemen:

I beg to acknowledge receipt of your letter of December 21, 1935 in which you enclose your Order #36. The time in which to file the information requested has since been extended to this company until January 31, 1936.

In reply we beg to advise as follows:

5335

1. Northern Power and Light Company purchases surplus electric energy at wholesale in interstate commerce for resale under an oral agreement between this company and North Dakota Power and Light Company, the delivery being made at the North Dakota-South Dakota state line at or near Keldron, South Dakota.

NDPLC FPC No. 1

5352

You are hereby advised that North Dakota Power and Light Company has filed a statement of this agreement to which reference and concurrence is hereby made.

2. Northern Power and Light Company also sells and interchanges surplus energy under an oral agreement with Northwestern Public Service Company. Deliveries under this agreement are made at 3 points in the state of South Dakota, at Barnard, Ipswich and Gettysburg. The price of energy delivered for interchange under this agreement is 5 mills per kilowatt-hour and the agreement is considered by the parties to be terminable at the will of either. Under normal operating conditions the energy delivered under this agreement by Northern Power and Light Company to Northwestern Public Service Company is purchased from North Dakota Power and Light Company and delivered to Northern Power and Light Company at Driscoll, North Dakota and/or at a point on the North Dakota-South Dakota state line near Keldron, and is generated at stations of North Dakota Power and Light Company in the state of North Dakota.

5353

NPLCo FPC No.

164p

NORTHWESTERN PUBLIC SERVICE COMPANY
Exhibit F
to
Rate Schedule FPC No. 6

NORTHWESTERN PUBLIC SERVICE COMP.

MONTANA-DAKOTA UTILITIES COMPANY

SUPPLEMENT TO INTERCHANGE CAPACITY AGREEMENT

FEDERAL POWER COMMISSION
JAN 28 19[illegible]
RECEIVED

To be attached to and become a part of said Agreement for billing purposes for the period January 1, 1946 to December 31, 1946.

		Northwestern Public Service Company	Montana-Dakota Utilities Company	Total
1.	Company generating capacity (kilowatts)	27,540	14,311	41,851
2.	Company system maximum demand (kilowatts)	20,079	14,935	35,014
3.	Company reserve capacity (kilowatts)	7,461	(624)	6,837
4.	Per cent Company reserve capacity	37.1%	(4.17%)	19.5265%
5.	Required reserve (kilowatts) @ 19.5265%	3,921	2,916	6,837
6.	Company deficiency in reserve capacity (kilowatts)		3,540 KW	
7.	Firm power charge @ $13.20 per kilowatt per year		$46,728.00	

RATING OF GENERATING STATIONS:

Northwestern Public Service Company

Station	Rating KW
Aberdeen	13,800
Webster	780
Redfield	900
Faulkton	110
Huron	1,130
Highmore	140
Mitchell	7,500
Armour	980
Yankton	2,340
Clark	180
Total	27,540

Montana-Dakota Utilities Company

Station	Rating KW
Beulah	6,000
Bismarck	5,250
Mandan	270
Dickinson	786
Mott	230
Mobridge	1,000
Kilendale	400
Lemmon	235
Gettysburg	140
Total	14,311

COMPANY SYSTEM MAXIMUM DEMAND (One Hour)

Northwestern Public Service Company	20,079 K.W.H.
Montana-Dakota Utilities Company	14,935 K.W.H.
Total	35,014 K.W.H.

The above demand is the generation for one hour between 5:00 P.M. and 6:00 P.M. on December 19, 1945, and constitutes the highest coincident demand established during the year 1945.

The above was determined and agreed to by the undersigned Operating Committee and will become the basis of billing under the Interchange Capacity Agreement for the period January 1, 1946 to December 31, 1946.

Dated January 15, 1946

OPERATING COMMITTEE
Northwestern Public Service Co.

/s/ By O. C. STOKKE

Montana-Dakota Utilities Co.

/s/ By A. P. McDONALD

The above is approved as the basis of billing from January 1, 1946 until additional capacity is installed or until the transmission line from Glendive to Dickinson requires a revision of this supplement.

ACKNOWLEDGED
JAN 28 1946
Secretary

JAN 30 1946
RATE [illegible] & CONTRACT
ANALYSIS SECTION

NORTHWESTERN PUBLIC SERVICE COMPANY
Exhibit B
to
Rate Schedule FPC No. 6

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NORTHWESTERN PUBLIC SER

MONTANA-DAKOTA UTILITI

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FEDERAL POWER COMMISSION

SUPPLEMENT TO INTERCHANGE CAPACITY AGREEMENT

To be attached to and become a part of said Agreement for billing purposes for the period January 1, 1947 through August 31, 1947.

		Northwestern Public Service Company	Montana-Dakota Utilities Company	Total
1.	Company generating capacity (kilowatts)	28,490	14,755	43,245
2.	Company system maximum demand (kilowatts)	24,560	16,240	40,800
3.	Company reserve capacity (kilowatts)	3,930	(1,485)	2,445
4.	Per cent Company reserve capacity	16.0%	(9.15%)	5.992648
5.	Required reserve (kilowatts) @ 5.992648	1,472	973	2,445
6.	Company deficiency in reserve capacity (kilowatts)		2,458 KW	
7.	Reserve Capacity Charge at the rate of $13.20 per annum for the period January 1, 1947 through August 31, 1947		$21,630.40	

RATING OF GENERATING STATIONS:

Northwestern Public Service Company

Station	Rating KW
Aberdeen	13,500
Webster	760
Redfield	900
Faulkton	110
Huron	1,330
Highmore	140
Mitchell	8,250
Armour	980
Yankton	2,340
Clark	180
Total	28,490

Montana-Dakota Utilities Company

Station	Rating KW
Beulah	6,000
Bismarck	5,250
Mandan	400
Dickinson	1,100
Mott	230
Hebridge	1,000
Ellendale	400
Lemmon	235
Gettysburg	140
Total	14,755

COMPANY SYSTEM MAXIMUM DEMAND (One Hour)

Northwestern Public Service Company	24,560 K.W.H.
Montana-Dakota Utilities Company	16,240 K.W.H.
Total	40,800 K.W.H.

The above demand is the generation for one hour between 5:00 P.M. and 6:00 P.M. on December 16, 1946, and constitutes the highest coincident demand established during the year 1946.

The above was determined and agreed to by the undersigned Operating Committee and will become the basis of billing under the Interchange Capacity Agreement for the period January 1, 1947 through August 31, 1947, the date of termination.

Dated February 18, 1947

OPERATING COMMITTEE
Northwestern Public Service Company

By _____

The above figures was determined by the undersigned Operating Committee subject to the objection by the representative of Montana-Dakota Utilities Co. that there should be no firm power charge, the Montana-Dakota Utilities Co. representative also signing this agreement under protest in as much as the entire Northwestern Public Service Company is involved before the Federal Power Commission for investigation. Montana-Dakota Utilities Co. also reserves the right at any time hereafter to demand a recomputation of its generating capacity, system demand, reserve capacity and all other foregoing figures and computations that may at any time during the year 1947 be affected in any way if additional generating capacity is installed by it or additional power purchased from the United States Government or any department or subdivision thereof becomes available to Montana-Dakota Utilities Co. so that the power available to property heretofore owned by Dakota Public Service Company is increased above any of the foregoing figures.

Dated February 18, 1947.

Montana-Dakota Utilities Co.

By Reed W Smith

The remaining portion of plaintiff's exhibit 22, which is defendant's rate schedule FPC No. 6.2, is as follows:

MONTANA - DAKOTA UTILITIES CO.

MINNEAPOLIS 2

February 27, 1946

Northwestern Public Service Company
Huron
South Dakota

Gentlemen:

In accordance with the Agreement between Northwestern Public Service Company and Dakota Public Service Company, dated as of July 1, 1941, and a Supplemental Agreement dated March 13, 1943 between these two companies, as provided in Article II, Section 1, as amended, notice is hereby given by Montana-Dakota Utilities Co., as successor to Dakota Public Service Company, of the termination of that Agreement, such termination shall be effective as of August 31, 1947.

Very truly yours,

MONTANA-DAKOTA UTILITIES CO.,

By (Signed) R. M. Heskett
R. M. HESKETT, PRESIDENT

RMH MM

RATE FILINGS & CONTRACT
ANALYSIS SECTION

EXHIBIT "A"

Plaintiff's Exhibit 23, consisting of a certified copy of Order No. 36 of FPC as amended and readopted February 4, 1936, portions of which are as follows:

The Commission having under consideration the matter of amending its rule (Order No. 36), adopted December 16, 1935, governing the filing of schedules under Section 205, Part II, Federal Power Act, showing all rates and charges made, demanded, or received for the transmission or sale of electric energy subject to the jurisdiction of the Commission and of monthly reports in connection therewith:

It is ordered:

That said rule be and it is hereby amended and readopted to be effective this date until the further order of the Commission to read as follows:

(a) (Filing) On or before January 15, 1936, each public utility shall file with the Commission schedules showing all rates and charges made, demanded, or received for or in connection with the transmission, sale, purchase, or interchange of electric energy subject to the jurisdiction of the Commission, and all contracts, rules and regulations, interchange agreements, and working agreements for the use of facilities, affecting or pertaining to such rates and charges which were effective on January 1, 1936, and such rates and charges shall not be changed except in accordance with the provisions of Section 205, Part II, Federal Power Act.

(b) (Oral Agreements) If any interchange agreement, working agreement for the use of facilities, or other understanding under which electric energy is sold, or interchanged or under which facilities are used for the transmission of electric energy is not in writing, the basic terms of such agreement or understanding upon which settlement is made shall be reduced to writing, approved by the parties thereto, and filed with the Commission, as prescribed in paragraph (a).

(Plaintiff's Exhibits 24, 25, 26, 27, 32, 33, 34, 36, 37, 49 and 50 consist of certified copies of certain FPC files con-

taining correspondence and data pertaining to the filing by defendant with FPC of the oral five mill energy interchange rate, the 1936 Interconnection Contract (Exhibit B to the complaint), the 1938 Interchange Capacity Agreement (Exhibit C to the complaint), the 1939 Interconnection Contract (Exhibit D to the complaint), the 1939 Interchange Capacity Agreement (Exhibit E to the complaint), and the 1941 Agreement (Exhibit F to the complaint). For simplicity of presentation and to avoid duplication in the printing of the record, the essential portions of those exhibits are set out herein in chronological sequence under the particular subject matters to which they refer, as follows:)

Filing of the oral five mill energy interchange rate.

Letter dated January 28, 1936 from Northern Power & Light Company to FPC (Plaintiff's Exhibit 36).

The above statement is made for your information without concession or agreement that the sales and interchange of energy under this agreement constitute interstate transactions.

So far as we are advised, the foregoing constitute the only wholesale sales of electric energy which might be viewed as interstate sales.

This information is filed without prejudice or waiver of any legal or constitutional rights of the company with respect to the Public Utility Act of 1935 or any provision thereof.

Yours very truly,

VICE-PRESIDENT

f.

Letter dated January 28, 1936 from North Dakota Power & Light Company to FPC (Plaintiff's Exhibit 37).

Acknowledgment is made of your letter of December 21, 1935 enclosing a copy of your Order #36. Reference is also made to extension of time to January 31, 1936 in which to file the information requested.

In reply we beg to advise

1. The North Dakota Power and Light Company sells surplus electric energy at wholesale in interstate commerce for resale to Northern Power and Light Company under an oral agreement which has been in effect for some years. Energy under this oral agreement is delivered at the North Dakota-South Dakota state line at a point near Keldron, South Dakota. This energy is transmitted and received over a transmission line of 38 kv. North Dakota Power and Light Company owns the line from its station in Beulah, North Dakota, to the point of delivery at the state line above mentioned, and Northern Power and Light Company owns the interconnecting transmission line in South Dakota from said point of delivery. The charge for the energy delivered by either company to the other under this arrangement is 3½ mills per kilowatt-hour. Under this agreement, energy may be interchanged but under normal operation, the bulk of the deliveries are from North Dakota Power and Light Company to Northern Power and Light Company. The understanding of the parties is that this oral arrangement may be discontinued at the will of either party.

We are filing the above information at this time as the above arrangement has not yet been reduced to writing and signed by the parties but conferences toward the accomplishment of that purpose are being held.

2. North Dakota Power and Light Company also has a similar oral agreement with Northern Power and Light Company under which surplus energy is sold and/or interchanged, at a flat price of 3½ mills per

kilowatt-hour. Deliveries under this agreement are made at Driscoll, in North Dakota. Under normal conditions energy is sold by North Dakota Power and Light Company to Northern Power and Light Company under this agreement. This contract is not regarded by the undersigned as an interstate transaction and the above statement is here stated for your information as Northern Power and Light Company does doubtless sell a portion of the energy delivered to it under this agreement to Northwestern Public Service Company making delivery at points in South Dakota.

Except as above stated, it is not believed that this company owns or operates facilities for the transmission or sale of electric energy at wholesale in interstate commerce for resale.

This information is filed without prejudice or waiver of any legal or constitutional rights of the company with respect to the Public Utility Act of 1935 or any provision thereof.

Letter dated February 1, 1936 from FPC to defendant (included in Plaintiff's Exhibit 26).

Receipt is acknowledged of your letter of January 28, filed in pursuance of Order No. 36, modified by the extension of time for filing information granted by the Commission.

Your attention is called to the provisions of Order No. 36 which require that information of this character shall be filed in triplicate. If you have two carbon copies of your letter available, please forward them.

If the Commission should require additional information in this connection, or in addition to that contemplated by the further requirement of Order No. 36 with respect to filing monthly reports, beginning February 15, 1936, you will be advised.

Letter dated March 10, 1936 from FPC to defendant (included in Plaintiff's Exhibit 26)

Receipt is acknowledged of your letter enclosing reports for the month of January, 1936, filed under the provisions of the Commission's Order No. 36, readopted February 4, 1936, for the following companies:

Northwestern Public Service Company

Northern Power and Light Company

Filing of the 1936 Interconnection Contract and the 1938 Interchange Capacity Agreement.

Letter dated August 15, 1938 from defendant to FPC (included in Plaintiff's Exhibits 26 and 34).

We are in receipt of instructions together with copies of Form FPC 88, on which is intended to report the transmission and sale of electrical energy interstate with other companies. It is our opinion that we do not have interstate commerce with other companies and that this form does not apply to Northwestern Public Service Co.

Letter dated December 20, 1938 from defendant to FPC (included in Plaintiff's Exhibits 26 and 34).

We have recently reduced to writing the oral agreement between Northwestern Public Service Company, North Dakota Power and Light Company and Northern Power and Light Company with respect to reserve capacity. We are attaching herewith four copies of this agreement.

Article IX of this interchange capacity agreement refers to a separate agreement with respect to the interchange of energy. We wrote you on January 28th, 1936, with respect to the energy interchange, but since writing you have reduced to writing the energy interchange agreement between Northwestern Public Service Company and Northern

ower and Light Company. We find, however, that we in-
lvertently failed to send you a copy of this latter contract.
e therefore now send you four copies of this latter agree-
ent.

The foregoing is furnished for the information of the
ederal Power Commission without prejudice to any ques-
on relating to its jurisdiction in the premises, the Com-
ny reserving all its legal rights with respect to such
risdiction.

Letter dated January 9, 1939 from FPC to defendant (included in Plaintiff's Exhibits 24 and 26).

This will acknowledge receipt of your letter of Decem-
r 20, 1938, inclosing four copies of contract dated Octo-
r 7, 1936, between your company and the Northern Power
d Light Company.

This contract has been numbered as follows:

Northwestern Public Service Company
Rate Schedule FPC No. 3
Filing date December 23, 1938

You also inclosed four copies of agreement dated Jan-
ry 1, 1938, between your company, the North Dakota
ower and Light Company, and the Northern Power and
ght Company, which we understand is an oral under-
anding reduced to writing between your company and
e two companies as above mentioned.

This agreement has been numbered as follows:

Northwestern Public Service Company
Rate Schedule FPC No. 4
Also Supplement No. 1
to
Rate Schedule FPC No. 3
Filing date December 23, 1938

It is noted that the effective date of the first above mentioned agreement designated as FPC No. 3 is given in the agreement as January 1, 1936, and the effective date in the agreement designated as FPC No. 4 is given as January 1, 1938. Both of these dates are some months prior to the date of filing the agreements referred to.

Accordingly, your attention is called to Article E of Section 35.3 of Order No. 50 of the Commission which provides "for good cause shown * * * the Commission may by order provide that a contract may become effective as of a date prior to the date of filing". You are therefore requested to make formal application to the Commission in keeping with the requirements of Article E just mentioned, so that the effective dates as above given may be approved by the Commission.

Letter dated January 23, 1939 from defendant to FPC (included in Plaintiff's Exhibits 25, 26 and 34).

As requested in your letter of January 9th, I am enclosing herewith the following:

> Application for authority to make effective these [these] rate schedules as of a date prior to filing such schedules.

We trust that your Commission will give approval to the effective dates of these schedules as contained in our application.

Application for authority to make Rate Schedules Effective Retroactively, included in the aforesaid letter of January 23, 1939 (included in Plaintiff's Exhibits 25, 26 and 34).

Before the
Federal Power Commission
Washington, D. C.

Federal Power Commission
Received
Jan 25 1939

Application for Authority to Make Effective Certain Rate Schedules as of a Date Prior to the Date of Filing Said Schedules.

Pursuant to the provisions of Section 35.3, Article E, of Federal Power Commission order number 50, the undersigned, Northwestern Public Service Company hereby applies to the Federal Power Commission for authority to make the following rate schedules effective as of a date prior to the date of filing said schedules:

Northwestern Public Service Company
Rate Schedule FPC No. 3
Filing date December 23, 1938
Effective date of contract January 1, 1936

Northwestern Public Service Company
Rate schedule FPC No. 4
Filing date December 23, 1938
Effective date January 1, 1938

Under date of January 28, 1936 we notified your Commission of an oral agreement between Northwestern Public Service Company and Northern Power and Light Company, providing for the interchange of surplus energy. This oral agreement was in effect for a number of years before it was reduced to writing. On October 7, 1936 this oral agreement was reduced to writing without changing the terms and we inadvertently failed to file a copy of the written agreement with your Commission. This agreement is identified as Rate Schedule FPC No. 3.

Northwestern Public Service Company, North Dakota Power and Light Company and Northern Power and Light Company operated their respective systems as a single interconnected system for a number of years under an oral agreement providing for the billing of energy interchanged and also for the billing of fixed charges on interconnection facilities, which were provided by Northwestern Public Service Company. Under this oral agreement no provision was made for each company to provide its proportion of the "reserve capacity" needed for the interconnected system.

Under date of January 1, 1938 an agreement was entered into whereby each company would furnish its proportion of the "reserve capacity" required for the interconnected system, or in lieu thereof the company or companies with a deficiency of reserve capacity will pay the company or companies having excess reserve capacity a demand charge. We inadvertently failed to file a copy of this agreement with your Commission. This agreement is identified as Rate Schedule FPC No. 4.

The undersigned applicant respectfully requests authority to make the agreement identified as FPC No. 3 effective as of January 1, 1936 and to make the agreement identified as FPC No. 4 effective as of January 1, 1938.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,
Vice President & Treasurer.

Letter dated February 14, 1939 from FPC to defendant (included in Plaintiff's Exhibits 24 and 26).

Reference is made to your filing on December 23, 1938, of a rate schedule agreement with the Northern Power & Light Company dated October 7, 1936.

An examination of the provisions contained in this agreement discloses that your company will receive for trans-

mission service rendered, a revenue in the amount of $20,000 annually.

In order that we may be fully advised with respect to the rendition of this service, you are requested to submit a statement and pertinent data, in support of this charge.

It is desired that the above request be submitted within ten days after receipt of this letter.

Letter dated February 22, 1939 from defendant to FPC (included in Plaintiff's Exhibits 25, 26 and 34).

This will acknowledge receipt of your letter of February 14th with reference to contract dated October 7, 1936, between Northwestern Public Service Company and Northern Power and Light Company, identified as Rate Schedule F. P. C. No. 3.

You ask that we submit a statement and pertinent data to support the charge of $20,000 made under this contract. This charge is to cover interest, depreciation and operating costs of the interconnection facilities that were entirely provided by Northwestern Public Service Company. These facilities are specifically listed on page 1 of the contract.

The systems of Northwestern Public Service Company, Northern Power and Light Company and North Dakota Power & Light Company are operated as a single interconnected system and this method of operation provides a substantial savings in production costs as well as in power pool investment for each of the participants. At the time the physical interconnection was made Northern Power and Light Company did not have sufficient cash to finance its portion of the cost and all of the capital was provided by Northwestern Public Service Company. The charge to Northern Power and Light Company is on the basis of actual costs.

Your letter is not very specific as to what information you desire and in the event the contract together with this letter does not give sufficient information we should be

glad to furnish you with whatever information you desire if you will outline just what you require in this connection.

The foregoing is furnished for the information of the Federal Power Commission without prejudice to any question relating to its jurisdiction in the premises, the Company reserving all its legal rights with respect to such jurisdiction.

Letter dated March 9, 1939 from FPC to defendant (included in Plaintiff's Exhibit 24) was the inquiry prompting defendant's letter of March 15, 1939, infra.

This will acknowledge your letter of February 22, 1939 in reply to our letter of February 14, 1939 with respect to data relating to certain transmission charges provided for in your rate schedule agreement with Northern Power and Light Company designated as FPC No. 3.

Specifically, the information is:

1. The number of miles of transmission lines.

2. The voltage of these lines.

3. The cost of these lines.

4. The cost of the substations and appurtenances.

5. Rate of interest assumed on capital invested.

6. Estimated life of transmission lines, substations and appurtenances, separately.

7. Depreciation rate applied to lines, substations and appurtenances.

8. Tax rate applied, showing derivation.

9. Insurance rate applied.

10. Annual maintenance and operating costs assumed.

11. Basis for assumption regarding maintenance and operating costs.

12. Description of any other items of expense that you have included in the derivation of your annual $20,000 charge.

It is desired that this information be submitted within ten days following receipt of this letter.

Letter dated March 15, 1939 from defendant to FPC (included in Plaintiff's Exhibits 25 and 34).

Following is the information requested in your letter of March 9th in connection with the transmission charges provided in the agreement with Northern Power and Light Company, designated as FPC No. 3:

1. The number of miles of transmission lines—123 miles.
2. The voltage of these lines—50 miles 22000 Volt
   73 " 33000 Volt
3. The cost of these lines—

Line from Aberdeen to Barnard and from Aberdeen to Ipswich—50 miles.	$105,247.00
Line from Ree Heights to Gettysburg 73 miles	141,001.20
Substation and Appurtenances at Aberdeen, S. D.	54,521.32
Substation and Appurtenances at Gettysburg, S. D.	24,220.26
Total Cost	$324,989.78

5. Rate of interest assumed on capital invested—6%.
6. Estimated life of transmission lines, substation and appurtenances—25 years.
7. Depreciation rate—4%.
8. Actual ad valorem taxes for the year 1937—$4,114.45
9. Actual insurance—(Aberdeen substation only) $27.50
10. Assumed maintenance and operating cost—$5,372.64

11. Basis for assuming maintenance and operating costs—

Transmission maintenance and operating costs for Northwestern Public Service Company on the entire Northwestern system averaged $43.68 per mile. The assumed cost for operating and maintaining these lines is assumed to be $43.68 or a total of $5,372.64.

12. Total annual charges—

Interest 6% of $324,989.78	$19,499.39
Depreciation 4% of $324,989.78	12,999.59
Insurance	27.50
Taxes	4,114.45
Maintenance and operating costs	5,372.64
Total fixed charges & operating costs	$42,013.57

At the time this contract was made it was assumed that the operating costs and fixed charges would amount to approximately $40,000.00 per year, Northern Power and Light Company to pay one-half and Northwestern Public Service Company, one-half. It will be noticed that total costs itemized above amount to somewhat more than $40,000.00 but this is to be expected as the contract does not provide that billing be on an actual basis.

The foregoing is furnished for the information of the Federal Power Commission without prejudice to any question relating to its jurisdiction in the premises, the Company reserving all its legal rights with respect to such jurisdiction.

Letter dated March 21, 1939 from FPC to defendant (included in Plaintiff's Exhibit 24).

Acknowledgment is made of your letter of March 15, 1939 transmitting information requested in our letter of March 9, 1939 relating to transmission charges set forth in your agreement with the Northern Power and Light Company, designated as FPC No. 3.

The information you have furnished appears to be complete and your prompt reply with respect to these items is appreciated.

Minutes and orders of the FPC relating to the 1936 and 1938 contracts (included in Plaintiff's Exhibit 49) are as follows:

6695

Minutes of the Eight Hundred Fifty-sixth Meeting

Pursuant to call by the Acting Chairman, the Commission convened at 10:00 a. m. on February 23, 1939.

Present: Acting Chairman Seavey, Commissioners Draper, Manley and Scott.

• • • • •

Action was taken, as set forth in the documents appended hereto, in the following matters:

• • • • •

—2—

6696

• • • • •

(13) Northwestern Public Service Company.

(Order allowing rate schedule to take effect prior to date of filing).

• • • • •

(18) Northwestern Public Service Company.

(Order allowing rate schedule to take effect prior to date of filing).

• • • • •

—3—

6697

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Thereupon, the Commission adjourned.

CLYDE L. SEAVEY,
Acting Chairman.

(Seal)

Attest:

LEON M. FUQUAY,
Secretary.

United States of America 6721
Federal Power Commission

Commissioners: Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

February 23, 1939.

In the Matter of Northwestern Public Service Company }

Order Allowing Rate Schedule to Take Effect Prior to Date of Filing.

It appearing to the Commission that:

(a) On December 23, 1938, the Northwestern Public Service Company filed with the Federal Power Commission its agreement, dated October 7, 1936, with the Northern Power and Light Company, designated in the files of the Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, providing for the interchange of surplus electric energy and emergency service and the rendition of transmission service by the Northwestern Public Service Company for the Northern Power and Light Company;

(b) Northwestern Public Service Company has requested that the said agreement be accepted by the Commission for filing, effective as of January 1, 1936;

(c) Good cause has been shown for, and the public interest will be served by, allowing Northwestern Public Service Company Rate Schedule F. P. C. No. 3 to take effect as of January 1, 1936;

The Commission orders that:

The agreement of October 7, 1936, between the Northwestern Public Service Company and Northern Power and Light Company, as filed with the Commission on December 23, 1938, and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, be and the same is hereby allowed to take effect as of January 1, 1936.

By the Commission.

LEON M. FUQUAY,
Secretary.

(Seal)

United States of America 6729
Federal Power Commission

Commissioners: Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, John W. Scott.

February 23, 1939.

In the Matter of Northwestern Public Service Company }

Order Allowing Rate Schedule to Take Effect Prior to Date of Filing.

It appearing to the Commission that:

(a) On December 23, 1938, the Northwestern Public Service Company filed with the Federal Power Commission its agreement, dated January 1, 1938, with the Northern Power and Light Company and the North Dakota Power and Light Company, designated in the files of the Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, providing for the pooling of the generating facilities of these companies to make available to each of the said companies the spare or reserve power of the other companies, and also providing for the interchange of surplus electric energy and the furnishing of emergency service when needed;

(b) Northwestern Public Service Company has requested that the said agreement be accepted by the Commission for filing, effective as of January 1, 1938;

(c) Good cause has been shown for, and the public interest will be served by, allowing Northwestern Public Service Company Rate Schedule F. P. C. No. 4 to take effect as of January 1, 1938;

The Commission orders that:

The agreement of January 1, 1938, between the Northwestern Public Service Company, the Northern Power and Light Company, and the North Dakota Power and Light Company, as filed with the Commis-

sion on December 23, 1938, and designated as Northwestern Public Service Company Rate Schedule F. P. C. No. 4, be and the same is hereby allowed to take effect as of January 1, 1938.

By the Commission.

LEON M. FUQUAY,
Secretary.

(Seal)

1939 Interconnection Contract and the 1939 Interchange Capacity Agreement.

Letter dated January 5, 1940 from Martens & Goldsmith to FPC (included in Plaintiff's Exhibits 27 and 34).

We are the attorneys for the Northwestern Public Service Co., at Huron, South Dakota, and are herewith enclosing the following:

Interconnection Contract dated July 1, 1939, which supersedes Interconnection Contract dated October 7, 1936 (Northwestern Public Service Company rate schedule FPC 3) with request for a prior effective date;

Interchange Capacity Agreement dated July 1, 1939, which supersedes Interchange Capacity Agreement dated January 1, 1939 (Northwestern Public Service Company rate schedule FPC 4), with request for a prior effective date.

As we have heretofore advised you, by an Agreement of Merger dated January 28, 1939, effective July 1, 1939, Northern Power and Light Company became merged into North Dakota Power & Light Company as the surviving corporation, under the corporate title "Dakota Public Service Company". The enclosed Interconnection Contract and Interchange Capacity Agreement make no changes so far as rates are concerned in the former rate schedules filed by Northwestern Public Service Company, designated Northwestern Public Service Company rate schedules FPC 3 and 4.

For the purpose of carrying the Merger into effect we would respectfully request that the enclosed schedules be filed so that they would become effective as of July 1, 1939. An original and five conformed copies of each of the schedules hereinbefore referred to are enclosed herewith.

Will you please acknowledge receipt and advise us of the rate schedule numbers given these agreements, and we will then prepare and forward for filing a Notice of Cancellation by Northwestern Public Service Company of its rate schedules FPC 3 and 4, and a certificate of Concurrence by Dakota Public Service Company in the two enclosed rate schedules.

Document entitled "Reasons for Making Rate Schedule Effective on a Prior Date" enclosed with the aforesaid letter of January 5, 1940 relating to the 1939 Interconnection Contract (included in Plaintiff's Exhibits 27 and 34).

Reasons for Making Rate Schedule Effective on a Prior Date.

Federal Power Commission,
Washington, D. C.

Federal Power Commission
Received
Jan 10 1940

Northwestern Public Service Company, in accordance with Section 35.3E of your rules and regulations, hereby requests that an order be entered providing that the herein referred to Interconnection Contract be filed so that such rate will be effective as of July 1, 1939, and as grounds for such order, represents and shows:

That by reason of the Agreement of Merger, dated January 28, 1939, and effective July 1, 1939, Northern Power and Light Company became merged into North Dakota Power & Light Company as the surviving corporation, under the corporate title "Dakota Public Service Company"; That by the terms of such Agreement of Merger, which was approved by the Board of Railroad Commis-

sioners of North Dakota and the Securities and Exchange Commission, North Dakota Power & Light Company absorbed Northern Power and Light Company and continued in existence as the same corporation with its corporate title changed to Dakota Public Service Company, and no new corporation was formed.

That the Interconnection Contract dated July 1, 1939, makes no change in the Interconnection Contract dated October 7, 1936, heretofore filed as Northwestern Public Service Company rate schedule F. P. C. number 3, and is made solely for the purpose of confirming the Agreement of Merger hereinbefore referred to.

Entirely through oversight of counsel, the officers of Northwestern Public Service Company were not advised to file the herein referred to Interconnection Contract.

Dated January 5, 1940.

Respectfully submitted,

NORTHWESTERN PUBLIC SERVICE COMPANY,
By KARL GOLDSMITH,
Its Attorney, Pierre, S. Dak.

Document entitled "Reasons for Making Rate Schedule Effective on a Prior Date" enclosed with the aforesaid letter of January 5, 1940 relating to the 1939 Interchange Capacity Agreement (included in Plaintiff's Exhibits 27 and 34).

This document is identical with the foregoing document except for the name of the Agreement therein referred to, the date thereof and the rate schedule number.

Letter dated January 18, 1940 from FPC to Martens & Goldsmith (included in Plaintiff's Exhibit 27).

This will acknowledge receipt of your letter of January 5, 1940, inclosing six copies each of the following:

Agreement dated July 1, 1939, between the Northwestern Public Service Company and the Dakota Public Service Company, whereby surplus and emergency energy are interchanged.

Agreement dated July 1, 1939, between the same companies, whereby reserve or spare generating capacity is interchanged.

Applications, pursuant to Sec. 35.3E of the Commission's Rules of Practice and Regulations, that July 1, 1939, be established as the effective date of each agreement.

The agreement dated July 1, 1939, whereby surplus and emergency energy are interchanged has been numbered:

Northwestern Public Service Company
Rate Schedule FPC No. 5-A
Effective date:
Filing date: January 10, 1940
(Cancels Rate Schedule FPC No. 3)

The agreement dated July 1, 1939, whereby reserve or spare generating capacity is interchanged has been numbered:

Northwestern Public Service Company
Rate Schedule FPC No. 5-B
Effective date:
Filing date: January 10, 1940
(Cancels Rate Schedule FPC No. 4)

The applications that July 1, 1939, be established as the effective date of each agreement will be referred to the Commission, and you will be notified as promptly as possible of the action taken.

It is noted that the plat, designated by the company as Exhibit A and referred to in Rate Schedule FPC No. 5-B,

has been omitted. Please file six copies of the plat designated as Exhibit A.

Since no service has been discontinued, it will not be necessary that you file, on behalf of the Northwestern Public Service Company, Notices of Cancellation for Rate Schedules FPC Nos. 3 and 4.

A copy of this letter is inclosed for transmission to the company.

The 1941 Agreement.

Letter dated February 2, 1942 from defendant to FPC (included in Plaintiff's Exhibits 32 and 34)

Enclosed herewith are six conformed copies of an interchange power agreement between Northwestern Public Service Company and Dakota Public Service Company.

This agreement was executed on January 28, 1942, to be effective as of July 1, 1941, and cancels and supersedes the Interchange Capacity Agreement dated July 1, 1939, identified as F. P. C. No. 5-B and the Interchange Energy Agreement dated July 1, 1939, identified as F. P. C. 5-A.

The enclosed agreement represents a simplified combination of the two agreements referred to above without material change in the formula for determining the charges. The new agreement has an added equitable provision which might become effective in the future if either party should desire to make comparatively heavy additions to its generating capacity.

While the monthly transmission line charge that Dakota Public Service Company pays to Northwestern Public Service Company has not been changed as to the amount of the monthly payment, the new agreement provides that a portion of the charge will be applied against the amortization of the existing investment and after the investment has been amortized the charge will be reduced to cover maintenance and depreciation on the interchange facilities.

We also wish to point out that while the new contract is effective July 1, 1941, the payments made prior to December 31, 1941 are exactly the same as would have been made under the two predecessor contracts, and that even if the new contract was not effective for 1942, nevertheless Exhibit "B" regulating payments during 1942 under the new contract would still be effective as an amendment to the old interchange capacity contract.

The enclosed copies of this contract are submitted for your approval jointly by the parties thereto.

Letter dated February 19, 1942 from FPC to defendant (included in Plaintiff's Exhibit 32).

This will acknowledge receipt of your letter of February 2, 1942 transmitting six copies of (1) an agreement dated July 1, 1941, between your company and the Dakota Public Service Company and (2) Exhibits A and B to the agreement.

This agreement has been tentatively designated:

Northwestern Public Service Company
Rate Schedule FPC No. 6

Your statement regarding the effective date of the rate schedule is noted. It appears that the appropriate effective date for the rate schedule is July 1, 1941. In connection therewith your attention is directed to Paragraph B of Section 35.3 of the Rules of Practice and Regulations under the Federal Power Act relative to filing of a request for an effective date prior to the date of filing of a proposed rate schedule. The request may be made in a letter.

It is noted that under the proposed agreement the demands will be measured over a 60-minute interval, and that such interval was used to determine the excess or deficiency in reserve capacity for the calendar year 1942. Please state the values of the the excess or deficiency in reserve capacity which would have resulted had a 30-minute demand inter-

val been used, as provided in the present agreement, instead of a 60-minute interval.

Please give the following information regarding your interconnection facilities with the Dakota Public Service Company, described on page one of the proposed agreement:

1. The year the facilities were constructed.

2. The original cost of the facilities.

3. The service lives and the depreciation rates used for the facilities.

Also please state the items, and the value of each item, which make up the transmission line charge of $1,666.66 per month for the period from January 1, 1936 through June 1950. Will this provision necessitate any retroactive payments by the Dakota Public Service Company? If the answer is yes, what period will such payment cover?

In paragraph 4 of your letter of February 2, 1942 you state that ". . . the new agreement provides that a portion of the charge will be applied against the amortization of the existing investment and after the investment has been amortized the charges will be reduced to cover maintenance and depreciation on the interchange facilities." Please state why you propose to collect depreciation charges after the investment in the facilities has been amortized.

It will be appreciated if your response on FPC Form No. 88, "Semi-Annual Statement of Interstate Transmission, Sale and Interchange of Electric Energy", for the period ended December 31, 1941 is forwarded to the Commission not later than your reply to this letter.

A filing date will be assigned to the proposed agreement upon receipt of the retroactive effective date application and the requested information.

An early response is requested.

Letter dated February 24, 1942 from defendant to FPC (included in Plaintiff's Exhibits 32 and 34).

In compliance with your request of February 19th, we are enclosing herewith a request in letter form for an effective date prior to the date of filing for the above rate schedule.

Following is the additional information requested:

1. We are not equipped to determine the 30-minute instantaneous maximum demand for the interconnected systems of Northwestern Public Service Company and Dakota Public Service Company and this is one of the considerations that prompted changing to a 60-minute period for the purpose of this rate schedule. In attempting to determine a 30-minute demand it was necessary to locate employees at each point of generation and interchange to take readings. It was not practical to have employees engaged on this work during the entire month that the maximum demand was likely to occur and we therefore tried to anticipate the day and the hours from previous experience. On the above basis we determined the 30-minute demand on December 22, 1941. On this basis the excess or deficiency in reserve capacity is as follows:

	Northwestern Public Service Company	Dakota Public Service Company	Total Interconnected System
Company Generating Capacities...	29,290 kw	13,955 kw	34,245 kw
Company System Maximum 30 Min. Demands	17,217 kw	12,903 kw	30,120 kw
Reserve Capacities	3,073 kw	1,052 kw	4,125 kw
Per Cent Reserve Capacity.....	17.84%	8.15%	13.695%
Required kw Capacity for 13.695% Reserve	19,575 kw	14,670 kw	34,245 kw
Excess or Deficiency of Reserve Capacity	715 kw	—(715 kw)	....

We wish to point out, however, that the maximum 60-minute demand occurred on December 15, 1941 and at that particular date and time we did not attempt to determine the 30-minute maximum demand.

All of our meters are read hourly and posted to plant log sheets and the 60-minute maximum demand can be accu-

rately determined from these records. It is impossible, however, at this time to ascertain what the 30-minute maximum demand might have been on December 15, 1941, which is the date that the 60-minute maximum demand occurred.

2. The connection facilities were placed in service in October, 1930.

3. Following is the original cost of these facilities:

62 miles 33 kv line from Highmore to Gettysburg, South Dakota	$109,856.76
28.5 miles 38 kv line Aberdeen to Ipswich, South Dakota	60,038.68
20 miles 38 kv line Aberdeen to Barnard, South Dakota	47,824.90
Substation facilities—Aberdeen, S. D.	60,479.48
Substation facilities—Gettysburg, S. D.	25,249.44
Total	$303,449.26

4. The above facilities were constructed by Northwestern Public Service Company and placed in operation in October, 1930 but no contract was entered into and no charge was made to Northern Power and Light Company until January 1, 1936, at which time the contract was entered into providing for a charge of $20,000 a year to Northern Power and Light Company. While this charge was intended to cover interest and depreciation, maintenance, taxes and operation of the interconnection facilities, the amount for each of these items was not specified.

On July 1, 1939 Northern Power and Light Company was merged into North Dakota Power & Light Company and the name of the surviving corporation was changed to Dakota Public Service Company, and at that time a new contract was entered into between Dakota Public Service Company and Northwestern Public Service Company. There were no important changes made in this contract.

In 1940 and 1941 plans were made calling for substantial additions to the systems generating capacity and at that

time it was realized by both parties that it was desirable to make some changes in the Interconnection Contract and in the Interchange Capacity Agreement. After a period of negotiation these two agreements were combined into the single agreement dated July 1, 1941. Under this new agreement the transmission line charge of $20,000 a year, or $1,666.66 per month, remains the same, however a part of this charge is applied against the amortization of the principal on the following basis.

Northwestern Public Service Company made the entire investment of $303,449.26, and it is assumed that one-half of this amount, or $151,724.63 is chargeable to Dakota Public Service Company.

Operation, maintenance and taxes are calculated at the rate of 3½% per year and interest is calculated at the rate of 5% per annum on the unpaid balance. The balance of $1,666.66 monthly charge is applied against the amortization of the principal and on this basis the principal is entirely amortized in July, 1950, and after that date the monthly charge will be reduced to $442.53, which covers only the operation and maintenance at the rate of 3½% of Dakota Public Service Company's share of the total investment.

This provision does not necessitate any retroactive payments by Dakota Public Service Company. In fact Dakota Public Service Company has not and will not be required to make any payments for the period that these interchange facilities were in existence prior to January 1, 1936.

In paragraph four of my letter of February 2nd the maintenance and operation charge was erroneously referred to as a maintenance and depreciation charge. This charge is for operation and maintenance and does not include anything for depreciation.

From Dakota Public Service Company's standpoint this contract is much more desirable than the original contract as a termination date is provided for the payment of interest without any increase in the monthly charge.

Document entitled "Reasons for Making Rate Schedule Effective on a Prior Date" enclosed with the aforesaid letter of February 24, 1942 (included in Plaintiff's Exhibits 32 and 34).

Reasons for Making Rate Schedule Effective on a Prior Date.

Federal Power Commission
Washington, D. C.

Northwestern Public Service Company, in accordance with Section 35.3E of your rules and regulations, hereby requests that an order be entered providing that the hereto referred Interchange Power Agreement, dated July 1, 1941 and tentatively designated as Northwestern Public Service Company Rate Schedule FPC No. 6 be filed so such rate will be effective as of July 1, 1941, and as grounds for such order represents and shows:

That the Interchange Power Agreement dated July 1, 1941, heretofore filed with your Commission and tentatively designated as Northwestern Public Service Company Rate Schedule FPC No. 6, is a combination of the Interchange Capacity Agreement between Northwestern Public Service Company and Dakota Public Service Company dated July 1, 1939, identified as FPC No. 5-B and the Interchange Energy Agreement between Northwestern Public Service Company and Dakota Public Service Company dated July 1, 1939, identified as FPC No. 5-A. That the rates provided in the Interchange Energy Agreement and the Interchange Capacity Agreement above designated FPC No. 5-A and FPC No. 5-B, respectively, are the same as those provided in the Interchange Power Agreement above referred to and tentatively designated Northwestern Public Service Company Rate Schedule FPC No. 6. That the Interchange Power Agreement dated July 1, 1941, tentatively designated Northwestern Public Service Company Rate Schedule FPC No. 6 was made for the purpose of combining the terms of the Interchange Energy Agreement and the Interchange Capacity Agreement, designated as FPC No. 5-A and FPC No. 5-B, respectively, into one contract, and to determine the amount of Dakota Public Service Company's

share of the cost of the interconnection facilities and the cost of the maintenance thereof, and to provide for amortized payments thereof.

That the Interchange Power Agreement dated July 1, 1941 was not filed prior to the effective date of the rates therein provided for the reason that, although the essentials and the terms of the agreement were agreed upon by the parties by July 1, 1941, the final form and wording of the agreement was not completed until January 28, 1942.

Wherefore, the undersigned respectfully requests that an order be entered providing that the Interchange Power Agreement dated July 1, 1941, tentatively designated Northwestern Public Service Company Rate Schedule FPC No. 6 be filed, effective as of July 1, 1941.

Respectfully submitted,

NORTHWESTERN PUBLIC SERVICE COMPANY,

C. L. SANDSTEDT,
Vice President and Treasurer.

Dated February 25, 1942.

Letter dated March 19, 1942 from FPC to defendant (included in Plaintiff's Exhibit 32).

This will acknowledge receipt of your letter of February 24, 1942 containing further data relative to a proposed interchange agreement between Northwestern Public Service Company and Dakota Public Service Company tentatively designated Northwestern Public Service Company Rate Schedule FPC No. 6.

Your remarks regarding demands and interconnection facilities are noted.

Your request for an effective date of July 1, 1941 will be referred to the Commission and you will be notified of the action taken.

Letter dated March 18, 1942 from the Secretary of FPC to Dakota Public Service Company.

"Gentlemen: The Northwestern Public Service Company has forwarded to the Commission in a letter dated February 2, 1942, an interchange agreement dated July 1, 1941, with your company.

This agreement has been tentatively designated Northwestern Public Service Company Rate Schedule FPC No. 6.

In accordance with Section 35.3A of the Rule of Practice and Regulations of the Federal Power Commission, please file six copies or a certificate of concurrence in the proposed agreement, or six copies of the agreement.

Your early reply will be appreciated.

Very truly yours,

LEON M. FUQUAY,
Secretary."

Letter dated March 24, 1942 from C. L. Sandstedt, Vice President and Treasurer, Dakota Public Service Company, to FPC which witness Fuquay testified was received by the Commission with the enclosures on March 27, 1942.

"In accordance with your letter of March 18, we are enclosing herewith six copies of a certificate of concurrence in connection with Northwestern Public Service Company's rate schedule FPC No. 6.

Yours very truly,"

Certificate of concurrence by Dakota Public Service Company (Plaintiff's Exhibit 33).

Montana-Dakota Utilities Company
(Formerly: Dakota Pub. Serv. Co., FPC No. 4)
Rate Schedule FPC No. 3
Filing Date: March 24, 1942
Effect. Date: July 1, 1941

Concurrence in
Northwestern Public Service Company,
Rate Schedule FPC No. 6.

Certificate of Concurrence.

This is to certify that Dakota Public Service Company [assets] to and concurs in the rate schedule described below, which Northwestern Public Service Company filed, and hereby files this Certificate of Concurrence in lieu of the filing of the rate schedule specified.

Northwestern Public Service Company Rate Schedule F. P. C. No. 6, being an Interchange Power Agreement dated July 1, 1941, between Dakota Public Service Company and Northwestern Public Service Company.

Dated March 24, 1942.

DAKOTA PUBLIC SERVICE COMPANY,
By C. L. SANDSTEDT,
Vice President.

(Corporate Seal)

Minutes and orders of the FPC relating to the 1941 agreement (included in Plaintiff's Exhibit 50) are as follows:

12532

Minutes of the One Thousand Two Hundred and Ninety-ninth Meeting.

The Commission convened at 10:00 a. m. on March 31, 1942.

Present: Chairman Olds, Commissioners Draper, Manly, Scott and Seavey.

• • • • •

12534

—3—

* * * * *

Action was taken, as set forth in the documents appended hereto, in the following matters:

* * * * *

(8) Northwestern Public Service Company

(Order allowing rate schedule to take effect)

12535

—4—

* * * * *

Thereupon, the Commission adjourned.

LELAND OLDS,
Chairman.

Attest: (Seal)

LEON M. FUQUAY,
Secretary.

12546

United States of America
Federal Power Commission

Commissioners) Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

March 31, 1942.

In the Matter of
Northwestern Public Service Company

Order Allowing Rate Schedule to Take Effect.

Upon consideration by the Commission of application filed by Northwestern Public Service Company, requesting that Northwestern Public Service Company Rate Schedule FPC No. 6, providing for the interchange of electric energy with Dakota Public Service Company, be allowed to take effect as of July 1, 1941;

It is ordered that:

(A) The aforesaid rate schedule be and it is hereby allowed to take effect as of July 1, 1941;

(B) The aforesaid rate schedule shall be deemed to have been filed and published in compliance with the Federal Power Act;

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein;

(D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, by or against the applicant.

By the Commission.

LEON M. FUQUAY,
Secretary.

Plaintiff's Exhibit 31 is as follows:

SUPPLEMENT TO

CANCELLED

INTERCHANGE CAPACITY AGREEMENT

EXHIBIT "B"

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Rating of Generating Stations determined as of December 31, 1938:

NORTHWESTERN PUBLIC SERVICE COMPANY		
	Aberdeen Station	6,250 K.W.
	Webster "	760 "
	Redfield "	900 "
	Faulkton "	110 "
	Huron "	1,130 "
	Highmore "	140 "
	Mitchell "	7,500 "
	Armour "	980 "
	Yankton "	1,540 "
		19,310 K.W.
DAKOTA PUBLIC SERVICE COMPANY		
	Duluth Station	6,000 K.W.
	Bismarck "	2,250 "
	Dickinson "	700 "
	Mott "	230 "
	Mobridge "	1,000 "
	Hillendale "	400 "
	Lemmon "	235 "
	Gettysburg "	140 "
		10,955 K.W.
	Total All Companies	30,265 K.W.

These ratings were determined and agreed to by the Committee on Operations and will apply for the contract term beginning July 1, 1939 and ending December 31, 1939.

Signed this July 1, 1939.

NORTHWESTERN PUBLIC SERVICE COMPANY

By _____

DAKOTA PUBLIC SERVICE COMPANY

By _____

SUPPLEMENT TO

INTERCHANGE CAPACITY AGREEMENT — EXHIBIT "C"

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

The Company System Maximum demands as listed below were established on December 20, 1938, by multiplying by two the net total output in kilowatt hours during the half hour from 5:30 P.M. to 6 P.M.

NORTHWESTERN PUBLIC SERVICE COMPANY	15,150 K.W.
DAKOTA PUBLIC SERVICE COMPANY	10,414 K.W.
TOTAL	25,564 K.W.

These Company System Maximum Demands were determined and agreed to by the Committee on Operations and will apply for the contract term beginning July 1, 1939, and ending December 31, 1939.

Signed this 1st Day of July, 1939.

NORTHWESTERN PUBLIC SERVICE COMPANY

By _____

DAKOTA PUBLIC SERVICE COMPANY

By _____

SUPPLEMENT TO

INTERCHANGE CAPACITY AGREEMENT EXHIBIT "D"

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Summary for determination of firm capacity and demand charges:

	NORTHWESTERN PUBLIC SERVICE COMPANY	DAKOTA PUBLIC SERVICE COMPANY	TOTAL INTER-CONNECTED SYSTEM
Company Generating Capacities	19,310 K.W.	10,955 K.W.	30,265 K.W.
Company System Maximum Demands	15,150 K.W.	10,414 K.W.	25,564 K.W.
Reserve Capacity	4,160 K.W.	541 K.W.	4,701 K.W.
Per Cent Reserve Capacity	27.46 %	5.2%	18.39%
Required K.W. Capacity for 18.39% Reserve	17,936 K.W.	12,329 K.W.	30,265 K.W.
Excess or Deficiency of Reserve Capacity	1,374 K.W.	- 1,374 K.W.	-
Demand Charge @ $13.20 per kilowatt of deficiency of reserve capacity for the contract term beginning Jan. 1, 1939 and ending Dec. 1, 1939, Dakota Public Service Company		$18,136.80	
Demand Charge Apportioned to Supplying Company (N.W.P.S.Co.)	$18,136.80		

These computations were determined and agreed to by the Committee on Operations and will apply for the contract term beginning July 1, 1939 and ending December 31, 1939.

Signed this 1st day of July, 1939.

NORTHWESTERN PUBLIC SERVICE COMPANY

By _____

DAKOTA PUBLIC SERVICE COMPANY

By _____

51

1-V 39

Plaintiff's Exhibit 31.

305

SEE
NOS
RAT

Northwestern Public Service Company
Exhibit B
to
Rate Schedule FPC No. 9-B
(Supersedes Company Exhibits "B", "C" and "D")

EXHIBIT "B"

SUPPLEMENT TO

INTERCHANGE CAPACITY AGREEMENT

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

FEDERAL POWER COMMISSION RECEIVED

Rating of Generating Stations determined as of December 31, 1939:

NORTHWESTERN PUBLIC SERVICE COMPANY

Aberdeen Station		6,250 K.W.
Webster	"	760 "
Redfield	"	900 "
Faulkton	"	110 "
Huron	"	1,130 "
Highmore	"	140 "
Mitchell	"	7,500 "
Armour	"	980 "
Yankton	"	1,540 "
		19,310 K.W.

DAKOTA PUBLIC SERVICE COMPANY

Beulah Station		6,000 K.W.
Bismarck	"	2,250 "
Dickinson	"	700 "
Mott	"	230 "
Motridge	"	1,000 "
Ellendale	"	400 "
Lemmon	"	235 "
Gettysburg	"	140 "
		10,955 K.W.

Total All Companies 30,265 K.W.

These ratings were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1940 and ending December 31, 1940.

Signed this January 1, 1940.

NORTHWESTERN PUBLIC SERVICE COMPANY

By _____

DAKOTA PUBLIC SERVICE COMPANY

By _____

Plaintiff's Exhibit 31.

307

EXHIBIT "C"

SUPPLEMENT TO

INTERCHANGE CAPACITY AGREEMENT CANCELLED

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

The Company System Maximum demands as listed below were established on December 19, 1939, by multiplying by two the net total output in kilowatt hours during the half hour from 5:30 P.M. to 6 P.M.

NORTHWESTERN PUBLIC SERVICE COMPANY	16,269 K.W.
DAKOTA PUBLIC SERVICE COMPANY	11,451 K.W.
TOTAL	27,720 K.W.

These Company System Maximum Demands were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1940 and ending December 31, 1940.

Signed this 1st day of January, 1940.

NORTHWESTERN PUBLIC SERVICE COMPANY

By _____

DAKOTA PUBLIC SERVICE COMPANY

By _____

Plaintiff's Exhibit 31.

EXHIBIT "D"

SUPPLEMENT NO

INTERCHANGE CAPACITY AGREEMENT

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Summary for determination of firm capacity and demand charge:

	NORTHWESTERN PUBLIC SERVICE COMPANY	DAKOTA PUBLIC SERVICE COMPANY	TOTAL INTER-CONNECTED SYSTEM
Company Generating Capacities	19,310 K.W.	10,955 K.W.	30,265 K.W.
Company System Maximum 30 Min. Demands	16,269 K.W.	11,451 K.W.	27,720 K.W.
Reserve Capacities	3,041 K.W.	-496 K.W.	2,545 K.W.
Per Cent Reserve Capacity	18.6%	-4.3%	9.18%
Required K.W. Capacity for 9.18% Reserve	17,762 K.W.	12,503 K.W.	30,265 K.W.
Excess or Deficiency of Reserve Capacity	1,548 K.W.	-1,548 K.W.	--
Demand Charge @ $13.20 per kilowatt of deficiency of reserve capacity for the contract term beginning Jan. 1, 1940 and ending Dec. 31, 1940, Dakota Public Service Company		$20,433.60	
Demand Charge apportioned to Supplying Company (N.W.P.S. Co.)	$20,433.60		

These computations were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1940 and ending December 31, 1940.

Signed this 1st day of January, 1940.

NORTHWESTERN PUBLIC SERVICE COMPANY

By _____

DAKOTA PUBLIC SERVICE COMPANY

By _____

164 88

Plaintiff's Exhibit 31.

Northwestern Public Service Company
Exhibit F
to
Rate Schedule FPC No. 5-B
(Supersedes Company Exhibits B and D
of Commission Exhibit E)

SUPPLEMENT TO EXHIBIT "B"

INTERCHANGE CAPACITY AGREEMENT

CANCELLED

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Rating of Generating Stations determined as of August 31, 1940:

NORTHWESTERN PUBLIC SERVICE COMPANY

Aberdeen Station	6,250 K.W.
Webster "	760 "
Redfield "	900 "
Faulkton "	110 "
Huron "	1,130 "
Highmore "	140 "
Mitchell "	7,500 "
Armour "	980 "
Yankton "	1,540 "
	19,310 K.W.

DAKOTA PUBLIC SERVICE COMPANY

Beulah Station	6,000 K.W.
Bismarck "	5,250 "
Dickinson "	700 "
Mott "	230 "
Mobridge "	1,000 "
Ellendale "	400 "
Lemmon "	235 "
Gettysburg"	140 "
	13,955 K.W.

FEDERAL POWER COMMISSION RECEIVED SEP - 9 1940

Total All Companies 33,265 K.W.

These ratings were determined and agreed to by the Committee on Operations and will apply for the contract term beginning September 1, 1940 and ending December 31, 1940.

Signed this 1st day of September, 1940.

NORTHWESTERN PUBLIC SERVICE COMPANY

By O. C. STOKES

DAKOTA PUBLIC SERVICE COMPANY

By J. W. CHESIRE

Plaintiff's Exhibit 31.

SUPPLEMENT TO EXHIBIT "D"

INTERCHANGE CAPACITY AGREEMENT

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Summary for determination of firm capacity and demand charge:

	Northwestern Public Service Company	Dakota Public Service Company	Total Inter-Connected System
Company Generating Capacities	19,310 K.W.	13,955 K.W.	33,265 K.W.
Company System Maximum 30 Min. Demands	16,269 K.W.	11,451 K.W.	27,720 K.W.
Reserve Capacities	3,041 K.W.	2,504 K.W.	5,545 K.W.
Per Cent Reserve Capacity	18.692%	21.867%	20.004%
Required K.W. Capacity for 20% Reserve	19,523 K.W	13,742 K.W.	33,265 K.W.
Excess or Deficiency of Reserve Capacity	-213 K.W.	213 K.W.	--
Demand Charge @ $13.20 per kilowatt of deficiency of reserve capacity for the contract term beginning September 1, 1940 and ending December 31, 1940, Northwestern Public Service Company	$2,811.60		
Demand Charge apportioned to Supplying Company (D.P.S.Co.)		$2,811.60	

FEDERAL POWER COMMISSION
RECEIVED
SEP - 9 1940

These computations were determined and agreed to by the Committee on Operations and will apply for the contract term beginning September 1, 1940 and ending December 31, 1940.

Signed this 1st day of September, 1940.

NORTHWESTERN PUBLIC SERVICE COMPANY

By O. C. STOKES

DAKOTA PUBLIC SERVICE COMPANY

By J. W. CHESIRE

Exhibit
to
Rate Schedule FPC No. 5-B
(Supersedes Company Exhibit C of
Commission Exhibit E; also
Commission Exhibit F)

SUPPLEMENT TO

INTERCHANGE CAPACITY AGREEMENT

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Rating of Generating Stations determined as of December 31, 1940:

NORTHWESTERN PUBLIC SERVICE COMPANY

Aberdeen Station	6,250 K.W.
Webster "	760 K.W.
Redfield "	900 K.W.
Faulkton "	110 K.W.
Huron "	1,130 K.W.
Highmore "	140 K.W.
Mitchell "	7,500 K.W.
Armour "	980 K.W.
Yankton "	2,520 K.W.
	29,290 K.W.

DAKOTA PUBLIC SERVICE COMPANY

Beulah Station	6,000 K.W.
Bismarck "	5,250 K.W.
Dickinson "	700 K.W.
Mott "	230 K.W.
Mobridge "	1,000 K.W.
Kilendale "	400 K.W.
Lemmon "	235 K.W.
Gettysburg "	140 K.W.
	13,955 K.W.

Total All Companies 34,245 K.W.



These ratings were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1941 and ending December 31, 1941.

Signed this 1st day of January, 1941.

NORTHWESTERN PUBLIC SERVICE COMPANY

By O. C. STOKES

DAKOTA PUBLIC SERVICE COMPANY

By J. W. CHESIRE

Plaintiff's Exhibit 31.

SUPPLEMENT TO EXHIBIT "C"

INTERCHANGE CAPACITY AGREEMENT

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

The Company System Maximum demands as listed below were established on December 18, 1940, by multiplying by two the net total output in kilowatt hours during the half hour from 5:30 P.M. to 6 P.M.

NORTHWESTERN PUBLIC SERVICE COMPANY	16,681 K.W.
DAKOTA PUBLIC SERVICE COMPANY	11,930 K.W.
TOTAL	28,611 K.W.

These Company System Maximum Demands were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1941 and ending December 31, 1941.

Signed this 1st day of January, 1941.

NORTHWESTERN PUBLIC SERVICE COMPANY

By O. C. STOKKE

DAKOTA PUBLIC SERVICE COMPANY

By J. W. CHESIRE

RECEIVED
DIVISION OF

Plaintiff's Exhibit 31.

SUPPLEMENT TO EXHIBIT "D"

INTERCHANGE CAPACITY AGREEMENT

NORTHWESTERN PUBLIC SERVICE COMPANY
DAKOTA PUBLIC SERVICE COMPANY

Summary for determination of firm capacity and demand charge:

	NORTHWESTERN PUBLIC SERVICE COMPANY	DAKOTA PUBLIC SERVICE COMPANY	TOTAL INTERCONNECTED SYSTEM
Company Generating Capacities	20,290 K.W.	13,955 K.W.	34,245 K.W.
Company System Maximum 30 Min. Demands	16,681 K.W.	11,930 K.W.	28,611 K.W.
Reserve Capacities	3,609 K.W.	2,025 K.W.	5,634 K.W.
Per Cent Reserve Capacity	21.63%	16.97%	19.692%
Required K.W. Capacity for 19.692% Reserve	19,966 K.W.	14,279 K.W.	34,245 K.W.
Excess or Deficiency of Reserve Capacity	324 K.W.	—324 K.W.	—
Demand Charge @ $13.20 per kilowatt of deficiency of reserve capacity for the contract term beginning January 1, 1941 and ending December 31, 1941, Dakota Public Service Company		$4,276.80	
Demand Charge apportioned to Supplying Company (N.W.P.S. Co.)	$4,276.80		

These computations were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1941 and ending December 31, 1941.

Signed this 1st day of January, 1941.

NORTHWESTERN PUBLIC SERVICE COMPANY

By O. C. STOKKE

DAKOTA PUBLIC SERVICE COMPANY

By J. W. CHESIRE

Plaintiff's Exhibit 31.

Plaintiff's Exhibit 34 is the same as Plaintiff's Exhibit FPC No. 14, and Plaintiff's Exhibit 34 contains only documents hereinbefore printed except for some formal letters transmitted, having nothing to do with Defendant's Rate Schedule No. 6.

Plaintiff's Exhibit 35 contains the 1941 contract and Exhibit A thereto, and the 1943 amendment, all of which are printed above as Exhibit F to the complaint (R. p. 87, supra).

Plaintiff's Exhibit 35 includes also six (6) sheets of supplements to interchange capacity agreement and notice of cancellation and attached letter of February 27, 1946, all of which are printed above as part of Plaintiff's Exhibit 22 (R. p. 249, supra).

Plaintiff's Exhibits 38, 39, 40 and 41, consisting of certified copies of applications filed with FPC by certain individuals for authorization under Section 305 (b) of Part III, Title II of "Public Utility Act of 1935" are as follows:

Plaintiff's Exhibit 38 reads as follows:

(Plaintiff's Exhibit 38.)

Federal Power Commission
Oct. 25, 1935
Received

Northwestern
Public Service Company
385 North Pine St.
Grand Island, Nebraska

Office
of the
President

October 23, 1935.

Federal Power Commission,
Washington,
D. C.

Gentlemen:

Attached herewith application for authorization under Section 305 (b) of Part III, Title II, of the "Public Utility Act of 1935".

Sincerely,

FEK:vlb
encl (3)

FRANK E. KRUESI.

Federal Power Commission
Oct. 25, 1935
Received
Docketed: 12/6/35
Secretary's Office RDH

Before the Federal Power Commission.

Application for Authorization under Section 305 (b) of Part III, Title II, of the "Public Utility Act of 1935". } Docket No.....

The undersigned, Frank E. Kruesi, files this application and respectfully states that:

I. The full name, occupation, business address, place of residence and post office address of the applicant are as follows:

(a) Full name—Frank E. Kruesi.

(b) Occupation—Public utility executive .

(c) Business address—385 No. Pine Street, Grand Island, Nebraska.

(d) Place of Residence—1804 West Division St., Grand Island, Nebraska.

(e) Post Office Address—Grand Island, Nebraska.

II. The name and address of every public utility and of every bank, trust company, banking association or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility and of any company supplying electrical equipment to such public utility, of which applicant holds stock, bonds, or notes, individually, as trustee, or otherwise, and the amount of the securities owned or held by him, are as follows:

(a) Northwestern Public Service Company (an electric and gas utility) National Bank of Huron Building, Huron, South Dakota, of which the applicant owns or holds the following securities:

(1) One (1) share without par value of Common Stock. These securities stand of record in the name of the applicant as nominee of North West Utilities Company of 20 North Wacker Drive, Chicago, Illinois, which is the beneficial owner thereof.

(b) North Dakota Power and Light Company (an electric and steam heat utility), National Bank of Huron Building, Huron, South Dakota, of which applicant owns or holds no securities.

(c) Northern Power and Light Company (an electric and steam heat utility), National Bank of Huron Building, Huron, South Dakota, of which applicant owns or holds no securities.

III. Each and every position held with any public utility, bank, trust company, banking association or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or any company supplying electrical equipment to such public utility, which is now held by applicant and which he seeks authority to hold; the date and manner of his election thereto;

the nature of the duties performed; and the date when he first entered upon their performance, are as follows:

(a) President and Director of Northwestern Public Service Company.

(b) President and Director of North Dakota Power and Light Company.

(c) President and Director of Northern Power and Light Company.

Applicant was elected a Director of Northwestern Public Service Company by vote of the stockholders at a meeting held April 16, 1935, and was elected President of said Company on April 30, 1935, by vote of the Board of Directors. Applicant was elected a Director of North Dakota Power and Light Company by vote of the stockholders at a meeting held April 16, 1935, and was elected President of said Company on April 30, 1935 by vote of the Board of Directors. Applicant was elected Director of Northern Power and Light Company by vote of the stockholders at a meeting held April 16, 1935, and was elected President of said Company on April 30, 1935, by vote of the Board of Directors.

Applicant was first elected a Director of Northwestern Public Service Company on January 30, 1928, and as President of said Company on June 15, 1933, and since said respective dates has continuously been re-elected and served as an officer and director of said Company. Applicant was first elected a Director and President of North Dakota Power & Light Company on June 15, 1933, and has been annually re-elected and has served continuously as President and Director of said Company since that date. Applicant was first elected a Director and President of Northern Power and Light Company on June 15. 1933 and has been annually re-elected and has served continuously as President and Director of said Company since that date.

IV. The relationship existing between all the corporations hereinbefore named in this application is as follows:

Northwestern Public Service Company is controlled through ownership of common stock by North West Utilities Company which is controlled by Middle West Utilities Company. North Dakota Power and Light

Company and Northern Power and Light Company are subsidiaries of United Public Utilities Corporation, in which Middle West Utilities Company has a substantial stock interest, at present non voting. The three operating companies mentioned in subdivision three maintain a single organization to take care of general accounting, billing and executive administration of the three companies, prorating the expense on the basis of their respective gross earnings.

V. Every business corporation (industrial, financial or otherwise) of which applicant is an officer or director, trustee, receiver, attorney or agent, and every public utility, bank, trust company, banking association or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility and every company supplying electrical equipment to a public utility in which applicant has a financial interest, and the general character of the business conducted by such corporation, are as follows:

(a) Applicant is an officer and/or director of the following business or industrial, et cetera, corporations:

(1) Knife River Coal Mining Company, Beulah, North Dakota—President and Director. This Company operates a lignite mine at Beulah, North Dakota.

(2) Central Power Company, Grand Island, Nebraska—President and Director. There is one share of $100 par value in the name of applicant as nominee of Middle West Utilities Company, Chicago, Illinois, which is the beneficial owner thereof.

(b) Applicant has no financial interest in any public utility, or in any bank, trust company, banking association or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility or any company supplying electrical equipment to a public utility, *other* than as reported Paragraph II hereof.

VI. Since January 1, 1935, the applicant has not received for his own benefit, directly or indirectly, any money or

thing of value in respect of the negotiation, hypothecation or sale of any securities issued by a public utility, nor has he shared in any of the proceeds thereof.

VII. The granting of the authority sought will not affect adversely either public or private interests for the following reasons:

While the character of the business of the said companies named in this application is substantially the same, that is, that of an electric utility and/or gas utility and/or steam heat utility, and the companies operate in contiguous territory the business of the companies is not competitive as none of the companies operate in the same territory served by another of the companies. The companies are all comparatively small and applicant is familiar with the properties and operations of each Company and his salary as an officer is spread over all companies, thereby effecting an economy to each. There are no matters, of which the applicant is aware, in which the interests of the said companies conflict.

VIII. No other application for similar authority has been made by the applicant.

The term "public utility", is used in this application as that term is defined in Section 201, Title II, of the Public Utility Act of 1935. In submitting this application, the applicant stipulates that the filing thereof shall not be construed as an admission of the legality or constitutionality of said Act or any part thereof or as a waiver of any legal or constitutional rights or as an admission on the part of applicant that any corporation referred to herein as a public utility is subject to any of the provisions of said Act.

FRANK E. KRUESI,
Signature of Applicant.

State of Nebraska }
County of Hall } ss.

I, Frank E. Kruesi, make oath and say that I hold no position as officer or director of any public utility or other business corporation except as indicated in the foregoing application, and that all of the statements contained

therein are [are] true and correct to the best of my knowledge and belief.

FRANK E. KRUESI.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 23rd day of October, 1935.

VERA L. BAUMAN,
(Seal) Notary Public.

My commission expires February 17, 1939.

Plaintiff's Exhibit 39 consists of the application of C. J. Strike, verified October 21, 1935, for authority to hold the positions of vice president and director of defendant, North Dakota Power & Light Company and Northern Power & Light Company, and contains similar information to that set forth in Plaintiff's Exhibit 38 and paragraphs IV, VI, VII and VIII of Exhibit 39 are identical with paragraphs IV, VI, VII and VIII of Exhibit 38.

Plaintiff's Exhibit 40 consists of the application of C. L. Sandstedt, verified on October 21, 1935, for authority to hold the positions of secretary, treasurer and director of defendant, North Dakota Power & Light Company and Northern Power & Light Company, and contains similar information to that set forth in Plaintiff's Exhibit 38, and paragraphs IV, VI, VII and VIII of Exhibit 40 are identical with paragraphs IV, VI, VII and VIII of Exhibit 38.

Plaintiff's Exhibit 41 consists of the application of J. F. Buckmier, verified on October 21, 1935, for authority to hold the positions of auditor and director of defendant and the position of auditor of North Dakota Power & Light Company and Northern Power & Light Company, and contains similar information to that set forth in Plaintiff's Exhibit 38, and paragraphs VI, VII and VIII of Exhibit 41 are identical with paragraphs VI, VII and VIII of Exhibit 38.

Plaintiff's Exhibits 42, 43, 44 and 45, consisting of applications for authority to hold interlocking positions, filed with FPC by certain individuals, are as follows:

Plaintiff's Exhibit 44 consists of the application of A. B. Sanborn, verified December 27, 1938, for authority to hold interlocking positions as president and director of defendant, Northern Power & Light Company and North Dakota Power & Light Company. This exhibit consists of 34 pages and one exhibit, and contains the same kind of information set forth in Plaintiff's Exhibit 38 in greater detail and with some additions thereto, including the following:

B. List of positions within the purview of Sec. 305 (b) of the act for which authorization is sought:

Position	Name of Corporation	Classification: ((1) Public utility, (2) Authorized by law to underwrite, (3) Supplying electrical equipment)
Director and President	Northwestern Public Service Company	(1) Public utility
Director and President	Northern Power and Light Company	(1) Public utility
Director and President	North Dakota Power and Light Company	(1) Public utility

Northwestern Public Service Company, Northern Power and Light Company, North Dakota Power and Light Company and Knife River Coal Mining Company (see subsection G) jointly maintain a central office in the City of Huron, South Dakota, with an executive staff and a central organization to carry on the business of the respective companies. All joint expenses, including salaries, rent, telephone and telegraph, traveling expenses, stationery, printing and office supplies, etc. (except the salaries and expenses of the engineering department, commercial department, central billing department and load dispatchers which are allocated monthly between the three named public utility companies in the same ratio that the gross operating revenues of each public utility company for the preceding calendar month bears to the combined gross operating revenues of said companies for said preceding calendar month) are allocated monthly to the four companies in the same ratio that the gross operating revenues of each of the four companies for the calendar month bears to the combined gross operating revenues of said four companies for said preceding calendar month.

C. Data as to positions with each public utility mentioned in subsection B of this Sec. 45.8:

(1) Name of public utility, state and date of incorporation (if any), and address of principal place of business:

Ans. Northwestern Public Service Company, incorporated on or about November 27, 1923, under the laws of the State of Delaware, and the address of its principal place of business is National Bank of Huron Building, Huron, South Dakota.

(2) States in which public utility is doing business or is qualified to do business:

Ans. Northwestern Public Service Company is qualified to do business and is doing business in the States of South Dakota and Nebraska.

(3) Description of the facilities owned or operated by the public utility for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce, and of the interconnection of such facilities with those of any other corporation:

Ans. Northwestern Public Service Company owns and operates, for the transmission of electric energy in interstate commerce, a 13,200 volt, three phase, wood pole distribution line from junction west of Springfield, S. D. to Niobrara, Nebraska; and a 2,300 volt, three phase, wood pole rural distribution line from Springfield, South Dakota, to Santee, Nebraska.

Northwestern Public Service Company also has facilities for the transmission of electric energy through 33,000 volt and 22,000 volt, three phase, wood pole transmission lines, interconnected with transmission lines of Northern Power and Light Company, at Gettysburg, Barnard and Ipswich, South Dakota. Northwestern Public Service Company also has facilities for the transmission of electric energy through a 33,000 volt, three phase, wood pole transmission line, interconnected with a transmission line of Central Power Company, at Central City, Nebraska. Northwestern Public Service Company also has interchange connections with Northern States Power Company near Ethan, South Dakota, and with the municipal system of Watertown, South Dakota.

Northwestern Public Service Company also sells electric energy to Elkhorn Valley Power Company near Creston,

Nebraska, by means of a 33,000 volt, three phase, wood pole transmission line; and to Central West Power Company near Woonsocket, South Dakota, by means of a 33,000 volt, three phase, wood pole transmission line. A map showing the location of the electric properties and facilities of Northwestern Public Service Company (and indicating all interconnections and the principal cities and areas served) is filed herewith as Exhibit A.

Ans. Since July 1, 1938, applicant has received from Northwestern Public Service Company, Northern Power and Light Company, North Dakota Power and Light Company and Knife River Coal Mining Company the sum of $1,000 per month and applicant expects to receive from said companies for the ensuing 12 months the sum of $12,000. The basis for the compensation received and to be received by applicant is for services rendered as President of said companies. Applicant's compensation for services to said companies is paid directly by Northwestern Public Service Company and is allocated to said companies on the basis of the arrangement described in subsection B, approximately as follows:

Northwestern Public Service Company	63.7%
Northern Power and Light Company	12.3%
North Dakota Power and Light Company	19.8%
Knife River Coal Mining Company	4.2%

(11) Name and address of principal place of business of any corporation which renders management, construction or other service to the public utility pursuant to contract or other continuing arrangement.

Ans. Middle West Service Company (a wholly owned subsidiary of The Middle West Corporation), 20 North Wacker Drive, Chicago, Illinois.

(2) States in which public utility is doing business or is qualified to do business:

Ans. Northern Power and Light Company is qualified to do business and is doing business in the States of North Dakota and South Dakota.

(3) Description of the facilities owned or operated by the public utility for the transmission of electric energy in interstate commerce or the sale of electric energy at

wholesale in interstate commerce, and of the interconnection of such facilities with those of any other corporation:

Ans. Northern Power and Light Company owns and operates, for the transmission of electric energy in interstate commerce, a 22,000 volt, three phase, wood pole transmission line from Ellendale, North Dakota, to Barnard, South Dakota; a 38,000 volt, three phase, wood pole transmission line from Wishek, North Dakota, to Bowdle, South Dakota; a 6,600 volt, three phase, wood pole distribution line from Hague, North Dakota, to Hague Substation, South Dakota; a 2,300 volt, three phase, wood pole distribution line from Zealand, North Dakota, to Artas, South Dakota; and a 13,200 volt, three phase, wood pole distribution line from Selfridge, North Dakota, to the junction of the McLaughlin-McIntosh 38,000 volt, three phase, wood pole transmission line near McLaughlin, South Dakota.

Northern Power and Light Company also has facilities for the transmission of electric energy through a 22,000 volt, three phase, wood pole transmission line interconnected with the transmission lines of Northwestern Public Service Company at Gettysburg, Barnard and Ipswich, South Dakota. Northern Power and Light Company also has facilities for the transmission of electric energy through a 38,000 volt, three phase, wood pole transmission line interconnected with the transmission line of North Dakota Power and Light Company at the North Dakota-South Dakota state line near Keldron, South Dakota and at Driscoll, North Dakota. A map showing the location of the electric properties and facilities of Northern Power and Light Company (and indicating all interconnections and the principal cities and areas served) is filed herewith as Exhibit A.

(3) Description of the facilities owned or operated by the public utility for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce, and of the interconnection of such facilities with those of any other corporation:

Ans. All of the facilities owned and operated by North Dakota Power and Light Company for the transmission of electric energy are located wholly within the State of North Dakota. The facilities of North Dakota Power and Light

Company are interconnected with the facilities of Northern Power and Light Company at Driscoll, North Dakota, and at the North Dakota-South Dakota state line near Keldron, South Dakota. A map showing the location of the electric properties and facilities of North Dakota Power and Light Company (and indicating the said interconnections and the principal cities and areas served) is filed herewith as Exhibit A.

(2) Any corporate, contractual, financial, or business relationship between any of the corporations listed in item (1) above and any of the public utilities listed in subsection B of this section 45.8.

Ans. Knife River Coal Mining Company, a wholly owned subsidiary of United Public Utilities Corporation, is engaged in the business of mining lignite coal near Beulah, North Dakota. During the calendar year 1937, Knife River Coal Mining Company sold 296,656 tons of coal, of which 49,834 tons were purchased by Northwestern Public Service Company for fuel for its electric generating plant at Aberdeen, South Dakota; 2,238 tons were purchased by Northern Power and Light Company for fuel for its electric generating plant at Ellendale, North Dakota; and 102,325 tons were purchased by North Dakota Power and Light Company for fuel for its electric generating plants at Beulah and Bismarck, North Dakota.

During the year 1937, North Dakota Power and Light Company sold steam to Knife River Coal Mining Company for use at its coal mine. See subsection B for the operating arrangement of the central organization at Huron, South Dakota, of Knife River Coal Mining Company, Northwestern Public Service Company, Northern Power and Light Company and North Dakota Power and Light Company.

H. Data as to the public utility holding company system.

(1) The name of the public utility holding company system of which each public utility listed in subsection B of Sec. 45.8 is a part.

Ans. Northwestern Public Service Company is a part of the public utility holding company system of North West Utilities Company, a subsidiary holding company of The Middle West Corporation, public utility holding company system.

Northern Power and Light Company and North Dakota Power and Light Company are a part of the public utility holding company system of United Public Utilities Corporation.

(2) The financial and corporate relationship existing between and among the corporations in the above holding company system, including the percentage of voting power represented by securities owned by the corporation preceding each corporation in the corporate structure of the system.

Ans. (A) The Middle West Corporation, parent of North West Utilities Company, at October 31, 1938, owned the following percentages of voting classes of securities of North West Utilities Company: (a) 100% of the outstanding Common Stock ($100 par value), (b) 33.23% of the outstanding Seven Per Cent Prior Lien Cumulative Preferred Stock ($100 par value), (c) 35.55% of the outstanding Seven Per Cent Cumulative Preferred Stock ($100 par value) and (d) 100% of the outstanding $6 Cumulative Preferred Stock (no par value), together constituting 82.36% of the total outstanding voting shares of all classes of said Company.

(B) North West Utilities Company, parent of Northwestern Public Service Company, at October 31, 1938, owned 100% of the outstanding Common Stock (without par value) of Northwestern Public Service Company, constituting 54.88% of the total outstanding voting shares of all classes of said Company.

(C) The Middle West Corporation at October 31, 1938, owned the following percentages of voting securities of the United Public Utilities Corporation: (a) 4.62% of the outstanding Class A Common Stock ($1 par value), which stock has been deposited under a voting trust agreement dated January 1, 1935, for a period of five years from said date, pursuant to a plan of reorganization of United Public Utilities Company, confirmed December 5, 1934, by the District Court of the United States for the Northern District of Illinois, Eastern Division, in proceedings for the reorganization of United Public Utilities Company pursuant to the provisions of Section 77 (B) of the Federal Bank-

ruptcy Act, as then amended, (b) 1.40% of the outstanding Cumulative Preferred Stock (no par value) $3 Dividend Series, and (c) 8.30% of the Cumulative Preferred Stock (no par value) $2.75 Dividend Series, together constituting 4.62% of the total outstanding shares of all classes of said Company presently voting.

At October 31, 1938, United Public Service Corporation (50.0063% of whose capital stock ($1 par value) is owned by The Middle West Corporation) owned 65.99% of the outstanding Class B Common Stock of United Public Utilities Corporation. At said date, The Middle West Corporation also owned 1.04% of said Class B Common Stock. At said date Class B Common Stock had no voting rights other than the exclusive right to elect one director of United Public Utilities Corporation.

(D) United Public Utilities Corporation at October 31, 1938, owned 100% of the total outstanding shares of all classes of Northern Power and Light Company and North Dakota Power and Light Company.

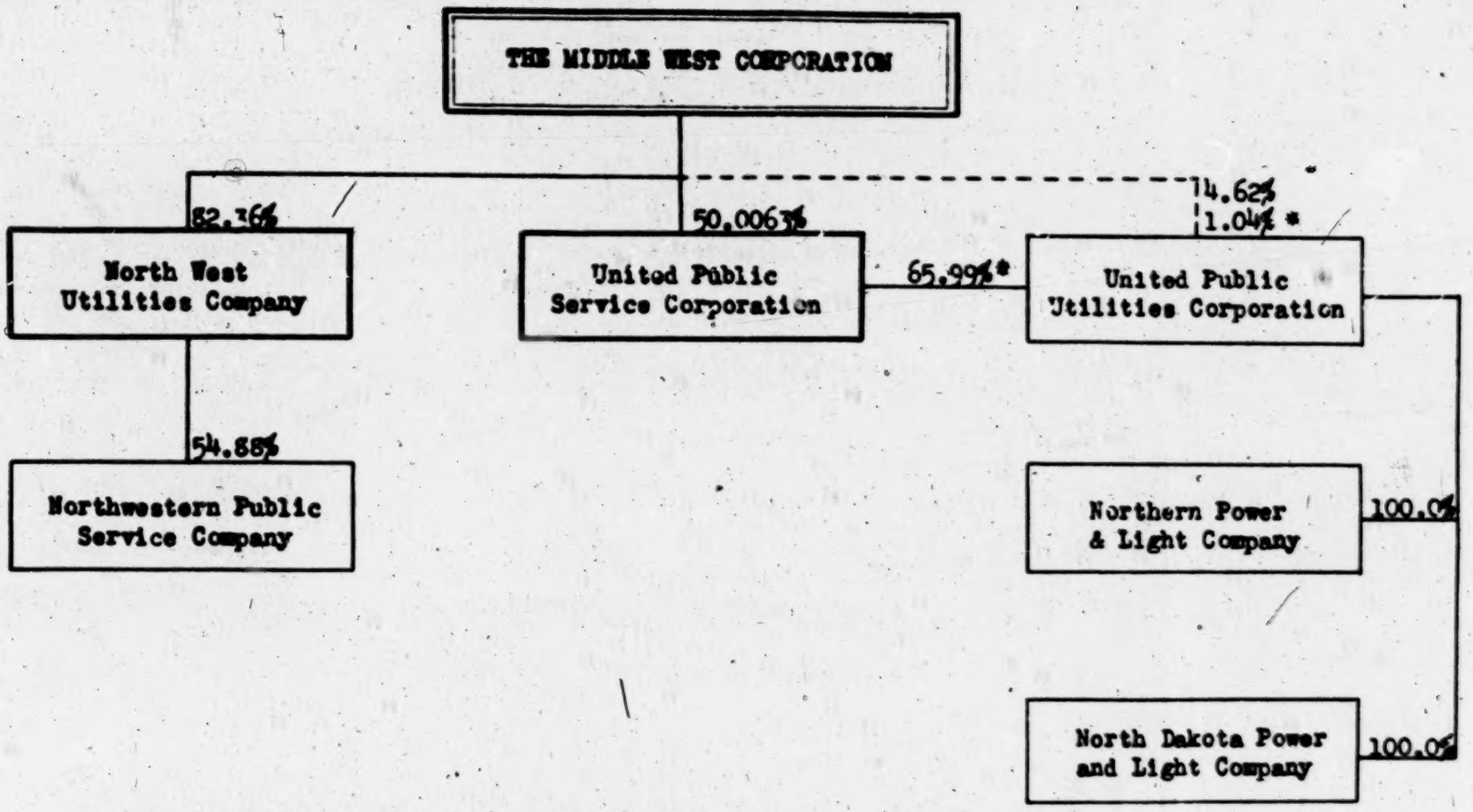
A chart indicating the financial and corporate relationship existing between said holding companies and said utility companies is filed herewith as Exhibit B.

(3) The name of each public utility holding company, listed in item (1) of this subsection H, which has registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Give date of registration.

Ans. North West Utilities Company registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 on December 1, 1935, File No. 30-44.

The Middle West Corporation registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 on December 1, 1935, File No. 30-48.

United Public Utilities Corporation registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 on November 30, 1935, File No. 30-7.



KEY -
Percentage indicates voting stock control
Broken line represents ownership of 50% or less of voting securities
* Class B common stock (voting power restricted to election of one director)

As of October 31, 1938

Exhibit B

Plaintiff's Exhibit 42 consists of the application by G. R. McArthur, verified January 7, 1939, for authority to hold the positions of vice president and director of defendant, Northern Power & Light Company and North Dakota Power & Light Company, and contains the same kind of information and data as that set out in Plaintiff's Exhibit 44.

Plaintiff's Exhibit 43 consists of the application by E. W. Dempewolf, verified January 12, 1939, for authority to hold the positions of assistant secretary and assistant treasurer of defendant, Northern Power & Light Company and North Dakota Power & Light Company, and contains the same kind of information and data as that set out in Plaintiff's Exhibit 44.

Plaintiff's Exhibit 45 consists of the application of William M. Dunn, verified October 3, 1944, for authority to hold the positions of treasurer and director of defendant and of Dakota Public Service Company, and contains the same kind of information and data as that set forth in Plaintiff's Exhibit 44 and also states in part as follows:

B. List of positions within the purview of Section 305 (b) of the act for which authorization is sought.

Position	Name of Corporation	Classification: (1) Public utility, (2) Authorized by law to underwrite, (3) Supplying electrical equipment
Treasurer and Director	Northwestern Public Service Company	(1) Public utility
Treasurer and Director	Dakota Public Service Company	(1) Public utility

(2) Any corporate, contractual, financial or business relationship between any of the corporations listed in item (1) above and any of the public utilities listed in subsection B of this section 45.8.

Knife River Coal Mining Company, a wholly owned subsidiary of United Public Utilities Corporation, a registered

public utility holding company, is engaged in the business of mining lignite coal near Beulah, North Dakota. During the calendar year 1943 Knife River Coal Mining Company sold 315,128 tons of coal, of which 46,479 tons were purchased by Northwestern for fuel for its electric generating plant at Aberdeen, South Dakota, and 133,872 tons were purchased by Dakota for fuel for its electric generating plants at Ellendale, Beulah, Bismarck and Mandan, North Dakota.

During the calendar year 1943 Dakota sold steam heat to Knife River Coal Mining Company for use at its coal mine. Reference is made to the answer to Item 10 of subsection C of this application for a statement of the operating arrangement of the central organization at Huron, South Dakota, of Knife River Coal Mining Company, Northwestern and Dakota.

H. Data as to the public utility holding company system.

(1) The name of the public utility holding company system of which each public utility listed in subsection B of Section 45.8 is a part.

Northwestern is a part of the public utility holding company system (as that term is defined in the Public Utility Holding Company Act of 1935) of North West Utilities Company and of The Middle West Corporation, registered holding companies.

Dakota is a part of the public utility holding company system of United Public Utilities Corporation, a registered holding company.

(2) The financial and corporate relationship existing between and among the corporations in the above holding company system, including the percentage of voting power represented by securities owned by the corporation preceding each corporation in the corporate structure of the system.

At August 31, 1944, North West Utilities Company owned all of the 52,150 outstanding shares without par value of the common stock of Northwestern, such shares constitut-

ing 100% of the total outstanding voting shares of all classes of stock of Northwestern.

At August 31, 1944, The Middle West Corporation owned the following securities of North West Utilities Company, together constituting 85.49% of the total outstanding voting shares of all classes of stock of North West Utilities Company: (a) all of the 260,531 outstanding shares of Common Stock of the par value of $1.00 per share, (b) 26,573 shares (or 60.39%) of the 44,000 outstanding shares of Seven Per Cent Prior Lien Preferred Stock of the par value of $100 per share, (c) 21,687 shares (or 35.70%) of the 60,755 outstanding shares of Seven Per Cent Preferred Stock of the par value of $100 per share, and (d) all of the 24,000 outstanding shares of $6 Cumulative Preferred Stock without par value.

At August 31, 1944, The Middle West Corporation also owned 315 shares (or 1.43%) of the 22,023 outstanding shares of Seven Per Cent Cumulative Preferred Stock of the par value of $100 per share and 105 shares (or 0.59%) of the 17,829 outstanding shares of Six Per Cent Cumulative Preferred Stock of the par value of $100 per share of Northwestern. The preferred stock of Northwestern is not currently entitled to vote for the election of directors.

At August 31, 1944, The Middle West Corporation also owned 172,393 shares (or 56.34%) of the 305,994 outstanding shares of capital stock (par value 25 cents per share) of United Public Service Corporation, constituting 56.34% of the total outstanding voting share of stock of that company.

At August 31, 1944, United Public Service Corporation owned 148,055 shares (or 66.88%) of the 221,380 outstanding shares of Class B Common Stock (of the par value of $1.00 per share) of United Public Utilities Corporation. At present, the Class B Common Stock of that company has no voting rights other than the exclusive right to elect one director.

At August 31, 1944, United Public Utilities Corporation owned all of the issued and outstanding securities of Da-

kota, as follows: (a) 8,370 shares of Common Stock without par value, constituting 100% of the outstanding voting shares of stock of Dakota, (b) $1,000,000 principal amount of First and Refunding 6% Gold Bonds, Series B, dated October 1, 1926, and due October 1, 1946, of Northern Power and Light Company, assumed by Dakota, (c) $3,000,000 principal amount of Ten-Year Six Per Cent Notes, due June 30, 1949; and (d) $1,335,794 principal amount of Ten-Year Six Per Cent Non-Cumulative Income Notes, due June 30, 1949.

A chart indicating the financial and corporate relationship existing as of August 31, 1944 between the above named corporations is filed herewith as Exhibit B.

(3) The name of each public utility holding company listed in item (1) of this subsection H, which has registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Give date of registration.

North West Utilities Company; December 1, 1935.

The Middle West Corporation; December 1, 1935.

United Public Utilities Corporation; November 30, 1935.

Exhibit B.

Chart indicating financial and corporate relationship existing as of August 31, 1944, between the corporations hereinafter named:

Part I

	% of Voting Control	
The Middle West Corporation		
North West Utilities Company.....	85.49%	
Northwestern Public Service Company.....	100.00%	(1)
United Public Service Corporation (Note 2).	56.34%	

Part II

United Public Utilities Corporation
Dakota Public Service Company..... 100%

(1) The Middle West Corporation also owns 315 shares (or 1.43%) of the Seven Per Cent Cumulative Preferred Stock and 105 shares (or 0.59%) of the Six Per Cent Cumulative Preferred Stock of Northwestern; such shares are not currently entitled to vote for the election of directors.

(2) United Public Service Corporation owns 148,055 shares of the 221,380 outstanding shares of Class B Common Stock of United Public Utilities Corporation, constituting approximately 66.88% of that class and approximately 39.98% of the aggregate number (370,300) of the outstanding shares of common stock of all classes of United Public Utilities Corporation. At present, the voting rights of the Class B Common Stock are restricted to the exclusive right to elect one director. United Public Utilities Corporation also has outstanding 148,920 shares of preferred stock which are now entitled to vote (one vote per share) for the election of directors.

For further detail, see answer to Item (2) of subsection H of application.

Plaintiff's Exhibit 46, consists of certificate of concurrence by Dakota Public Service Company in defendant's rate schedule FPC No. 4 (the 1938 Interchange Capacity Agreement) dated December 22, 1939, bearing identification and filing date by FPC of December 28, 1939, and signed by A. B. Sanborn, President of Dakota Public Service Company.

Plaintiff's Exhibit 47, consists of certificate of concurrence by Dakota Public Service Company in defendant's rate schedule FPC No. 3 (the 1936 Interconnection Contract) dated December 22, 1939, bearing identification and filing date by FPC of December 28, 1939, and signed by A. B. Sanborn, President of Dakota Public Service Company.

Plaintiff's Exhibit 48, consists of certificate of concurrence by Dakota Public Service Company, and reads as follows:

DAKOTA PUBLIC SERVICE COMPANY.
Supplement No. 1
Effective Date: May 8, 1943
Filing Date: February 22, 1945
to
Rate Schedule FPC No. 4
(CONCURS In Northwestern Public Service Co.
Rate Schedule FPC No. 6.1)

Plaintiff Exhibit
FPC No. 47 [illegible]
Deputy [illegible]
identification

CERTIFICATE OF CONCURRENCE.

This is to certify that Dakota Public Service Company assents to and concurs in the rate schedule described below, which Northwestern Public Service Company filed, and hereby files this Certificate of Concurrence in lieu of the filing of the rate schedule specified.

Supplement No. 1 to Northwestern Public Service Company Rate Schedule FPC No. 6, being a Supplemental Agreement dated March 13, 1943 to the Interchange Power Agreement dated July 1, 1941, between Dakota Public Service Company and Northwestern Public Service Company.

Dated February 19, 1945.

DAKOTA PUBLIC SERVICE COMPANY
By [signature]
Treasurer

(Corporate Seal)

Finance - Statistics

Filed Feb 11 1948
Off of Mabel Peck

FEDERAL POWER COMMISSION
FEB 22 1945
RECEIVED

Plaintiff's Exhibit 48.

In the course of his testimony the witness Fuquay identified each of the foregoing documents. The foregoing portions of Exhibits reproduced above in connection with the testimony of the witness Fuquay contain all of the contracts, rate schedules and supplements thereto, filed by defendant, Northern Power & Light Co., North Dakota Power & Light Co., and Dakota Public Service Co., relating to inter-company transactions; and the documents and partial documents contained in the foregoing portions of the record with reference to the testimony of the witness Fuquay and reproduced herein in connection with such testimony and the letters and documents contained in plaintiff's Exhibits 26 and 34 constitute all of the material, records, correspondence to and from the Federal Power Commission, testimony, if any, before the Federal Power Commission, and minutes, orders and actions of the Federal Power Commission concerning the filing by defendant of defendant's rate schedules, numbers F. P. C. 1, 3, 4, 5-A, 5-B, 6 and all supplements thereto, and applications to give such rates retroactive effect.

Defendant objected to the entire line of testimony and to all of the exhibits as follows:

Mr. Benson: It is true, I think, that a couple of the letters are duplicated, introduced in another place for another purpose. I explained the situation to the Court before with reference to the taking of the deposition. The purpose of offering all of these exhibits in toto is disclosed by the question to the witness where he was asked to certify everything that was in the file prior to a certain date. The significance of which is to show what was before the Commission, and everything before the Commission, before its action or its attempted action on this rate. I can't do th. t and pull some of those letters out. I have got to ask him all that is before the Commission.

Mr. Woods: I wonder if it would not be in order for us to suggest, we reserve the objection to all of these exhibits they are irrevelant and immaterial, and particularly incompetent to impeach the action of the Federal Power Commission, or collaterally attack any order made by them, and ask that that objection may stand to all of this line

of testimony or exhibits obtained from the Federal Power Commission?

Mr. Benson: I don't assume the Court desires us now to read statements contained in this file which we will assert are misrepresentations.

The Court: That is a matter, I think, that is up to the attorneys, how they put in their proof.

Mr. Woods: Are you agreeable to our having that standing objection?

Mr. Benson: We don't object to that.

The Court: The record may show the standing objection to the evidence stated by Mr. Woods.

Further in the course of the testimony by the witness Fuquay the following transpired:

By Mr. Robinson:

Q. Mr. Fuquay, you are the same Mr. Fuquay who testified in connection with this deposition hearing at the office of the Federal Power Commission on October 29 and October 30, last? A. Yes.

Q. Now, on October 30, in answer to certain questions put to you by Mr. Schiff, you stated that you had made or caused to have been made a search of the records which are, and I will quote your language, "The official public records", page 119 of the transcript, and again on page 127 of the transcript, I direct your attention to the fourth line from the top of page 119 of the transcript, and I also direct your attention to page 127, the tenth line from the bottom of the page. A. Yes, I see it.

Q. And to page 128, the fifth and sixth lines from the top of the page. A. I see it.

Q. Now, in answer to certain questions asked you by Mr. Benson, both on October 29 and October 30, you referred to certain files as being the only files which you were able to find with respect to the particular matters referred to in Mr. Benson's questions. Now, Mr. Fuquay, I ask you whether, in answering the questions asked you by Mr. Benson, you were referring to all of the files and rec-

ords of the Federal Power Commission, or only to its official public records and files?

A. I was referring only to its official public records.

Q. Now, Mr. Fuquay, I direct your attention to Rule 36, and subdivision (c), entitled Public Records, and subdivision (d) thereof entitled Other Records, and I will ask you whether or not the Commission does have records and files other than the so-called public or official records and files of the Commission?

A. I think that is clearly implied from the rule itself.

Q. Now, in connection with the deposition hearing on October 29 and October 30, did you cause a search to be made of any of the files and records of the Federal Power Commission other than its official public files and records?

A. No, I did not.

Q. Then any statement that you made with [resepect] to any file or files being the only file or files which you could find would necessarily refer only to the official public records or files as distinguished from the confidential records and files of the Commission? A. That is correct.

Q. Now, Mr. Fuquay, on October 30, Mr. Schiff directed your attention to certain correspondence referring to a Mr. Alliman, and I direct your attention to page 135 of the transcript where he specifically, in his question, referred to the first paragraph of a certain letter which specifically referred to Mr. Alliman. I further direct your attention to page 136 of the transcript where Mr. Schiff's questions asked whether Mr. Alliman had made a survey report and asked whether, "Is it a proper way to ascertain an answer to this question by application to the Commission?" And to which question you answered "Yes". Now, Mr. Fuquay, I will ask you whether or not either Montana-Dakota Utilities Company or Northwestern Public Service Company has, as of this date, filed a request with the Commission for leave to see or examine any of the confidential files of the Commission?

A. I have not investigated to see whether that is true, or not.

Mr. Benson: You want to stipulate neither you nor we have asked to examine any private files of the Commission with reference to, and for the purpose of using the same in this litigation?

Mr. Robinson: That is correct.

Mr. Benson: I will so stipulate.

Q. I believe on October 30, you clarified for us the fact that you did not know what documents, files, records or other material the Commission had before it or considered when acting upon any of the matters that it has acted upon which are the subject matter of this deposition hearing. Now, you have stated that you produced all of the official public records which could be found in connection with any given request. No attempt was made, was it, by you, Mr. Fuquay, to produce annual reports and material of that nature at this hearing? A. No, there was none.

Q. There is material of that nature which is classified in the Federal Power Commission files as official public records? A. Yes, there are annual reports.

Q. By this last question you understood me to mean, did you not, annual reports filed by the company?

A. By various companies, yes.

Q. And, in accordance with my request, did you cause a check to be made of the official public files of the Federal Power Commission to ascertain whether Montana-Dakota Utilities Company ever filed a notice advising the Federal Power Commission of the termination of Northwestern Public Service Company Rate Schedule FPC No. 6 and Supplement No. 1 thereto?

A. I have had such a search made.

Q. And did you find any such notice? A. No, I did not.

Mr. Benson: You filed notice of termination. Are you going to offer the testimony?

Mr. Robinson: You offer the testimony.

Mr. Robinson: If the Court please, at this time the defendant would like to renew its objection to the testimony of the witness, Fuquay, as to what matters or things, what files, records, documents, evidence or other matters the Federal Power Commission had before it at the time that it acted upon any of the matters and things set forth in the evidence so far by the plaintiff, on the ground that the witness has definitely shown himself not to be competent to testify with respect to that matter, and we ask

that all of the testimony of the witness and the exhibits offered in support thereof or in connection therewith be stricken.

Mr. Benson: May it please the Court, we would like to have Rule No. 36 marked before replying to the motion.

Plaintiff's Exhibit 51, which was received in evidence, consists of certified copy of Rule 36 of FPC, and reads in part as follows:

(c) Public Records. Save as otherwise required by law, all matters of official record, other than information held confidential for good cause found, shall be available at the principal office of the Commission in Washington, D. C., to persons properly and directly concerned, upon application to the Office of the Secretary during regular office hours. Such official records shall include all matters filed with or submitted to the Commission under the provisions of any order, rule, or regulation of the Commission or any applicable statute, as well as matters embodying Commission action. In public proceedings before the Commission the docket records relating to such proceedings and the pleadings, transcript of testimony, exhibits, and all documents received in evidence or made a part of the record therein shall be likewise available for inspection and copying by the public, in so far as consistent with the proper discharge of the Commission's duties.

(d) Other Records. The records and files of the Commission, and all documents, memoranda, correspondence, exhibits, and information of whatever nature, other than the matters described in subparagraph (c) of this Rule, coming into the possession or within the knowledge of the Commission or any of its officers or employees in the discharge of their official duties, are confidential, and none of such material or information may be disclosed, divulged, or produced for inspection or copying except that, upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be disclosed to a particular applicant.

Mr. Benson: It is our contention that the rule which I read, said that when any proceeding is instituted pursuant to the orders or rules of the Commission, and those are rate proceedings, that all of those records are public records, and there is no showing here—

Mr. Robinson: In view of the order which counsel has just read to the Court, I will amend our objection and not object to the documents which have been identified by the witness, Fuquay, but I will object to all of the testimony of the witness and ask that his testimony, other than merely identifying the documents, be stricken as indicating he is not in position to testify; he is incompetent to testify as to what record the Commission, itself, had before it when taking any action in connection with this matter.

The Court: As I understand it, the only purpose for the deposition at all was to lay the foundation for certain records of the Commission. There isn't any question under the evidence but what the documents and records which were referred to in the testimony of the witness have been identified as records of the Commission.

Mr. Robinson: We have no objection to that point. The point is, as counsel stated yesterday afternoon, there is testimony which counsel tried to elicit from this witness, he used the word "all", "All documents, or testimony or records". We state that this witness has shown definitely that this proceeding did not bring out all of such documents. We are merely objecting to the witness' testimony and the inference that might be drawn therefrom, that said witness did make available to us all of the documents and records. We are not objecting to the particular documents which have been offered as such.

The Court: As I recall it, this witness is secretary of the Commission, and has charge of the records. If anybody is competent to testify that he has submitted or has produced all of the records, he is able to find, he is the man that is able to do it.

Mr. Robinson: He told us he was not able to produce to us the private records because we did not get an order from the Commission.

The Court: All of the records that he produced here are public records and his evidence is sufficient foundation for the introduction of the documents referred to in his deposition as records of this Commission. The objection is overruled and motion denied and we will let the evidence stand.

The witness Fuquay testified that the legends which appear upon many of the foregoing exhibits on the upper right-hand corner thereof (for example, the legend appearing on the upper right-hand corner of Exhibit B to the complaint) which include the name of the filing company, the designation of the document as a rate schedule, the effective date of the document and the filing date were in each case placed thereon under the authority of FPC after receipt of the documents by that Commission.

At the close of the introduction by plaintiff of the deposition of the witness Fuquay defendant introduced in evidence Defendant's Exhibits 201-213, both inclusive, which are as follows:

Defendant's Exhibit 212 consists of a certified copy of the application of Margaret Frost to FPC, verified October 4, 1944 for authority to hold the positions of assistant secretary and assistant treasurer of defendant and Dakota Public Service Company, and contains the same kind of information and data, including the excerpts printed, as that contained in Plaintiff's Exhibit 45.

Defendant's Exhibit 213 consists of a certified copy of an application of Ralph Mauch to FPC, verified December 12, 1941, for authority to hold the positions of assistant secretary and assistant treasurer of defendant and Dakota Public Service Company, and contains the same kind of information and data as that contained in Plaintiff's Exhibit 44. Said application in part reads as follows:

B. List of positions within the purview of section 305 (b) of the act for which authorization is sought:

Position	Name of Corporation	Classification: ((1) Public utility, (2) Authorized by law to underwrite, (3) Supplying electrical equipment)
Assistant Secretary and Assistant Treasurer	Northwestern Public Service Company	(1) Public utility
Assistant Secretary and Assistant Treasurer	Dakota Public Service Company	(1) Public utility

(2) Any corporate, contractual, financial, or business relationships between any of the corporations listed in item (1) above and any of the public utilities listed in subsection B of this section 45.8.

Ans. Knife River Coal Mining Company, a wholly owned subsidiary of United Public Utilities Corporation, is engaged in the business of mining lignite coal near Beulah, North Dakota. During the calendar year 1940 Knife River Coal Mining Company sold 324,879 tons of coal of which 56,087 tons were purchased by Northwestern Public Service Company for fuel for its electric generating plant at Aberdeen, South Dakota; 112,161 tons were purchased by Dakota Public Service Company for its electric generating plants at Ellendale and Beulah, North Dakota.

During the year 1940 Dakota Public Service Company sold steam heat to Knife River Coal Mining Company for use at its coal mine. See subsection B for the operating arrangement of the central organization at Huron, South Dakota, of Knife River Coal Mining Company, Northwestern Public Service Company and Dakota Public Service Company.

H. Data as to the public utility holding company system.

(1) The name of the public utility holding company system of which each public utility listed in subsection B of Sec. 45.8 is a part.

Ans. Northwestern Public Service Company is a part of the public utility holding company system (as that term is defined in the Public Utility Holding Company Act of 1935) of North West Utilities Company and of The Middle West Corporation.

Dakota Public Service Company is a part of the public utility holding company system of United Public Utilities Corporation.

(2) The financial and corporate relationship existing between and among the corporations in the above holding company system, including the percentage of voting power represented by securities owned by the corporation preceding each corporation in the corporate structure of the system.

Ans. At June 30, 1941, The Middle West Corporation owned the following securities of North West Utilities Company, together constituting 85.49% of the total outstanding voting shares of all classes of stock of North West Utilities Company: (a) All of the 260,531 issued and outstanding shares of Common Stock, par value $1.00 per share; (b) 26,573 shares (or 60.39%) of the 44,000 issued and outstanding shares of Seven Per Cent Prior Lien Preferred Stock, cumulative, par value $100 per share; (c) 21,687 shares (or 35.7%) of the 60,755 issued and outstanding shares of Seven Per Cent Preferred Stock, cumulative; par value $100 per share; and (d) all of the 24,000 issued and outstanding shares of $6 Cumulative Preferred Stock without par value.

At June 30, 1941, North West Utilities Company owned all of the 52,150 issued and outstanding shares of Common Stock without par value of Northwestern Public Service Company, constituting 100% of the total outstanding voting shares of all classes of stock of Northwestern Public Service Company.

At June 30, 1941, The Middle West Corporation owned 315 shares (or 1.32%) of the 23,822 issued and outstanding shares of Seven Per Cent Cumulative Preferred Stock, par value $100 per share, and 105 shares (or .59%) of the 17,854 issued and outstanding shares of Six Per Cent Cumulative Preferred Stock, par value $100 per share of Northwestern Public Service Company. The preferred stock of Northwestern Public Service Company has no voting rights, except that if dividends on the preferred stock for dividend periods equal in the aggregate to 12 months become in default, the preferred stock in respect of which such default

exists becomes vested with equal voting power, share for share, with the Common Stock until such default is cured; at June 30, 1941, no dividends on any shares of preferred stock of Northwestern Public Service Company were in default.

At June 30, 1941, The Middle West Corporation owned 172,393 shares (or 54.64%) of the 315,532 issued and outstanding shares of Capital Stock, par value $1.00 per share, of United Public Service Corporation, constituting 54.64% of the total outstanding voting shares of stock of United Public Service Corporation.

At June 30, 1941, United Public Service Corporation owned 148,055 shares (or 65.99%) of the 224,352 issued and outstanding shares of Class B Common Stock of United Public Utilities Corporation. The Class B Common Stock of United Public Utilities Corporation has no voting rights other than the exclusive right to elect one director of United Public Utilities Corporation.

At June 30, 1941, United Public Utilities Corporation owned all of the issued and outstanding securities of Dakota Public Service Company, as follows: (a) 8,370 shares of Common Stock without par value, constituting 100% of the outstanding voting shares of stock of Dakota Public Service Company; (b) $1,000,000 principal amount of Northern Power and Light Company First and Refunding 6% Series B Gold Bonds, dated October 1, 1926, and due October 1, 1946, assumed by Dakota Public Service Company; (c) $3,000,000 principal amount of Ten-Year Six Per Cent Notes, due June 30, 1949; and (d) $1,335,794 principal amount of Ten-Year Non-Cumulative Income Notes, maximum interest 6%, due June 30, 1949.

The statements made above with respect to voting rights and voting power do not purport to give effect to voting rights existing under statutory or common law.

A chart indicating the financial and corporate relationships existing between the above named companies at June 30, 1941, is filed as Exhibit B to this application.

(3) The name of each public utility holding company listed in item (1) of this subsection H, which has registered

with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Give date of registration.

Defendant's Exhibit 204 consists of a certified copy of the order entered by FPC on February 18, 1936, and is as follows:

Authorizations under section 305 (b).

The Commission having under consideration the matter of the authorization of persons to hold the position of officer or director of more than one public utility or to hold the position of officer or director of a public utility and the position of officer or director of a bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility or officer or director of any company supplying electrical equipment to such utility, as provided in section 305 (b) of Part III of the Federal Power Act:

The following finding and order was adopted:

It appearing to the Commission:

That applications have been filed by certain persons, being those named in Exhibit "A" attached to and made a part of this order, under section 305 (b) of Part III of the Federal Power Act pursuant to Order No. 32 for authorization to hold certain positions of officer or director as set forth in such applications;

Now, therefore, the Commission having considered such applications, and upon the information therein contained, finds:

That the persons named in Exhibit "A" attached hereto, have severally made due showing in form and manner prescribed by the Commission in Order No. 32 with respect to positions of officer or director in corporations within the purview of section 305 (b) that neither public nor private interests will be adversely affected by the holding of such positions in such corporations.

sent the cost of the Aberdeen substation facilities to be. Is that right? A. That is right.

Q. At least, Mr. Buckmier, there was an account in your office, of which you were the auditing head, and what officer of the company at the time, on February 24, 1942?

A. I was secretary at that time.

Q. And secretary of the company. Figures showing the cost, among other things, of the Aberdeen substation facilities? A. That is what that shows there.

Q. That would be in your department? You are the keeper of the records? A. Not to determine the figure.

Q. You are the keeper of those records?

A. That is right.

Q. You produced these records here in court relating to the cost of these interconnection facilities, didn't you?

A. That is right.

Q. They were in your possession at the time, and you signed the contract as one of the officers of the company in which the figures of that sort were accumulated, for the one half of $303,000.00, and which you represented the cost of all of these to be? A. That is right.

Q. And despite that you say now, or did say a few moments ago, that you haven't the slightest recollection of ever having dealt with that figured cost of the Aberdeen substation at all? A. I did not determine that figure.

Q. Even if you didn't determine it, even if some adding machine or some typist determined it, was it ever brought to your attention as secretary of the company?

A. Not to my knowledge.

Q. But despite that fact you signed this contract in which it was represented that the total cost was $303,449.00? A. That appears to be my signature.

Q. Where did you get the figures in that contract that you signed which are the same as the figures in this letter?

A. I didn't get the figures. Someone else determined those figures.

Q. Who else would it be?

A. I presume it was Mr. Sandstedt.

Q. What was his position?

A. He was vice president and treasurer.

Q. Did he ever run the secretarial duties of your office?

A. To determine the figures.

Q. How do you know he did? Did you remember when he did? A. Some one under his direction.

Q. How do you know? A. I don't know.

Q. You don't know, do you?

A. It was the only manner we could—

Q. Did you ever hear of this letter of February 24, 1942, in which the cost of the Aberdeen substation facilities appears before today? A. I don't recall.

Q. Never heard of it? A. I don't recall.

Q. Did you ever hear the figure, $60,479.00 as the cost of that substation? A. I don't recall.

Q. Did you ever hear the total figure of $303,449.26 as the total cost of those facilities before today?

A. I don't remember.

Q. Never did? A. I don't remember.

Q. You are secretary and director and auditor of the company and the man who signs for the company the contract which appears in Exhibit 22. Is that right?

A. I signed it, yes.

Q. When you signed it, did you know what you were representing, or did you care about the truth of what you were representing, in this Exhibit 22? Which is a contract? A. I presume at the time I did.

Q. You think you might have known it at the time?

A. I don't know for sure.

Q. Assuming you did know it at the time, where did you get your information or your knowledge?

A. That figure was determined by someone else. It must have been, because there is no such figures in our records.

Q. No such figures at all?

A. They are in the records but they have to be allocated.

Q. Did you ask anybody before you signed it if those were right figures, or if you were under-charging or over-charging in order to collect this $20,000 a year?

A. I don't recall.

Q. Were you concerned with what the total cost of the interconnection facilities was? A. I must have been.

Q. If you were concerned with it, haven't you some dim recollection of hunting up those figures or inquiring about those figures? A. I did not prepare the figures.

Q. I didn't ask you if you prepared them. I said, weren't you concerned as to the source of those figures?

Q. Does that contain that letter? A. No, This is item 26.

Q. Where is the letter we asked you for which you said, under 25, you had?

Mr. Woods: This is the one I answered about.

Mr. Fellows: You are not on the witness stand. When I want to examine you I will have you sworn.

Q. Where is that letter I asked you for and you said you had? A. I didn't have this one. I had this one in 26.

Q. Do you have with you a letter from Strike to Mills, dated January 10, 1935, or a carbon copy?

A. I do not have it.

Q. Did you hunt for that letter? A. I did.

Q. Did you find it? A. I did not find it.

Q. Where did you hunt? A. I hunted in the files.

Q. Did you hunt in the files where it would naturally be filed and where those files were kept? A. Yes.

Q. All right. Do you have with you, then, a copy of a letter or communication from Mills to Strike, dated January 11, 1935? A. I could not locate it.

Q. Entitled "Subject: Management UPU properties." Did you find that one? A. I did not find that.

Q. Where did you hunt for it? A. In the file.

Q. In the same files where these things are always kept?

A. That is right.

Q. Did you make inquiries from any persons who might know where they were probably mislaid? A. I think I did.

Q. Did they make a search? A. Yes.

Q. A thorough search? A. Yes.

Q. Every place where you thought possibly they might be? A. That is right.

Q. And they can't be found?

A. They could not be found.

Q. Do you state now, to your best judgment, they are lost? A. I would think they would be.

Q. Do you remember or have any independent recollection of the existence of those letters at some time or another? A. No.

Q. Do you have a copy of a form by George A. Mills to Mr. Green which was attached to the letter which I last asked you about, which you said you could not find?

A. I haven't it.

Q. Did you make the same kind of a search for that? A. I did.

Q. Did you find any whether it was attached or unattached to the letter? A. I could not find any.

Q. It was the identical kind of search? A. That is right.

Q. So far as items in 25 are concerned, you have not produced here any of those communications, for the reason, you state, they cannot be found? A. That is right.

Q. After thorough search? A. That is right.

The witness Buckmier produced Plaintiff's Exhibit 53 from the records of the defendant. He testified that said exhibit was a part of the records of the engineering department.

Plaintiff's Exhibit 52 and Plaintiff's Exhibit 65 are the Sargent & Lundy Report and are identical and Plaintiff's Exhibit 65 was received in evidence.

Plaintiff's Exhibit 53 was received in evidence and is a collection of load diagrams dated August 21, 1937, December 21, 1937, July 16, 1938, December 6, 1938, December 20, 1938, July 29, 1939, December 19, 1939, July 9, 1940, December 18, 1940, August 5, 1941, December 22, 1941, December 21, 1942, December 22, 1943, December 20, 1944, December 21, 1944, December 19, 1945.

Up to and including July 9, 1940, they are entitled "Interconnected System North and South Dakota N. D. P. & L. Co.-N. P. & L. Co.-N. W. P. S. Co., showing locations of generating stations, transmission lines and 'junction towns'". Subsequent to that date they are entitled "Interconnected System North and South Dakota, Dakota Public Service Co. and N. W. Public Service Co., showing locations of generating stations, transmission lines, junction towns, etc."

Q. Can you tell me who had supervision of the load dispatchers? A. No, I haven't any knowledge of that.

Q. Who paid their salaries?

A. The joint management office paid their salaries.

Now, therefore, it is ordered:

That the persons named in said Exhibit "A" be and they are hereby severally authorized to hold the positions for which authorization has been sought as aforesaid in corporations within the purview of said section 305 (b) of the Federal Power Act, subject to the specific reservation of the right of the Commission to require any or all of said persons to make further showing that neither public nor private interests will be adversely affected thereby, and to make any other or further order or orders in respect of any or all said applications.

Exhibit "A."

Docket No.	Name	Address
ID-283	Buckmier, Joseph Frank	Huron, South Dakota
ID-586	Sandstedt, Carl Laurence	Huron, South Dakota
ID-628	Strike, Clifford John	Huron, South Dakota

Defendant's Exhibit 201 consists of a certified copy of the order of FPC entered February 18, 1936, authorizing Frank E. Kreusi to hold the positions for which authorization had been sought, and otherwise conforms to Defendant's Exhibit 204.

Q. You don't know who they reported to? A. No.

Q. Do you know the date when the records of North Dakota Power & Light, and Northern Power and Light were moved to the office of the defendant at Huron? Was that in 1929?

A. I think it was 1929 or first part of 1930.

Q. From that time on the records of these northern companies were all kept in the defendant's office in Huron, were they not?

A. There were some records kept out in the division offices.

Q. What was the nature of those records kept out in the division offices?

A. The detailed accounts receivable. Storage records.

Q. They were not primary records? They were working records that were finally assembled in the permanent records, weren't they? A. Yes.

Q. What I am referring to is the general records of the North Dakota companies was kept in your office? A. Yes.

Mr. Fellows: That is all.

By Mr. Royhl:

Q. When you say your office, do you mean the joint company office? A. The joint management office.

Q. All four of these companies? A. That is right.

Q. That included the defendant, did it?

A. That included the defendant.

Q. Did that also include Northern Power & Light Co. while it was in existence? A. It did.

Q. And the North Dakota Power & Light Co.? A. Yes.

Q. And later the merged company, Dakota Public Service Co.? A. Yes.

Q. And this joint management, did it also include the Knife River Coal Mining Co.? A. Yes.

Mr. Benson: That is objected to as immaterial. There is no issue of the Knife River Coal Mining Co.

Mr. Fellows: Objected to for the further reason we called this witness for cross examination.

The Court: There is an answer in the record, let it stand.

Defendant's Exhibit 203 consists of a certified copy of the order of FPC dated March 21, 1939, and is as follows:

Defendant's Exhibit 203.

Federal Power Commission.

Commissioners: Clyde L. Seavey, Acting Chairman; Claude L. Draper, Basil Manly, concurring. John W. Scott, dissenting.

March 21, 1939.

In the Matter of Joseph F. Buckmier. } Docket No. ID-283.

Authorization Pursuant to Section 305 (b) of Federal Power Act.

Upon supplemental application of Joseph F. Buckmier, National Bank of Huron Building, Huron, South Dakota, filed January 23, 1939, and amendment thereto filed February 16, 1939, pursuant to Section 305 (b) of the Federal Power Act, for authorization to hold the following positions:

Secretary	Northwestern Public Service Company.
Secretary, Director	Northern Power and Light Company.
Secretary, Director	North Dakota Power and Light Company.

which application supplements his original application filed October 25, 1935, for authorization to hold the following positions:

Auditor, Director	Northwestern Public Service Company.
Auditor	Northern Power and Light Company.
Auditor	North Dakota Power and Light Company.

and upon which application filed October 25, 1935, authorization was granted by the Commission's order of February 18, 1936;

By Mr. Royhl:

Q. Does your office or your duties entail anything concerning the engineering records of these joint companies?

A. They do not.

Q. What department has charge of those?

A. It is what we call the engineering department.

Q. Does that include both transmission and power?

A. Yes.

Q. Who has charge of that department?

A. The transmission and distribution department are in charge of Mr. Sickle.

Q. How about the power?

A. The production department is in charge of Mr. Stokke.

Q. And they were subpoenaed with demands, were they, generally, with you? A. Yes.

Q. Also the subpoena was served upon the president of the company? A. Yes.

Q. I think you have told counsel that you have used your best effort to obtain compliance with the subpoena?

A. I have.

Q. But there were some matters that were not in your department? A. That is right.

Q. Did you, at the time of the service of these subpoenas upon you, and the other persons who were served, did you have a conference concerning the gathering of these various items and exhibits and records?

A. Yes, we did. I had a conference with the assistant secretary of the company, Mr. Mauck.

Q. In that way did you work through the various departments in obtaining these various matters demanded?

A. Yes. I assumed responsibility for the accounting department. Mr. Mauck assumed the responsibility to assemble all of the other records from the different departments involved.

Q. What position did C. L. Sandstedt hold with the defendant company? A. He was vice president, and treasurer.

Q. What position did he hold with the North Dakota and Northern companies? A. He held the same position.

Q. And Dakota Public Service Co.? A. That is right.

Q. Prior to his being vice president and treasurer, what office did he hold?

The Commission, having considered said application, upon the information therein contained and other information in relation thereto furnished by the applicant, finds that:

Applicant has made due showing in the form and manner prescribed by this Commission that neither public nor private interests will be adversely affected by his holding the following positions, pending the further order of the Commission in regard thereto:

Secretary, Auditor, and Director	Northwestern Public Service Company.
Secretary, Auditor, and Director	Northern Power and Light Company.
Secretary, Auditor, and Director	North Dakota Power and Light Company.

And the Commission orders that:

(A) Until further order of the Commission, said applicant be and he is hereby authorized to hold the positions described in the above finding, subject to the provisions of Part 45 of the Rules of Practice and Regulations of the Commission, and to the specific reservation of the right of the Commission to require said applicant to make further showing that neither public nor private interests will be adversely affected by his holding of said positions;

(B) All orders heretofore made authorizing applicant to hold positions pursuant to Section 305 (b) of the Federal Power Act be and the same are hereby superseded.

By the Commission.

LEON M. FUQUAY,
Secretary.

Defendant's Exhibits 205, 208 and 209 consist of certified copies of orders dated March 21, 1939, of FPC au-

A. He was secretary and treasurer, and before that he was general auditor.

Q. You say you are now general auditor?

A. I am now general auditor.

Q. You succeeded him? A. That is right.

Q. What duties did Mr. Sandstedt handle during the time of these correspondence or papers that were exhibited to you?

A. Among his duties was the rate. He had charge of the rate department.

Q. Who handled those rates before the Federal Power Commission for that company during the time covered by this litigation? A. Mr. Sandstedt.

Q. He is dead now, is he? A. That is right.

Q. When did he die?

A. He passed on, I believe, in June, 1944.

Q. Up until the time Mr. Sanborn became president of the defendant company, who was president of the company? A. Mr. Strike.

Q. Is he dead, too? A. He just passed on, Wednesday.

Q. Who was chief financial officer of the defendant company? A. Mr. Sandstedt.

Q. Mr. Sandstedt was an accountant, was he?

A. Yes, he was.

Q. Was he an engineer? A. No.

All of the records of every kind and nature produced by defendant in court pursuant to various subpoenas or otherwise were designated as Plaintiff's Exhibit 55, without further specific marking or identification as to each document, and were offered in evidence. Such mass of records and documents was received in evidence, with the understanding that any reference to any particular document or instrument included in the offer would require a further and more detailed identification of the same.

The examination of Mr. Buckmier continued.

By Mr. Fellows:

Q. Are Exhibits 55-1 and 55-2 joint management contracts for the years 1936 and 1939 respectively?

A. Yes, they are.

The foregoing Plaintiff's Exhibits 55-1 and 55-2, received in evidence, are respectively Exhibits G and H to the Complaint as amended (R. pp. 178 and 182, supra).

Q. The name J. B. Buckmier that appears on these documents is your signature, isn't it? That appears on 55-2, is your signature?

A. Yes. The signature on 55-2 is my signature.

Q. Can you turn to Exhibit 55 and find the information about who were the officers of the defendant corporation on the 6th day of August, 1929? Are you able to tell who the directors were on the 6th day of August, 1929. A. Yes.

Q. Will you state who they were?

A. The directors that were elected at the annual stockholders meeting on March 26, 1929, were Martin J. Insull, T. T. Parker, F. E. Kruesi, P. F. Burritt, C. W. Amidon, C. J. Strike, W. H. H. Frost, C. L. Sandstedt, O. C. Stokke.

Q. Can you find anything in the records of who the officers were on that date?

A. I haven't been able to locate the meeting.

Plaintiff's Exhibit 52 was received in evidence.

O. C. STOKKE was called as an adverse witness and sworn and testified as follows:

Cross-Examination, by Mr. Fellows.

Mr. Royhl: We object to this man being called as an adverse witness. He is neither officer nor director.

Mr. Fellows: Let's find out what he is.

Q. Your name is O. E. Stokke? A. O. C. Stokke.

Q. Where do you live? A. Huron, South Dakota.

Q. Your occupation? A. Superintendent of production.

Mr. Fellows: Your Honor, that brings him under the rule.

Q. You are superintendent of production of the defendand corporation? A. Northwestern Public Service Co.

Q. And have been for a long period of time? A. Yes.

thorizing Glenne R. McArthur to hold the positions of vice president and director of defendant, Northern Power and Light Company and North Dakota Power & Light Company; authorizing Albert B. Sanborn to hold the positions of president and director of defendant, Northern Power and Light Company and North Dakota Power & Light Company; and authorizing Ernest W. Dempewolf to hold the positions of assistant secretary and assistant treasurer of defendant, Northern Power and Light Company and North Dakota Power & Light Company, and otherwise conform to Defendant's Exhibit 203.

Defendant's Exhibit 202 consists of a certified copy of the order of FPC dated May 2, 1939, authorizing Carl L. Sandstedt to hold the positions of vice president, treasurer and director of defendant, Northern Power and Light Company and North Dakota Power & Light Company and otherwise conforms to Defendant's Exhibit 203.

Defendant's Exhibit 207 consists of a certified copy of the order of FPC dated July 14, 1936 authorizing William McKinley Dunn to hold the positions of assistant secretary and assistant treasurer of defendant, North Dakota Power & Light Company and Northern Power and Light Company, and otherwise conforms to Defendant's Exhibit 203.

Defendant's Exhibit 211 consists of a certified copy of the order of FPC dated March 3, 1942, authorizing Ralph E. Mauch to hold the positions of assistant secretary and assistant treasurer of defendant and Dakota Public Service Company, and otherwise conforms to Defendant's Exhibit 203.

Defendant's Exhibit 210 consists of a certified copy of the order of the FPC dated December 5, 1944, authorizing

Margaret Frost to hold the positions of assistant secretary and assistant treasurer of defendant and Dakota Public Service Company, and otherwise conforms to Defendant's Exhibit 203.

Defendant's Exhibit 206 consists of a certified copy of the order of FPC dated December 5, 1944, authorizing William McKinley Dunn to hold the positions of assistant secretary and assistant treasurer of defendant, North Dakota Power & Light Company and Northern Power and Light Company, and conforms to Defendant's Exhibit 203.

Mr. Fellows: We will call Mr. J. F. Buckmier as an adverse witness.

J. F. BUCKMIER, being called as an adverse witness by the plaintiff and being sworn, testified as follows:

Cross Examination, by Mr. Fellows.

Q. Mr. Buckmier, are you an officer of the defendant company? A. I am.

Q. What officer? A. I am secretary and general auditor.

Q. How long have you been secretary and general auditor?

A. I have been general auditor since 1927. And secretary since 1938.

Q. Have you been a director of the company all of that time? A. No. Since 1933.

Q. You have been a director since and you are now?

A. That is right.

Q. There was served upon you a subpoena for the production of some records. I am going to ask you to take these one at a time, if you have them here, and have you produce them. Do you have with you your copy of the subpoena? A. I have.

Q. Have you brought with you all of the accounting records of accounts between the Northwestern Public Service Company and the law firm of Martens & Goldsmith, for the years 1930 to 1945, both inclusive, showing the payments of fees and expenses by your company to them?

A. I have.

Q. Will you place those up there?

A. I have item 2 and 3 in the same envelope.

Q. Does this envelope also contain accounts and records between your company and Goldsmith, between 1930 and 1945, showing payments of fees and expenses?

A. That is right.

Q. Mr. Buckmier, do your records show a breakdown of the separate substations, notably the Aberdeen interconnected substation and control equipment used for interconnection with Northern Power & Light Co. and Dakota Public Service Co.? Do you have the breakdown between these things? A. In one accounting number?

Q. Where do you have those?

A. I don't have any record of it.

Q. You know as a fact, in your reports, you are required to make a breakdown, and you have shown a breakdown of those things, don't you?

A. Which reports are you referring to?

Q. Mr. Buckmier, you know as auditor and officer of this company that you made a specific charge wherein the cost of that Aberdeen substation and transmission line was broken down, don't you? A. That is not broken down.

Q. Didn't you make a separate charge against us for that cost, and if you did, where did you get the figures? When I refer to "us" I refer to Northern Power & Light Co.

Q. You know Northwestern Public Service Co. made a charge to us for that? A. Yes, I know that.

Q. Where did you get the figures for that charge, separate from any other charge?

A. The charges was this $20,000.00 a year for rental. There was no figure involved in that.

Q. Will you state who Mr. C. L. Sandstedt was in your company in February, 1942?

A. He was vice president and treasurer of the company.

Q. Vice president and treasurer up there at Huron?

A. That is right.

Q. Do you know his signature when you see it?

A. I think so.

Q. Look at the signature on that letter of February 24, 1942, in Exhibit 34, on the photographic copy, and state

whether or not the signature above the typewritten words, "Vice President and Treasurer" is C. L. Sandstedt's, you just referred to. That is his signature, isn't it?

A. I think it is.

Q. You were working under him at that time? A. Yes.

Q. Examine this letter, which is in Exhibit 34, and state whether or not you recognize that as having been sent from your office, and being a letter of which there is a copy in your office?

A. Yes, this must have come from our office.

Q. That is a copy of a letter sent from your office?

A. Yes.

Q. On your stationery? A. That is right.

Q. Turn to the second page of that letter and under Item 3, the paragraph which is denominated "following is original cost of these facilities" and going down to where it says, "Substation facilities, Aberdeen, South Dakota, cost $60,479.48." Have you found that place?

A. Yes.

Q. Where did those figures come from if you didn't have a breakdown?

A. I have no knowledge where they came from.

Q. Can you make a guess? A. I didn't prepare this.

Q. It was prepared from records in your department, as auditor, wasn't it? A. I don't recall.

Q. Can you tell the Court from what other source, outside of your department, they could have possibly gotten those figures, if there were such figures in existence?

A. These could have been made by an engineer.

Q. What engineer could have made those figures to begin with? A. I would not know.

Q. Assuming an engineer made those figures, where would he have them, except in your department?

A. Well, that is what we have here. We have the records here.

Q. Do you mean to say that letter came from the engineering department of your company? A. The breakdown.

Q. Answer the question. Did that letter come from the engineering department of your company?

A. No, it did not.

Q. Doesn't it contain matters which are peculiarly in your department and shown by the records in your department? A. We have no such breakdown.

Q. You haven't any such figures as that at all in any of your records? A. No breaking down in this manner.

Q. Under the requirements for production, in Paragraph 15, you stated you didn't have these items and they had not been separated in your office at all, didn't you?

A. What are you referring to?

Q. I am talking about the cost of the Aberdeen substation interconnection facilities?

A. They can be broken down, I presume.

Q. Didn't you testify before I got this out that in those records which you were asked to produce under Paragraph 15 of your subpoena, that you had never had a breakdown of them in your office? A. That is right, no breakdown.

Q. If you had never had a breakdown of them in your office will you explain, if you can, where your company, over the signature of C. L. Sandstedt, got figures of this kind from which they were able to put the cost of the Aberdeen substation in their report of February 24, 1942, to the Federal Power Commission, Washington, D. C., the substation at Aberdeen cost $60,479.48?

A. They could be obtained from these records we had here by analysis.

Q. Let me find out if you can tell me something else. Examine this Exhibit 22 here. You will find supplemental agreement dated March 13, 1943. Do you see that?

A. Yes.

Q. You signed that as secretary, didn't you? A. I did.

Q. Who signed as president or vice president?

A. Sanborn and Sandstedt.

Q. You are familiar with this instrument? A. Yes.

Q. That is the contract whereby you were collecting for interconnection facilities at the rate of $1666.66 a month, from Northern Power & Light Co.? A. That is right.

Q. And in that contract in this exhibit which I just showed you, you state, don't you, or represent, that one half of the cost of those facilities was $151,724.68?

A. Yes.

Q. And that is just half of the cost. That is what you represent in there, isn't it? A. Yes.

Q. Just multiply that half of the cost by two and tell the Court whether or not the answer is not this $303,449.26, which is the total of the items including what you repre-

A. I don't recall.

Q. Haven't the slightest recollection of having asked anybody? A. I don't remember.

Q. As an officer of this company then and now, do you know anything about the truth of any of those figures that go to make up the $303,000? A. I don't know.

Q. By the way, Mr. Buckmier, when you signed this contract which appears in our Exhibit 22, dated March 13, 1943, between Northwestern Public Service Company, the defendant, and the Dakota Public Service Company, you were auditor also, were you not, and an officer and director of the other contracting party, Dakota Public Service Co.?

A. What date was that?

Q. March 13, 1943? A. Yes, I was.

Q. So when you signed this exhibit, you purport to have signed it as secretary of the defendant company in this action, didn't you? A. No.

Q. Who did you sign for?

A. I signed for Northwestern Public Service Co.

Q. That is what I say, for the defendant in this action?

A. Yes.

Q. And when you signed it, what officer were you in the Dakota Public Service Co., that was the other part to that contract that was agreeing to pay $20,000.00 a year as amortized cost of these interconnection facilities that amounted to $303,000? What officer were you in that other company?

A. I believe I was secretary and auditor for that company.

Q. And director? A. As I recall.

Q. Practically the same officer? A. I think so.

Q. When you were dealing for Northwestern Public Service Co., and when you were also dealing in that same contract for the Dakota Public Service Co., do you mean to say that you signed an agreement that obligated the return or payment to defendant company in this action of over $150,000 without having any knowledge of the truth of the amount upon which those payments were to be based, or didn't you care? A. I presume I must have.

Q. If you cared why didn't you make some inquiry or search to find out the truth of the [times] that made the $303,000? A. Someone else had done that.

Q. You were secretary of the company?

A. That is right.

Q. You were signatory to the contract? A. That is right.

Q. By the way, that is not the only contract that fixes those figures, is it? There was some other of which this is just a supplemental one? Isn't that right?

A. I think there was.

Q. You were working physically, you were down here at the Huron office of the defendant company in this case, at the time that was signed, weren't you? A. Yes.

Q. And the records, if there were any records, that go to make up those amounts, were in the Huron office, weren't they? A. Yes, they were.

Q. Who were you representing when you signed that contract, or who do you think you were representing?

A. I was representing the joint management.

Q. Representing the joint management, you were getting money, pulling money out of the northern company to the Huron company, the defendant here, for half of the claimed $303,000 interconnection costs? A. That must be right.

Q. Didn't you feel some duty on your part to represent, in those contracts, negotiations, and in the contract, the Dakota Public Service Co. up there in North Dakota, especially in regard to whether or not the figures that were to be and had been paid were correct?

A. I must have assumed they were correct at the time.

Q. Didn't you feel obligation enough to the company in North Dakota to check and see, well, maybe those figures are only half that; maybe they don't amount to anything; or just didn't you care?

A. I at the time was satisfied that was the figures.

Q. From what were you satisfied? You say you made no inquiry, you made no search of the records. From what were you satisfied?

A. I was satisfied from the basis of the allocation that was made.

Q. What allocation?

A. On the Aberdeen and all of the ones we have just been discussing.

Q. You were just satisfied with the figures as they appeared in that report? A. I had confidence.

Q. Did you have anything to base any satisfaction with

those figures on or not? You didn't care what figures were shown in that contract, did you? A. I didn't say that.

Q. You would not say you did, would you?

A. I certainly would not have signed it if I had not felt it was just.

Q. Where did you get that feeling?

A. From the party that determined the figure.

Q. You were the auditor and secretary of both companies to that contract, weren't you? A. That is right.

Q. And a signer of the contract?

A. Signer as secretary.

Q. Yes. And still in fulfilling your obligation to both companies you didn't check the accuracy of those figures at all, and you permitted them to go into a report and also into the contracts as being the contract price. Didn't you now? Yes or no. A. I was satisfied they were correct.

Q. I didn't ask you that question. I said you were willing without any further inquiry or search or anything else, in the discharge of your obligation to both companies, to allow those figures to go in without any inquiry or search or any information of any kind? A. I was satisfied.

Q. That doesn't answer my question. I said, you were willing to do it. Were you?

A. At the time I must have been satisfied that was correct.

Q. How long ago was that made? 1943, wasn't it?

A. The date of the contract.

Q. Now, I want a carbon copy of your company's letter, by C. J. Strike, to Mills, entitled "Joint Office Payroll and Expense Allocation" dated July 10, 1935.

Mr. Woods: If Your Honor please, I would like to make a statement in connection with this that perhaps should have been made a little earlier. Counsel will have to take some of the responsibility for the fact this witness can't identify every exhibit, does not know about everything, whether it is in his department or not. I think everything that has been requested has been produced here, or we are now producing it here. The witness may not know about that.

Mr. Fellows: Let's find out about that.

The Court: If the witness doesn't know he can't tell. Let counsel continue the examination.

Q. When I was so rudely interrupted, I was asking you to produce a letter from Mr. Strike to Mr. Mills.

Mr. Royhl: That was just presented to you.

Q. Have you the one from Mills to Strike, January 11, 1935? A. I could not find that one.

Q. Did you look in all of the files where that letter would normally be kept? A. I think I did.

Q. Did you go through the files that would contain that in the ordinary course of business?

A. That is as I remember it.

Q. Did you make a thorough search? A. Yes.

Q. You think it can't possibly be found in your office?

A. That is right.

Q. Now, under 26, do you have a copy of a letter, dated February 24, 1942, written by Sandstedt to the Federal Power Commission? A. I have.

Q. You have that? A. Yes.

Mr. Benson: I think there is an error in the statement of counsel, Mr. Woods was producing item 25 in the subpoena to the witness now on the stand. We would like to find out whether counsel now is not in error when he says he is producing a carbon copy of a letter C. J. Strike to George A. Mills, entitled "Joint Office Payroll and Expense Allocation," dated January 10, 1935. We asked for the carbon copy.

Mr. Stafford: There is no such copy found.

Mr. Fellows: He testified he had it here.

Mr. Woods: We thought we did have it here. I will tell you what we did have. We have a letter, or what purports to be a carbon copy of a letter, dated January 14, 1935.

Mr. Fellows: That is not the letter we asked for at all.

Q. You testified you had here, you reached down and got out a letter or carbon copy of a letter written by C. J. Strike to George A. Mills, dated January 10, 1935, entitled "Joint Office Payroll and Expense Allocation." Have you that letter? A. No, This is what I presented.

Q. You were at one time an officer of the company, were you not? A. Not an officer.

Q. Were you a director? A. A director.

Q. During what period of time?

A. I can't remember the exact dates, but it was back in the early '30's. Possibly from '29 to '32, '33. I am not sure.

Q. You were elected in 1929 as a director of the defendant company, were you not?

A. I would assume so from what I heard this morning of the reading of the minutes.

Q. For how many years did you continue to be a director? A. I believe until '32 or '33. I am not sure.

Q. After that you were not again a director?

A. I was again elected director in 1939.

Q. Up until what time? A. 1945.

Q. You ceased to be a director in 1945?

A. If I remember correctly it was 1945. Pardon me, I believe it was 1946.

Q. Were you an officer during any of that time, from 1939 on? A. No, sir.

Q. You were superintendent of production?

A. Superintendent of production.

Q. Were you also connected with Dakota Public Service Co. in some capacity, during that period of time, or all of it? A. As superintendent of production.

Q. And as director, too, for part of the time, weren't you? A. Not the North Dakota Power and Light Co.

Q. I said the Dakota Public Service Co. For part of that time were you director of Dakota Public Service Co.?

A. No, sir.

Q. Were you of the Northern Power and Light or North Dakota Power and Light? A. No, sir.

Q. Did you serve those companies as superintendent of production? A. Yes.

Q. During what period, or was it during the same period you served the defendant corporation?

A. Superintendent of production from early 1935 up until the date—

Q. I believe Exhibit 53 has been testified to by Mr. Buckmeir as a general load diagram for all of the years

enumerated in the writing on the cover of it. He states there are two of them missing, namely one of December 15, 1941, and one of January 7, 1942. Do you know where those other two load diagrams are?

A. If there was load diagrams for those dates you have just mentioned—In all probability there was no load reading taken on those particular dates.

Q. Your reports to the Federal Power Commission indicate there were. Have you made any search for any that were called for by your subpoena which are not contained in that folder? A. I searched for the load diagrams.

Q. And that is all you found? A. That is all I found.

Q. And these load diagrams were scattered in some of the different stations?

A. No. These copies I had in my general office file.

Q. How do you account for the absence of the two you have mentioned?

A. I can answer that better by explanation.

Q. All right.

A. These load diagrams were prepared from special readings that I and the engineering department had been taking for all of the years I was connected with the production department. They were taken for this reason, we wanted to get some idea from an operating standpoint, from a load condition standpoint, on the system, capacities of plants, etc., some idea of what the peak condition was on the system with respect to transmission of load and coincident peak demands on the combined systems of the three companies. The selected dates were generally taken during a peak summer load to get the actual conditions of maximum demands on the system, interconnected systems of the three companies. They were also taken during the annual peak which usually occurred in the month of December of each year.

Q. Without continuing why they were taken, what records have you which show your December 15, 1941 reading, or whether or not a reading was taken at that time?

A. December 15th?

Q. 1941?

Mr. Royhl: You can open that up and see what is in there.

A. There isn't a load diagram in here for December 15th.

Q. Does the absence of a load diagram in this exhibit, for December 15, 1941, indicate that none was taken on that date?

A. No readings were taken on that date for this load diagram.

Q. So there wasn't any taken on that date?

A. That is right.

Q. How about January 7, 1942? Can you find one for that date? A. There isn't anything here for that date.

Q. The absence of those two would cause you to state that no readings were taken on those two dates?

A. No fifteen minute readings.

Q. Yes. A. That is right.

Q. Were there any thirty minute readings taken on that date? A. No.

Q. Any hourly readings taken on those dates? A. Yes.

Q. Where is your evidence that indicates any hourly readings were taken?

A. The hourly readings are taken every hour at every station.

Q. Will you produce some evidence on your books that show hourly readings on December 15, 1941?

A. I would have to get that information from the load dispatcher's daily log readings.

Q. Those are the hourly readings taken for those dates?

A. Yes.

Q. Do you have some independent recollection of those dates? A. Yes, I do.

Q. You mentioned effective capacity. Will you explain that?

A. Effective capacity is what I would define or use for determination as the capability of continuous operation of that particular station. The combined units in the station. For example, [Buelah], 6200.

Q. That is on 24 hour basis?

A. That is KW capacity any hour of the 24.

A. To begin with, fifteen minute readings were taken at all metering points. For example, at all of the power stations where there were circuits feeding a local city line.

For example, [Buelah], 320 KWH, Dickinson, 1000. That was the load at the city of Dickinson at this particular moment. All of those known readings were used to establish specific locations where that load was needed. Then the hours that were left over, transmitted out on the transmission line, the known flow of power from these stations outside of these stations all were marked. The known left-over kilowatt hours was distributed by the load dispatcher on allocation basis of what the known load is in those particular areas.

Q. Why was it done that way?

A. To give our engineers in the engineering department and others entitled to it, what the approximate load conditions were in these various sections during the coincident peak hour demands on the system.

Q. There were points where there were no meters, wasn't there? Where it was not metered? A. Oh, yes.

Q. Refer to some of those points where you show figures.

A. Let's take, for example, at the connection, west line connection from Northwestern Public Service Co. to the line of the Dakota Public Service Co., or Northern, at Ipswich.

Q. There was no meter there?

A. There was no meter there.

Q. How did you arrive at the figures you placed there?

A. The total power flow was out of Bismarck, was out of Mobridge, or north out of Barnard or west out of Aberdeen, the total power flow was distributed on allocation basis as I mentioned by the load dispatcher, divided up through these areas in direct proportion possible to, on the known demand of those areas. In other words, readings were taken by the division superintendent two or three times a year at what the peak demands were at these particular points. In other words, that is estimated from the power generated.

Q. That is estimated where there are no meters?

A. That is right.

Q. Who made these meter readings? The load dispatchers?

A. No. The meter readings were made on special forms submitted to different power plants, chief engineers and operators. For the generation at those stations.

Q. Now, there is some more stuff on here. The green figures between stations are the estimate—

A. Estimated fifteen minute peak demands during this total system.

Q. On that date. A. Yes, as tabulated on there.

Q. That tabulation down below purports to be a tabulation of all of these figures?

A. Yes, all of these figures in here.

Q. Of the thirty and sixty minute coincident—

A. With the same allocation.

Q. Arrived at the same way?

A. Arrived at in the same way although they are not spread out here.

Q. Who had supervision of the load dispatchers?

A. The load dispatchers are part of the engineering department. They are employees of the general office engineering department.

Q. Were they under your supervision?

A. Directly with respect to generation or loading of plants.

Q. Who did they take orders from? From you?

A. Instructions orders?

Q. Yes?

A. Such instructions or orders as they would require in order to function on their jobs, yes.

Q. Who did they make their reports to? To you? Did they make their reports to you?

A. I am not sure just what particular reports you are referring to.

Q. Tell the Court the duty of your dispatchers.

A. The load dispatcher's duty with respect to production, my department, is the dispatching of power loads of the respective stations of the power pool companies, the three companies or the two companies.

Q. What is the dispatching of loads? You are not very specific. What do they have a load dispatcher there for?

A. Maybe I can better answer that in this manner. That during every minute, so to speak, or every fifteen minutes or every hour of the day, or every period of the day, there is variation of load on the system from the so-called peak load of the day, in the evening or whichever part of the day it occurred, on throughout the day. The dispatching

office is situated at a location on the system where the load dispatchers are acquainted with the load conditions on the system, and they are also in touch with the various power plants at every hour of the day and know what those particular plants are carrying in load.

Q. Do these dispatchers keep some kind of a record?

A. Yes, they keep a log record.

Q. About how do they keep those log records? Where do they finally end up? In your office?

A. They are kept there at the dispatching office.

Q. You were subpoenaed to bring in some records, including Aberdeen station record. Have you got those, for 1930? A. Station log sheets of the Aberdeen power station?

Q. Yes. I would like to have you pull up the one for 1930. A. For the year 1930?

Q. Yes.

A. I do not have the station logs for the year of 1930 for Aberdeen power station.

Q. Where are they?

A. They have likely been disposed of. They were not kept.

Q. For what years do you have them here?

A. I have them for the years 1937 to 1945, inclusive.

Q. Do you know that they have been destroyed or put beyond your reach? A. Those prior to 1937?

Q. Yes. A. Yes, they have been destroyed.

Q. How do you know that?

A. The fact that they were not at the power station. They have been destroyed and the chief engineer so advised me.

Q. Is it your custom to destroy those after a certain period of time?

A. The custom has been to keep them three or four years, but in the last few years we have endeavored to keep them for a period of six years.

Q. Look at the first paragraph of your subpoena. Did you produce the accounting studies and the engineering studies made by the defendant company or furnished to it by Middle West Utilities, or Middle West Service, or Middle West Corporation, showing the studies made to determine that North Dakota Power and Light should

sell energy to Northern Power and Light at a rate of three and one-half mills per KWH?

A. I have furnished such engineering studies as I could locate in the files.

Q. Let's get those out. You might read Paragraphs 2 and 3 and you could get them all together. Do you have now in your hand the accounting and engineering studies made by the defendant company or furnished to it by Middle West Utilities, or Middle West Service or Middle West corporation, or the Receiver of Middle West Utilities, showing studies made to determine North Dakota Power and Light should sell energy to Northern Power and Light at the rate of 3.5 mills per KWH?

A. Engineering studies only.

Q. Do you have any accounting studies in addition to them? A. No.

Q. Just engineering? A. Just engineering.

Q. What years do those cover?

A. They are dated April, 1935, December, 1935, December, 1935, and July, 1936.

Q. That is all there are in your records at the office?

A. Yes.

Q. Are there any that are missing from there?

A. I don't recall any others.

Q. To your best recollection this is all you ever had?

A. That is all I can recall.

Plaintiff's Exhibit 55-3 was received in evidence and consists of four engineering studies made by the witness Otto Stokke, each addressed to C. J. Strike, and dated April 8, 1935, December 31, 1935, December 31, 1935, and July 14, 1936, respectively, which studies are summarized as follows:

Study Dated April 8, 1935:

The purpose of the study is stated to be to arrive at an equitable Rate Schedule for power to and between the three affiliated companies (North Dakota Power & Light Company, Northern Power and Light Company and defendant). It involves an analysis and study of the interconnected system of transmission hilines and power plants regarding plant capacities, incremental production costs, line losses, hourly kilowatt demands throughout the day

and night, and seasonal conditions of operations in plants and on the transmission lines, as viewed from "*practical* operating conditions, or experiences," and omitting any assumed or technical phases of performance.

The normal plant kilowatt capacities and peak kilowatt-hour demands of each of the three companies (based on December, 1934, figures), "which would be the situation if each company were entirely isolated," are summarized as follows:

1) North Dakota Power & Light Company—had approximately 7900 KW of regular normal plant generating capacity, a system peak hourly load of approximately 4600 KWH, leaving available an excess plant capacity of approximately 3300 KW;

2) Northern Power and Light Company—had available approximately 1800 KW of regular normal plant generating capacity, and a peak hourly load of approximately 3400 KWH, leaving a shortage of approximately 1600 KW of generating capacity. In order to have adequate reserve, it would need about 3,000 KW of generating capacity at one or more locations;

3) Defendant—had available approximately 15,800 KW of regular plant generating capacity, and a peak hourly load in South Dakota of approximately 11,000 KWH, leaving an excess of approximately 4,800 KW of generating capacity; there being, therefore, no need for defendant to purchase power from outside companies because its generating capacity was adequate for its own requirements.

Regarding the generating plants of these three companies, it was stated that:

1. North Dakota Power & Light Company—

With both turbines operating at Beulah and the steam-heat by product generation at Bismarck, Mandan and Dickinson, there was 1500 to 2500 KW of hourly excess capacity, a large part of which was then being transferred to Northern Power and Light Company, which "comprises 'low' incremental cost kilowatts, or dump power", available for sale to Northern Power and Light Company or

defendant at a low rate per KWH. It was further stated in this connection that the generation at Bismarck was considered as being all delivered to the town of Bismarck or to the own use of North Dakota Power & Light Company; the Mandan plant could be considered only for emergency purposes and as applying only to the local requirements of Mandan; the plants at Mott and Dickinson could be considered only for standby service in the event of failures in transmission lines or shutdown of other generating plants; and the Dickinson plant was used only during peak hours.

2. Northern Power and Light Company—

The Mobridge plant was its principal generating station, was one of the most efficient units of the three companies, and was located in the most suitable location and load center of the company's system. It was operated only during the steam heating season and for occasional standby service when the Beulah plant was down to one unit because of inspection or maintenance. During peak hours of the day and evening, energy was delivered in varying amounts from the transmission line to Mobridge for local requirements above the output of that plant. The diesel plant at Lemmon was operated only for standby protection to that town and occasionally to supply energy east to McIntosh; the Gettysburg plant was operated only for standby protection to that town and occasionally to supply energy to the branch line towns north of Gettysburg; the Hazelton plant units were operated only for standby protection to that town; and the Ellendale plant steam generators were operated only for emergencies and to supply standby service to that town.

It was stated that because of the low rate of 3.5 mills per KWH at which Northern Power and Light obtained current from North Dakota Power & Light Company, it was desirable to purchase all of its requirements above the production normally generated at Mobridge and from the other plants as above outlined, making it unnecessary or inadvisable to increase the output of those plants or to invest in additional generating capacity on that property. It was also stated that the sale of energy to defendant by Northern Power and Light Company in excess of North-

ern's requirements at 5 mills per KWH provided a small margin of profit to Northern Power and Light Company after deducting transmission losses; and further, that during certain hours of the day defendant was supplying energy to Northern Power and Light Company both at Aberdeen and at Gettysburg (for that town and towns to the north up to Bowdle), thereby making an attractive situation for Northern Power and Light Company.

3. Defendant—

It was stated that from an analysis of incremental cost of production, investment and fixed charges, standby service and cost of purchased kilowatts, and the credit of returned kilowatts, defendant "is handicapped in every respect and the loser in all transactions as now operated thru the interconnection with the Northern Power and Light Company"; that the Aberdeen station and adjoining nearby plants could adequately handle all defendant's demands in that area, and that the interconnections with Northern Power and Light Company could be only considered as essential or profitable to defendant in the event that the price (5 mills) was considerably below its own production fuel cost per KWH. It was further stated that the interconnections could only be considered advisable and profitable in the event of sale of energy to Northern Power and Light Company at a margin of profit above defendant's incremental costs at Aberdeen, and savings which might result from an improved station load factor and capacity factor. Also, the arrangement then functioning was detrimental to the operations and operating costs of defendant, particularly because when energy could best be purchased over peak hours of the day or evening, Northern Power and Light Company was then unable to supply energy to defendant but instead defendant generally delivered energy to Northern Power and Light Company during those periods, with a final result of handicapping the Aberdeen station in standby protection and resultant poor load factor.

A tabulation was included showing the deliveries at Aberdeen from Northern Power and Light Company to defendant and vice versa during the 24 hour period commencing at 12 midnight, with two or one turbines operat-

ing at Beulah. It was said that the tabulation clearly indicated that defendant was rendering combined firm power and standby service at many hours or periods; and the tabulation shows that without exception defendant was delivering current to Northern Power & Light Company during all hours except from twelve midnight to 8:00 A. M. when only one turbine was operating at Beulah, and that the flow of current to defendant was considerably reduced during the peak hours (the most desirable or essential time) when two turbines were operating at Beulah.

It was stated that the energy rates per KWH then in effect between defendant and Northern Power and Light Company were not equitable nor correctly set up with respect to the gross purchases by either company, as would later be shown by the incremental costs of production and corresponding losses as applied to portions of energy transferred between the companies; and further, that defendant incurred a loss on the deliveries of energy to Northern Power and Light Company for sale by it in Gettysburg and its other towns to the north which arrangement was unsatisfactory.

There then follows a review of statistics and actual costs of operation concerning the various generating stations of North Dakota Power & Light Company and Northern Power and Light Company (excluding Hazelton) and of the Aberdeen station of defendant. Concluding on that subject, Stokke stated that incremental cost on loads above the actual 1933 and 1934 outputs for the Aberdeen station of defendant would be 5.5 mills per net KWH.

It was further stated that unaccounted-for or total losses over the transmission and distribution system of the three companies during 1934 were (for transmission losses) 3.5% for North Dakota Power & Light Company, 15% for Northern Power and Light Company and 7% for defendant.

Suggesting a revised Rate Schedule, Stokke then submitted certain data, summary and conclusions "on the matter of a fair and equitable rate to be charged between the interconnected companies," and stated, "Unless we deal in actualities and facts, we are liable to establish

a Rate Setup which is unequitable, or favorable to one company and unfavorable or unattractive to another operating company," and that some assumptions might have to be applied as to subsequent operating conditions on the interconnected system in order to arrive at the probable exchange of power and costs, or rates to be charged. He suggested that a revised flat rate might be applied to Northern Power and Light Company from the previous experience of the last several months which probably could be revised once or twice a year to meet any radical changes in operating procedure of the plants or transmission lines or changes in sales by each of the companies, and further that a flat rate of 4 mills per KWH (covering all incremental costs and line losses on the "surplus or dump current sold to N. P. & L. Co.") be made in lieu of the then rate of 3.5 mills. He further stated that the then rate of 3.5 mills was somewhat below the cost at which Northern Power and Light Company could produce the additional required kilowatts.

Stokke considered the possibility of Northern Power and Light Company increasing the output of its Mobridge plant and correspondingly reducing its purchases from Beulah but noted the loss in sales of lignite from the mine of Knife River Coal Mining Company to the Beulah plant of North Dakota Power & Light Company, and the resultant loss of profits from such sales, which would produce a corresponding loss to United Public Utilities Corporation, which owned both the mine and the electric utility company. The Mobridge plant did not use Knife River lignite but obtained its fuel from an outside source.

It was further stated that the energy interchange rate of 5 mills between defendant and Northern Power and Light Company was "entirely unsatisfactory and unprofitable" to defendant, and that "it would be preferable that" defendant "generate all its own kilowatt-hour output requirements and discontinue purchased energy from the N. P. & L. C."; but that the interconnection at Aberdeen could remain for standby protection principally for Northern Power and Light Company, there being "very little need of the tie with N. P. & L. Co. as far as the N. W. P. S. Co. is concerned with respect to standby service or protection."

New rates for "standby or firm power" between Northern Power and Light Company and defendant were suggested, being 6.5 and 7.5 mills per KWH for energy sold by defendant to Northern Power and Light Company and 5.5 and 6.5 mills per KWH for energy sold by Northern Power and Light Company to defendant.

In concluding, Stokke stated that no consideration had been given in his analysis "to the fixed charges on the investment of hiline and substation equipment built between and connecting the three associated companies." He pointed out that the matter of the rates between the companies was very complicated because of the variables of operating conditions, and that the interconnections frequently became beneficial over periods of hours or days to each company depending on the many conditions or circumstances which developed or were involved, such as plant shut-downs and transmission line repairs and maintenance. He further stated that the load dispatchers were attempting to dispatch loads to stations which could produce energy at the lowest cost of production and at the lowest cost of transmission to points in the interconnected system.

In closing, Stokke invited a discussion of the points submitted in the analysis for arriving at any new plan of operation or any revision of existing rates.

Study Dated December 31, 1935 re North Dakota Power & Light Company and Northern Power and Light Company:

This study is stated to be an analysis of production costs of the power plants of North Dakota Power & Light Company and Northern Power and Light Company to determine a rate schedule on the surplus energy available throughout the year from the Beulah station. It states that "Previous studies from similar analysis each year have also proven the practical and economical aspects and need of the interconnection, and method of operations now in effect as in previous years since the interconnections were made between the two systems." The purpose of the analysis is stated to be to substantiate the desirability of the then operations and to prove that the then rate of 3.5

mills charged by North Dakota Power & Light Company was fair and reasonable, as well as economical, profitable and desirable for both North Dakota Power & Light Company and Northern Power and Light Company and should be continued in 1936 and probably on a similar basis for subsequent years.

It is further stated that the increased generation in net KWH of surplus power was obtained entirely from the Beulah station, and that by reason of the greatly improved load and capacity factors at the Beulah station the cost of producing such surplus energy was greatly reduced. From statistics given it was stated that the surplus energy was produced at an incremental cost of 2.82 mills per net KWH, all of which was accomplished at the Beulah station. In addition, the delivered cost being the incremental cost of production adjusted for average transmission losses in the North Dakota Power & Light Company system of 3.5%, was stated at 2.92 mills per KWH delivered.

The analysis then states:

"Now, then, in order to arrive at an equitable rate, or sale price per KWH of this surplus power, it was first necessary to determine what the Northern Power and Light Company could best do for itself in producing a like amount of required energy with its present generating equipment, and/or the installation of adequate new generating equipment, with the additional fixed charges by reason such added investment, and generation costs of such combined requirements in all power generation. At the present date, the Northern Power & Light Co. cannot produce its own requirements in total KWH sales to own customers. An addition of 3500 to 4500 Kilowatts of new generating equipment is required for independent operations or without outside purchases of KWH requirements. Therefore, we have found that the Northern Power & Light Co. would be faced with additional plant investment and fixed charges thereto on each KWH produced, plus total production operating costs of new and present equipment."

After reviewing statistics showing a unit cost per net KWH to Northern Power and Light Company, assuming

that it had adequate generating equipment, but without including therein the energy resold by Northern Power and Light Company to defendant upon which Northern Power and Light Company made a net profit at the rate of .87 mills per KWH, the analysis concludes as follows:

"As previously shown, the North Dakota Power & Light Co. can produce the surplus, or dump power, at a very low 'incremental' cost by reason of the improved load and capacity factors developed on the Beulah Station. I have also shown in preceding paragraphs that the Northern Power & Light Co. can not produce the required energy at as low a cost as purchased or delivered to its lines Elgin and Driscoll. Therefore, we have concluded that a rate of $0.0035 per KWH sold to Northern Power & Light Co. at metering points would be a profitable proposition to the North Dakota Power & Light Co. and further, would also be a practical and very economical, as well as a desirable proposition to the Northern Power & Light Co. on such an adopted purchase price, or rate, of $0.0035 per KWH. The Northern Power & Light Co. will of course, benefit to a greater extent on such a rate."

The analysis also shows a net annual return of $7,838.00, or .68 mills per KWH, to North Dakota Power & Light Company on the sale of the surplus energy to Northern Power and Light Company, being the difference between the rate received of 3.5 mills and the incremental cost of production. It also shows an annual savings to Northern Power and Light Company on the surplus energy purchased from North Dakota Power & Light Company over what it would have cost Northern Power and Light Company to produce the same with adequate additional generating equipment of $44,340, or 3.25 mills per KWH.

In concluding this analysis, Stokke stated as follows:

"I am of the opinion, from the standpoint of economics, that the rate of $0.0035 or 3½ mills per KWH sold and/or purchased, is fairly equitable, and is profitable, to both companies in the transactions. Furthermore, from the standpoint of operations to each company, we have found the arrangement by interconnection very desirable and essential throughout the year and particularly during

peak load periods. While the rate of $.0035 is somewhat more favorable to the Northern Power and Light Co., it is however good business for the North Dakota Power & Light Co."

(Study Dated December 31, 1935 re Northern Power and Light Company and defendant:

This analysis covers detailed information as to generation costs by defendant, with special analysis of such costs at the Aberdeen Station, and also information as to the desirability of continuing the interconnection with Northern Power and Light Company for the purchase of surplus energy obtainable from the Beulah station throughout the off-peak hours of the day or night. It comprises a summary of computations of plant production costs per KWH of defendant, available off-peak energy obtainable from Northern Power and Light Company and the purchase price thereof, and the incremental production cost of such power to defendant and the annual savings obtained by purchasing the same rather than generating the same in defendant's plants.

The analysis determined a savings to defendant amounting to $4,207.00 or 1.13 mills per KWH by reason of purchasing available surplus energy from Northern Power and Light Company instead of generating such energy. Stokke concludes that there were operating advantages in the interconnection of the two companies which were mutually beneficial and that the then plan of operations should be continued so as to give continued dependable service on the interconnected system and because of the aforesaid savings to defendant, saying "It is profitable business to both companies." He then demonstrates that allowing transmission losses of 20%, Northern Power and Light Company made a net profit of $2,340.00 or .63 mills per KWH on all of the surplus energy transferred over its lines and resold to defendant, being the difference between the 5 mill price and the cost of such energy and the delivery thereof to Northern Power and Light Company. In conclusion, he states that certain disadvantages to defendant because of operating conditions were to a full extent offset by the advantage in buying low price surplus energy from Northern Power and Light Company.

Study Dated July 14, 1936:

This analysis contains summaries and conclusions as to operating statistical data and costs of the interconnected system based on operating conditions and experiences during 1935 for all three companies. It states that in order to arrive at an equitable rate for the interchange of surplus power between Northern Power and Light Company and defendant, it would be proper and necessary to consider both North Dakota Power & Light Company and Northern Power and Light Company "as practically a single operating company of the U. P. U. Corporation, the holding company," and also to consider among the practical aspects the important factor of "stand-by service" from either company in the event of breakdowns of generating or transmission equipment which is mutually beneficial to defendant and the "U. P. U. Group."

The analysis states further:

"Consideration will also be given in this study to operations which theoretically would be in effect had not the interconnections been made several years ago for the transfer of surplus power. Without the advantages of the interconnections, the separately operated companies would have experienced considerable difficulties in operations, higher costs of operations, and the probability of heavy expenditures in generating equipment to handle the increasing KW demands and KWH outputs.

"All companies have benefited by the interconnections particularly during the past few years, and each succeeding year substantiates the need of the interconnections from an operating standpoint because of the increasing KWH outputs or sales of energy by each company. It is my opinion, at this date, that the benefits of the interconnections are equal to the Northwestern Public Service Co. and to the Northern Power & Light Co. and North Dakota Power & Light Co. as a combined company. The question of (a) intercompany power rates, and of (b) fixed charges on the transmission line investments of the interconnection, are details to be computed from year to year, with changing conditions of sales or outputs, demands and generating capacities and production costs."

Six tables of statistics and computations are set forth covering (1) the operations of the U. P. U. companies without the interconnections (estimated); (2) the operations of defendant without the interconnections (estimated); (3) the combined operations of the U. P. U. Group and defendant without the interconnections (estimated); (4) the combined operations of the U. P. U. companies and defendant with the interconnections (actual); (5) a summary of savings to all the companies by reason of the interconnection operations, and (6) the sales among the three companies of surplus energy during 1935 and profits thereon to North Dakota Power & Light Company and Northern Power and Light Company. The estimated figures in the tables are stated to have been predicated on the assumption that both the U. P. U. Group stations and those of defendant would have operated without serious shut-down of stations, shortage of generating equipment or transmission difficulties.

The table summarizing the savings to all companies shows and it is so stated, that a considerable saving in overall production costs was effected by the interconnected operations, being estimated at $16,882.30, or a reduction in unit production cost of .25 mills per KWH.

The analysis states that the fixed charges on the investment made to construct the interconnection equipment should be proportioned to the respective companies annually, because of variance in operating conditions from year to year; that transmission operating expenses are nominal; and (at a later point) that the fixed charges then being billed to Northern Power and Light Company "appear to be very reasonable and properly allocated between the two companies and should likely be continued as now applied."

The last table described above shows a net profit of $1,009.16 to North Dakota Power & Light Company on the surplus energy sold to Northern Power and Light Company at 3.5 mills, based on the incremental production costs with allowance of transmission losses at 3.5%, and also a net profit of $2,931.20 to Northern Power and Light Company on such energy sold by it to defendant at 5 mills, after allowance of transmission losses of 20%.

The analysis shows further that defendant made a savings of $3,581.41 on the surplus energy purchased by it from Northern Power and Light Company during 1935, being the difference between the price paid at 5 mills per KWH and the amount it would have cost to produce such energy on an incremental basis, allocating 75% of such production to the Aberdeen station and 25% to the nearby stations at Webster, Redfield and Huron, which profit amounted to approximately 1 mill per KWH.

The analysis further states:

"General Operations. In the present scheme, or plan of operations there are a variety of advantages and benefits obtained by both companies by means of the interconnection and transfer, or sale of surplus power, between the affiliated companies.

"It is difficult to show wherein the advantages or benefits are in favor of one company or the other. At the present writing, the Northwestern had adequate generating facilities in equipment to handle its own requirements in KWH output. The same is true of the U. P. U. group companies in 1935, and possibly during 1936. However, due to the increasing outputs on the U. P. U. Companies, it is likely that additional generating equipment will be required by next year—1937—for that company group system to handle its own increasing output. This will likely be done, accordingly."

Summarizing particular benefits resulting from the general operating plan, the report states that the dispatching of the load was accomplished daily with the idea of obtaining the lowest production cost energy from the principal generating stations of all three companies and simultaneously providing dependable and satisfactory service to all communities served by the three companies; further, that the high class of dependable and continuous electric service rendered by the three companies was largely due to the service available by means of the interconnections, without which there would likely have been some serious outages experiences by all the companies; further, that the running capacity factors of the primary machines in the various stations had been improved and

an improved load factor to the system and plants had been achieved from which all three companies benefited equally; further, that the availability of emergency energy by reason of the interconnections during periods of transmission maintenance or line repairs, savings in transmission operating costs, and continuity of service which otherwise might not have been accomplished, had been of considerable advantage to all three companies.

The report states that the rates for surplus energy then in force "are equitable and fair to both companies" and also that "The present plan of allocation of fixed charges on the investment in transmission interconnecting lines and equipment, to both companies, is fair and proper."

Stokke concludes with the suggestion that the allocation of operating costs and division of profits under the sale and purchase of surplus power and the fixed charges to be charged could best be worked out in a conference among himself, Strike and Sandstedt.

Q. Are the engineering studies you have just referred to those papers fastened under a clip as Exhibit 55-3?

A. Yes, those are the engineering studies.

Q. That is part of the records of your office, kept in the routine of your office? A. That is right.

Q. Are these all your studies, prepared by you?

A. Yes, I prepared them.

Q. Do you have any studies that were furnished to your company by Middle West Utilities, or by its receiver, or Middle West Service Co., or Middle West Corporation, showing studies made by them to determine that this energy should be sold to Northern Power and Light Co. at 3.5¢ per KWH? A. No, I do not.

Q. Have you any recollection of having had any in your office, these accounting or engineering studies, that were furnished by these other parties I have enumerated?

A. No, sir, I have not.

The witness Stokke had been subpoenaed to produce various records and documents.

Q. Now referring to No. 13 of the subpoena served on you, did you produce the meter readings?

A. I brought such meter readings data as was available.

Q. What ones were missing? Are you able to tell offhand?

A. The meter readings that I did find were for the years 1938, 1944 and 1945, only.

Q. 1938, 1944 and 1945. Do you know or can you account for the absence of the other years that you didn't find?

A. No, I can't.

Q. Did you make a search in the files where they normally would be kept? A. They were discarded.

Q. Do you think all of the intervening ones were discarded?

A. They must have been. We only kept them for a couple of years.

Q. Can you explain why the intervening ones were discarded and these are still here?

A. Intervening between '38 and '44?

Q. Yes.

A. They were discarded. It so happens the '38 meter readings were attached to a copy of the tabulation sheet, and exhibit that I had in my files. It was a carbon copy that I incidentally kept, which I found as I went through the files.

Q. You made a thorough search for those others?

A. Yes, I did.

Q. You think they are destroyed? A. I am sure they are.

Plaintiff's Exhibit 55-4-A, B and C, which was received in evidence, reads as follows:

Exhibit "B".

Supplement to
Interchange Capacity Agreement

Northwestern Public Service Company
Dakota Public Service Company

Rating of Generating Stations determined as of December 22, 1941:

Northwestern Public Service Company		
Aberdeen Station		6,250 K. W.
Webster	"	760 K. W.
Redfield	"	900 K. W.
Faulkton	"	110 K. W.
Huron	"	1,130 K. W.
Highmore	"	140 K. W.
Mitchell	"	7,500 K. W.
Armour	"	980 K. W.
Yankton	"	2,340 K. W.
Clark	"	180 K. W.
		29,290 K. W.
Dakota Public Service Company		
Beulah Station		6,000 K. W.
Bismarck	"	5,250 K. W.
Dickinson	"	700 K. W.
Mott	"	230 K. W.
Mobridge	"	1,000 K. W.
Ellendale	"	400 K. W.
Lemmon	"	235 K. W.
Gettysburg	"	140 K. W.
		13,955 K. W.
Total All Companies		34,245 K. W.

These ratings were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1942 and ending December 31, 1942.

Signed this 1st day of January, 1942.

NORTHWESTERN PUBLIC SERVICE COMPANY,
By O. C. STOKKE.

DAKOTA PUBLIC SERVICE COMPANY,
By J. W. CHESIRE.

Exhibit "C".

Supplement to
Interchange Capacity Agreement

Northwestern Public Service Company
Dakota Public Service Company

The Company System Maximum demands as listed below were established on December 22, 1941, by multiplying by two the net total output in kilowatt hours during the half hour from 5:30 P. M. to 6 P. M.

Northwestern Public Service Company...	17,217 K. W.
Dakota Public Service Company.....	12,903 K. W.
Total	30,120 K. W.

These Company System Maximum Demands were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1942 and ending December 31, 1942.

Signed this 1st day of January, 1942.

NORTHWESTERN PUBLIC SERVICE COMPANY,
By O. C. STOKKE.

DAKOTA PUBLIC SERVICE COMPANY,
By J. W. CHESIRE.

Exhibit "D".

Supplement to Interchange Capacity Agreement

Northwestern Public Service Company Dakota Public Service Company

Summary for determination of firm capacity and demand charge:

	Northwestern Public Service Company	Dakota Public Service Company	Total Interconnected System
Company Generating Capacities	20,290 K.W.	13,955 K.W.	34,245 K.W.
Company System Maximum 30 Min. Demands	17,217 K.W.	12,903 K.W.	30,120 K.W.
Reserve Capacities	3,073 K.W.	1,052 K.W.	4,125 K.W.
Per Cent Reserve Capacity	17.84%	8.15%	13.695%
Required K.W. Capacity for 13.695% Reserve	19,575 K.W.	14,670 K.W.	34,245 K.W.
Excess or Deficiency of Reserve Capacity	715 K.W.	—715 K.W.	....
Demand Charge @ $13.20 per kilowatt of deficiency of reserve capacity for the contract term beginning January 1, 1942 and ending December 31, 1942, Dakota Public Service Company		$9,438.00	
Demand Charge apportioned to Supplying Company (N. W. P. S. Co.)	$9,438.00		

These computations were determined and agreed to by the Committee on Operations and will apply for the contract term beginning January 1, 1942 and ending December 31, 1942.

Signed this 1st day of January, 1942.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By O. C. STOKKE.

DAKOTA PUBLIC SERVICE COMPANY,

By J. W. CHESIRE.

(End of Plaintiff's Exhibit 55-4-A, B and C.)

By Mr. Benson: Q. You see Plaintiff's Exhibits 55-4-A, B, and C, don't you? A. Yes.

Q. I notice on 55-4-A there is the name, J. W. Chesire?

A. That is right.

Q. Do you know Mr. Chesire? /A. Yes.

Q. What is Mr. Chesire's position? A. On that date?

Q. When did you first become acquainted with Mr. Chesire? A. Back in the early '30's.

Q. What was he doing when you first became acquainted with him?

A. He was an operator in the power plant at Mitchell.

Q. You signed every one of the exhibits to the load contract which was contained in the interchange capacity agreement between Northwestern Public Service Co. and Northern Power and Light Co. and North Dakota Power Co., did you not? A. Yes.

Q. And you also signed the same kind of exhibits which were made with reference to the interconnection contract between Northwestern Public Service Co. and Dakota Public Service Co.? A. Yes.

Q. Did Mr. Chesire sign all of those exhibits? He did sign some of them? A. Some of them, not all of them.

Q. At the time he signed those exhibits what was he doing? What was his position?

A. He was chief engineer of the Bismarck power plant.

Q. Who had direct supervision of Mr. Chesire? Was it yourself who directed his activities?

A. Yes. In power plant operations I was his supervisor.

Q. You were his superior? A. In operations.

Q. Did he have a superior in some other function?

A. The division manager, yes.

Q. What did he do that was under the control of the division manager?

A. Principally personnel in the plant. Hiring and discharging of men. Many incidentals.

Q. Now, maximum demand was determined on the systems of Northern Power and Light and North Dakota Power and Light and Northwestern Public Service Co. Did Mr. Chesire do anything in determining those maximums or did you have charge of that?

A. We both had charge of that. Committee members.

Q. Was there a man by the name of Diehl?

A. Fred Diehl, yes.

Q. What was his position?

A. At the time he was a committee member, chief engineer of the Bismarck plant.

Q. You mean at the time his name appears on any of these documents that are in evidence here, that are exhibits to these load contracts, he was chief engineer at the Bismarck plant? A. Yes.

Q. As such chief engineer was he under your supervision and control? A. Yes, with respect to plant operation.

Q. Did anybody else sign any of these exhibits besides Chesire and Diehl, that you recall?

A. The committee member for Northern Power and Light.

Q. Who was that? A. N. S. Patterson.

Q. Where was Mr. Patterson located then?

A. Mobridge.

Q. What was position?

A. Electrical Superintendent, Mobridge Division.

Q. What was his duties as Electrical Superintendent, Mobridge Division?

A. General division superintendency over the electrical operation of the system.

Q. Was he an electrical engineer? A. Oh, yes.

Q. Was he under your supervision? A. No, not directly.

Q. Whose supervision would he be under?

A. He would be under the transmission and distribution general superintendent.

Q. Who would that be? A. E. K. Alberts.

Q. The division superintendent at Bismarck when Mr. Diehl was there, who was he?

A. His name was Porter. I don't recall his initials.

Q. Under whose supervision was he?

A. Under Mr. Alberts'.

Q. Who was division superintendent at Bismarck at the time Mr. Chesire was head of the power plant there?

A. Mr. Porter up until a few years ago, and later someone else was selected for that job. I can't remember.

Q. Who had supervision of Mr. Porter? A. Mr. Alberts.

Q. Who had supervision of the man who followed Mr. Porter? A. Transmission and electrical superintendent.

Q. Who was that?

A. Mr. Alberts at that time, if you are talking of '37 to '39 period.

Q. '39 to '41, who had charge of the division superintendent at Bismarck?

A. I am not sure it was Mr. Alberts.

Q. '41 to 45? A. Somewhere in there Mr. Alberts left.

Q. Who followed Mr. Alberts?

A. Mr. Bayles for a short period.

Q. Who followed Mr. Bayles? A. Mr. Sickel.

By Mr. Rohyl: Q. During what period were you a member of the joint staff of the connected companies, a member of the joint management staff?

A. From the beginning of 1929, on.

Q. Through 1945? A. Yes.

Q. In the matter of the production of instruments and records, etc., here, did you make any determination as to whether or not they are a part of the defendant's files or a part of the joint management's files? A. Yes, I have.

Q. Would such of those instruments as came within the defendant's charge, you have mentioned, 1929 to 1945, would they have been part of the joint management file of the three companies, and in some instances, two companies? A. Yes, in some instances two companies.

Q. And in tendering those files, you tender them with that reservation, do you? A. Oh, yes.

Q. You have spoken of J. W. Chesire. I believe you said he was division manager? A. Chief engineer.

Q. During what period did you say he was chief engineer?

A. Chief engineer of the Bismarck plant, I would say, from 1939 on.

Q. Through 1945? A. Through 1945, yes.

Q. He was not a part of your joint management operation, was he? A. No.

Q. By whom was he employed up to 1939?

A. Employed by joint management as a load dispatcher.

Q. And for what company?

A. For the operating companies.

Q. Was Chesire a dispatcher? A. Yes.

Q. Up to about what time?

A. At the time he was transferred to Bismarck as chief engineer.

Q. Can you give us the date?

A. I am pretty sure that was in the year 1939.

Q. Was he assigned chief engineer at Bismarck until after 1939 or about 1939?

A. In that period somewhere. I don't have the dates.

Q. How long had he acted as dispatcher prior to that?

A. I would say he was dispatcher, load dispatcher, from—He left the Mitchell plant in 1928, I [beleive]. Transferred to load dispatcher. Somewhere back in there.

Q. Prior to the joint management of these three companies, North Dakota, Northern, and Northwestern, where was the dispatcher's office located?

A. At the Mitchell plant.

Q. And thereafter, about 1929, it was moved to Aberdeen? A. Moved to Aberdeen, yes.

Q. And remained there through 1945? A. That is right.

Q. After 1939 you say that Mr. Chesire was employed by the Dakota Public Service Co. as chief engineer of the Bismarck Plant? A. That is right.

Q. And continued at that employment through 1945?

A. Yes.

Q. At what time did he first appear as a member of the operating committee, so called? A. 1939.

Q. And through whose appointment?

A. Through the appointment of the management of the U. P. U. Co., referring to North Dakota and Northern.

Q. And after 1939 they were merged into this Dakota Public Service Co.? A. That is right.

Q. Then the operating committee after 1939 consisted only of two members. Is that right? A. Yes.

Q. And this operating committee in these exhibits which have been offered in evidence, that was an activity under the so-called reserve capacity agreement, was it? A. Yes.

Q. And I believe you said in answer to Mr. Benson's interrogatory that Mr. Chesire and yourself, as this committee, prepared these Exhibits B? A. Yes.

Q. And you prepared them jointly, as a committee?

A. Yes.

Q. Now, that Exhibit B form was first inaugurated in 1938, wasn't it? A. Yes.

Q. And I believe you said in answer and enumerated that the first year, or possibly the first and second year, there were three members of this operating committee?

A. That is right.

Q. And you mentioned a Mr. Diehl? A. Yes.

Q. I think you said Fred Diehl. Is that right?

A. That is right.

Q. Was he ever employed by the Northwestern Public Service Co.? A. Yes.

Q. In what capacity? A. Assistant chief engineer.

Q. Where? A. Aberdeen plant.

Q. When did he go to the Northern property? Was he ever on the Northern property?

A. No, no Northern property. North Dakota.

Q. He was chief engineer at Bismarck? A. That is right.

Q. Do you know when he went there?

A. I can't remember the year, but he was chief engineer of that plant, I am sure, in 1937. Maybe in 1936. I am not positive of that?

Q. That is at Bismarck? A. At Bismarck.

Q. And you say Chesire was chief engineer at Bismarck?

A. Yes.

Q. After Diehl left? A. After Diehl left, yes.

Q. So Mr. Diehl had had considerable experience in the utility business?

A. In the utility business, in power plants, load dispatching, etc. Yes, to my knowledge.

Q. You mentioned a man by the name of Patterson, who was on one or more of the first operating committee reports? A. Yes.

Q. And you say he was located at Mobridge? A. Yes.

Q. That would be on the Northern Power and Light?

A. That is right.

Q. What was his capacity?

A. Division Electrical Superintendent, was the title.

Q. Had he been with these companies for some time?

A. He had been with Northern for several years. I would not know the number of years.

Q. When you had the three man committee did you operate together in the preparation of these forms, Exhibit B? A. Yes.

Q. Is Mr. Chesire still in the North Dakota area?

A. I believe he is today.

Q. He is still employed up there?

A. I am sure he is, as far as I know.

Q. Is Mr. Patterson? A. I think he is.

Q. Mr. Diehl? A. No. He left in 1939.

Q. You have been asked concerning who hired Mr. Chesire. In his position with the North Dakota company, and with the Dakota Public Service Co. Do you know who hired him? A. Yes, Mr. Ruden, the division manager.

Q. And Mr. Ruden was employed by Dakota Public Service Co.?

A. He was division manager, Bismarck division.

Q. Did you have anything to do with the hiring or firing of any of these men? A. No.

Q. Were you on the operating committee for the years 1946 and 1947? A. Yes.

Q. I show you papers which are attached to and a part of Plaintiff's Exhibit 35, and ask you if you signed the Exhibit B for 1946 and Exhibit B for 1947?

A. I signed 1946. I signed 1947.

Q. Do you know who represented the plaintiff company as a member of the operating committee in the year 1947?

A. Yes, I do.

Q. Who was it? A. Mr. Cecil W. Smith.

Q. Do you know who represented the plaintiff company on the operating committee for the year 1946?

A. Mr. McDonald.

Q. Are the Exhibits B, attached to and a part of the rate schedule, FPC No. 6, shown in Plaintiff's Exhibit 35, the committee reports for those years, 1946 and 1947? A. Yes.

Q. I hand you a load diagram which has been marked for identification as Defendant's Exhibit 217, which is contained in the envelope marked Plaintiff's Exhibit 53, and ask you if that was the diagram concerning which you were interrogated by counsel as to the legends and methods of preparation? A. Yes, that is the same one.

Q. Was that peak taken on the hourly basis for the purpose of the contract, Exhibit B, under the reserve capacity agreement of 1941?

A. Those readings were taken with the idea in mind that the peak might occur on that day at that hour.

Q. Was that, in fact, the coincident peak of the companies? A. Not the peak hour, no, sir, on this date.

Q. What was the peak hour as of that date?

A. December 15, 1941. It occurred on December 15th.

Q. Do you have any computations as of December 15th?

A. On load diagrams, no.

Q. I observe on the back of the diagram, Defendant's Exhibit 217, computations concerning peak hour on December 15, 1941. To what does that refer?

A. That refers to the total generation of the combined system and gives the figures there, 28,840, the total generation by each of the operating companies, Northwestern Public Service Co., Dakota Public Service Co., and also shows the quantity of transferred power between the two companies.

Q. And you made those computations? A. Yes.

Q. Are they true and correct? A. Yes.

Q. Then that represents the peak for the year shown?

A. Yes, that is right. Those are my figures.

Q. And they are in lead pencil on the back of Defendant's Exhibit 217? A. That is right.

Q. And that, you say, is a sixty minute peak?

A. Sixty minute peak, yes.

Q. You spoke of another year where the load diagrams in and of itself, with the colored crayons and the drawing, did not represent the peak period under the reserve capacity contract? A. That is right.

Q. Would that be what year, as shown by these diagrams?

A. It was the generating readings, but I am not sure it is on these sheets.

Q. You may look at them.

A. Yes, it is so noted on here, the peak occurred on January 7, 1942, whereas this load diagram was from fifteen minute readings taken on December 21, 1942.

Q. The peak that was used on the reserve capacity contract in the preparation of Exhibit B to that contract by you and the operating committee, did you say the peak is of January 7, 1942? A. Yes.

Q. Do you have any computations on that?

A. They are shown on the exhibit. January 7, 1942, the peak, coincident peak for the two companies, and their totals.

Q. And that was a computation that was used in the preparation of Exhibit B for that period? A. Yes.

(Defendant's Exhibit 218 marked for identification.)

Mr. Royhl: We ask that the particular load diagram appearing as part of the envelope, Exhibit 53, be marked as Defendant's Exhibit 218.

The Court: Very well, it may be so marked.

Q. You have spoken of certain green figures appearing on Exhibits 217 and 218, and the other load diagrams which are contained in the envelope, Plaintiff's Exhibit 53. I think you said that, in part, those were meter readings?

A. Yes.

Q. And in part they were estimates which you and the district chief made? A. The load dispatcher.

Q. Those green figures, were they always meter readings if there was a meter reading available? A. Yes.

Q. And the rest, for engineering use and experience, were estimated by you and the dispatcher?

A. That is right.

Q. I think you said there was some engineering reason why those estimates were made and that distribution of load so shown? A. Yes, I did.

Q. What was it?

A. To give some idea, general idea, of the distribution of the fifteen minute peaks in certain sections or lines or certain areas. Briefly, that was one reason for the information.

Q. You have been asked concerning generating capacity as has been shown on these diagrams? A. Yes, I was.

Q. And I think you said that there was a dependent capacity shown? A. Effective capacity or capability.

Q. And you described that as being something that was dependable to the system?

A. That illustrates or indicates the capability of the station over a continuous operation. Many hours.

Q. Something that the system can depend on?

A. That is right.

Recross-Examination by Mr. Benson.

Q. You said that the man who represented the North Dakota Power and Light Co. and the Northern Power and Light Co. on the exhibits that were attached to these inter-

change capacity agreements, were selected by the U. P. U. Co.? A. To my knowledge, they were.

Q. To your knowledge? A. Yes.

Q. Where did you get that knowledge?

A. Because they were employees—

Q. You say to your knowledge? A. Yes.

Q. Did you see a letter?

A. I was so informed by Mr. Strike, to begin with.

A. I was informed or told by Mr. Strike that I was to be the committee member representative for the Northwestern Public Service Co. And for the other companies he informed me that Mr. Diehl, at the time, had been selected as committee member for North Dakota Power and Light. And Mr. Patterson, of Northern Power and Light, and that the selection had been approved by the U. P. U. Co., Mr. White.

Q. Mr. Strike told you it had been approved? A. Yes.

Mr. Benson: Move the testimony be stricken as based on hearsay.

The Court: It is hearsay, but we will let it stand, subject to the objection.

STANLEY J. SICKEL was called as an adverse witness by the plaintiff, was sworn and testified as follows:

Cross-Examination, by Mr. Fellows.

Q. Mr. Sickel, what is your connection with the defendant company?

A. I am superintendent of transmission and distribution.

Q. For how long a time and over what period?

A. As superintendent since the Fall of 1945.

Q. What was the purpose of ever keeping these log books in the first place? What was the purpose in making these log books in the first place?

A. These log books serve as a constant day by day check on the orders given by the dispatchers to the men who are under their supervision to that extent. That ap-

plies not only to the power plants but also to line crews, trouble shooters, switchmen, anyone who may be called upon to do work on equipment that is under the supervision of the load dispatcher. We find it necessary to keep these logs for a limited period in order to establish responsibility for switching orders, and in order to determine the length and duration of interruptions. They are confirmation of verbal orders that were given. We keep them for periods long enough to satisfy any normal requirement for such confirmation, and they are bulky and our space is limited, so when they have apparently served their purpose they are discarded.

Q. Are you familiar with the rules and regulations of the Federal Power Commission in respect to keeping these particular records? A. I am not too familiar, no.

Q. Have you ever seen these rules and regulations relating to the preservation of records of public utilities?

A. I don't recall that I ever have.

(Plaintiff's Exhibit 57 marked for identification.)

Q. Did you ever see a copy of this pamphlet, Exhibit 57, which is entitled "Federal Power Commission, Regulations to Govern Preservation of Public Utilities Records," which bears the seal of that commission?

A. I don't recall that I have seen that.

Q. Was your attention ever called to that?

A. Not that I recall, no.

Plaintiff's Exhibit 57 was received.

Plaintiff's Exhibit 57 is the regulations of the Federal Power Commission to govern the preservation of records of public utilities and licensees, effective August 1, 1938, and requires that various and sundry records be kept for the years indicated in the regulation and, among other things, requires that the following records be kept for the term indicated hereinafter:

"19. Tax records:

(a) Copies of schedules, returns and supporting working papers to taxing authorities and records of appeals.	20 years.

59. Production:

(d) Generation and output logs with supporting data. 6 years.

(e) Station and system generation reports. Permanently.

(f) Generating high-tension and low-tension load records. 6 years.

60. Transmission and distribution:

(a) Substation and transmission line logs. 6 years.

(b) System operator's daily logs and reports of operation. 6 years."

By Mr. Royhl: Q. You have produced the dispatch log, so-called, for the years 1944 and 1945? A. That is correct.

Q. That is in four volumes? A. I believe it is.

Q. I think you told counsel that these registered daily messages between the dispatchers over the integrated systems and with the field operators?

A. They are records of telephone conversations. That is right.

Q. With whom, normally, does the dispatcher communicate?

A. In the ordinary dispatching of load on the system, the dispatcher communicates with the operator on duty at the various power plants. Occasionally with the chief engineer. Normally with the operator on duty.

Q. That is, in the handling of the loads from the various plants? A. That is right.

Q. Now, in the messages that are shown, that is one end of the message. Is that registered on the other end of the message?

A. Yes. Both parties to the conversation keep their end regarding the conversation.

Q. Then assuming that the dispatcher was calling the chief engineer of the plant at Bismarck, would that in-

dividual in Bismarck maintain the identical record normally?

A. Yes. He would have the same record of the same conversation recorded at his end.

Q. Does he maintain the same type of record?

A. It is kept in the same form, yes.

Q. Showing the hour and the day when the message was sent or received? A. That is correct.

Q. And the nature of the order that followed?

A. Yes, the substance of the order. Not verbatim.

Q. You are familiar in a general way with these records, are you? A. In a general way, yes.

Q. Down through the years do they, in the handling of these various matters, seem to develop a code of their own?

A. To some extent they do. It is not a shorthand, but they converse in their own slang, if you might put it that way. Many of the codes are recorded that way. They are perfectly intelligible to one who is familiar with it.

Q. Does the dispatcher's record show anything in addition to the messages or communications, or does it show what operation followed as a result thereof?

A. Not in a general sense, no. It records his instructions, but the record of what actually took place—may I use an example?

Q. Yes.

A. The dispatcher might call the plant and ask them to pick up a thousand kilowatts, or drop off five hundred kilowatts as the case may be. That instruction would be recorded in the log, but the actual fact of whether or not they did pick up or did drop off would be reflected on the station log itself in the meter reading.

Q. And the station log which you mentioned, in that instance, would be a record such as these records that you have furnished here? A. That is correct.

Q. Known as "daily station log"? A. Yes.

Q. And the result of that communication would be reflected either by stepping up the load or decreasing the load in that station? A. Exactly.

Recross Examination, by Mr. Fellows.

Q. When did you say you went in there as head of this operating department?

A. I became superintendent of transmission and distribution in 1945. I was acting superintendent from late 1942 until 1945.

Q. Prior to that what were you doing?

A. I was assistant.

Q. When did you go to work for the company?

A. Continuous employment or first employment?

Q. First employment. A. 1927.

Q. Continuously from when? A. From 1933.

Q. I think you testified Friday that the load dispatcher was so appointed and regulated that he represented both the Northern and Northwestern Public Service Companies?

A. That is right.

Q. And the Northwestern Public Service Company did not have control of his operations. That is right, isn't it? That is what you testified to, isn't it?

A. The dispatcher was a joint employee with the rest of us.

Q. But his control was both in the northern companies and Northwestern Public Service Co.?

A. His control—I don't quite identify what you mean by that.

Q. Who had control of the load dispatcher?

A. He was supervised by Mr. Stokke and myself.

Q. Representing which companies?

A. Representing all of the companies.

Q. That is what I am getting at. When you were asked to bring in, under subpoena, all of your accounting records, your engineering accounting records, did you run across this letter of July 15, 1936, which is marked Plaintiff's Exhibit 58?

Plaintiff's Exhibit 58, which was received in evidence, reads as follows:

Plaintiff's Exhibit 58.

July 15, 6.

Inter-Connection Contract.

Northwestern Public Service Company.
Northern Power & Light Company.

F. E. Kruesi.
C. J. Strike.

I am enclosing the drafts of a proposed contract for inter-connection between the above mentioned Companies. I am also enclosing an analysis showing the purported savings to each of the Companies by reason of the inter-connection.

You will note that the statement shows that the cost of power for the combined companies would be increased $9,341.05 if the systems were operated independent of each other and therefore the above figure is assumed to be the saving due to the present method of operation.

Using the year of 1935 as a basis, and the present inter-change rates, the benefits to the Companies are as follows:

Northwestern Public Service Co....	$3,581.41	38.3%
North Dakota Pr. & Lt. Co.....	2,821.05	30.2%
Northern Power & Light Co.....	2,938.59	31.5%
	$9,341.05	100.0%

You will appreciate that there are a tremendous number of calculations to be made and also conditions to be assumed, and we have in this analysis, assumed that Northwestern's present operations of banked boilers, et cetera, would be no different operated as an isolated system. This, however, is somewhat conjecture in that under the present operations, Northwestern does have adequate reserve, and is the Company which is called upon for emergency.

In other words, if a boiler is down at Beulah, Northwestern picks up the deficit in capacity, if there is any trans-

mission line trouble which isolates Beulah partially, or totally, it is Northwestern which picks up the load.

It might be argued that in as much as Northwestern is paying half of the fixed charges on the inter-connection facilities, that they should be entitled to one-half of the savings, but this difference amounts to only $1100.00 per year, and it would be difficult to adjust this to a more accurate basis as conditions change from time to time and it is impossible to exactly allocate the savings unless the rate per K. W. H. for inter-change transfers was changed each month. For instance, Beulah was down with a boiler the entire month, and Northwestern furnished current constantly into the Northern system.

The effect of our study can be summarized as follows:

	Savings Without Inter-connection	Increased Costs and Loss of Revenue	Savings by Reason of Inter-connection
N. W. P. S. Co. purchased 3,673,240 K. W. H. from Northern Power & Light Co. at 5 mills	$18,366.20		
Cost of generated in Northwestern Pub. Serv. Co. plants		$21,947.60	
Northern Power & Light Co. purchased 4,407,888 K. W. H. from No. Dak. Pr. & Lt. Co. at 3½ mills for delivery to N. W. P. S. Co.	15,427.61		
Northern Pr. & Lt. Co. sold 3,673,240 K. W. H. to N. W. P. S. Co. at 5 mills		18,366.20	
No. Dak. Pr. & Lt. Co. generated 4,407,888 K. W. H. for N. W. P. S. Co. at increment cost of 2.86 mills.	12,606.56		
The above sold to Northern Power & Light Co. at 3½ mills		15,427.61	
Total	$46,400.37	$55,741.42	$9,341.05

If the inter-connection did not exist we have assumed that 75% of the kilowatt hours now purchased from Northern would have been generated by the Aberdeen station at an incremental cost of 5 mills per K. W. H. and the balance by our other stations at an arbitrarily assumed incremental cost of 7.1 mills per K. W. H.

After carefully studying all angles of this situation we believe that the present rates fairly distribute the savings

by reason of the inter-connection, assuming that the next generating equipment will be added on the U. P. U. system. The savings are well enough distributed that we would not recommend any change in the inter-change rate at this time.

You will appreciate that the operations of the entire system is under the Load Dispatcher which keeps the control in Northwestern's hands, and by reason of such, we believe that the operation of equipment will continue to be adjusted so that the present ratio of benefits will continue approximately as is.

In addition to the savings listed above, there are certain other benefits by reason of operating the three systems as an inter-connected system, some of which are as follows:

1st. The inter-connection facilities often permit maintenance of generating units, boilers, transmission lines, etc. without placing into service inefficient standby equipment. It is impossible to accurately determine the monetary benefits in all cases but we feel confident that the power costs of all companies would be increased if it were not for the inter-connection under such circumstances. However, no attempt is made to include such benefits in the cost analysis.

2nd. Service has been greatly improved, particularly to the U. P. U. Companies and on the line west of Huron, and the number of service interruptions substantially reduced.

Conclusion:

We believe that the inter-connection does serve as an advantage to all companies and that within reasonable bounds, the benefits are fairly well allocated using the present inter-change rate which is 3½ mills from North Dakota Power & Light Company to Northern Power and Light Company, and 5 mills for inter-change between Northern Power and Light Company and Northwestern Public Service Company.

I trust that the enclosed study will be of some assistance to you in arriving at a conclusion in this matter.

Yours very truly,

C. J. STRIKE.

CJS–B

Savings by Reason of Operating the Systems of Northwestern Public Service Company—North Dakota Power & Light Company and Northern Power & Light Company as an Interconnected System

	Northwestern Public Serv. Company	No. Dakota Power & Lt. Company	Northern Power & Lt. Company	Total
Present Costs				
KWH Generated	47,868,585	34,772,029	3,725,338	86,365,952
" Purchased Outside	7,410,800	.....	.....	7,410,800
" " Inter Co.	3,673,240	.....	12,639,756	.....
Total Output	58,952,625	34,772,029	16,365,094	
Cost of Power				
Generation	443,433.50	198,183.08	55,372.65	696,989.23
Purchased Outside	47,095.00	.....	.....	47,095.00
" Inter Co.	18,366.20	.....	44,239.16	62,605.36
Total Cost of Power	508,894.70	198,183.08	99,611.81	806,689.59
Cost Per Kilowatt-Hour—Mills				
Generation	9.26	5.7	14.86	
Purchased Outside	6.35	....	....	
" Inter Co.	5.	....	3.5	
Total	8.63	5.7	6.08	
Accounted For				
Sales	46,535,241	30,303,487	11,324,120	
Company Use	1,091,832	152,314	132,949	
Total Accounted For	47,627,073	30,455,801	11,457,069	
Unaccounted For	11,325,552	4,316,228	4,908,025	
% Losses	19.21%	12.41%	30. %	
Costs of Generation Without Interconnection				
Additional KWH to be generated..	3,673,240	(3,673,240)		
Losses Estimated 20%		(734,648)		
	3,673,240	(4,407,888)		
Northwestern Public Service Company				
Aberdeen — 2,754,930 KWH @ 5.6 mills	15,427.61			
Other Stations 918,310 KWH @ 7.1 mills	6,520.00			
Total 3,673,240	21,947.61			
Savings in cost of Inter Co. purchased	18,366.20			
Net additional cost	3,581.41			3,581.41

	Northwestern Public Serv. Company	No. Dakota Power & Lt. Company	Northern Power & Lt. Company	Total
North Dakota Power & Light Co.				
Beulah Savings 4,407,888 KWH @ 2.86 mills		(12,606.56)		
Loss in revenue KWH sold to N. P. & L. Co. 4,407,888 KWH @ 3½ mills		15,427.61		
Net additional cost		2,821.05		2,821.05
Northern Power & Light Co.				
Loss in KWH sold to N. W. P. S. Co. 3,673,240 @ 5 mills			18,366.20	
Savings in Purchased from N. D. P. & L. Co. 4,407,888 @ 3½ mills			(15,427.61)	
Net additional cost			2,938.59	2,938.59
Total costs without Interconnection	512,476.11	201,004.13	102,550.40	816,030.64
Savings by reason of Interconnection	3,581.41	2,821.05	2,938.59	9,241.05

( ) Denotes red figures.

A. I don't recall ever seeing this letter. It perhaps was brought in, but it was not in my files.

Q. You recognize it as a carbon copy of a letter written by Mr. C. J. Strike to the North Dakota Public Service Commission, don't you?

A. No. I could not recognize. I have never seen it before.

Q. Do you recognize it as a carbon copy of a letter written by Mr. Strike? Or some person in connection with the Northwestern Public Service Co.'s office?

A. I can't recognize it because I have never seen it before.

Mr. Fellows: We offer in evidence Plaintiff's Exhibit 58, being the certificate of the Secretary of the Public Service Commission of the State of North Dakota, attached to the letter of July 15, 1936.

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial; no proper foundation laid; hearsay as to this defendant.

Mr. Fellows: This is a certified copy of an official file.

Mr. Royhl: That is certified copy from North Dakota.

The Court: Received.

Plaintiff's Exhibit 55-5, which was received in evidence, reads in part as follows:

Plaintiff's Exhibit 55-5.

Northwestern Public Service Company
General Offices
Huron, South Dakota

June 6, 1930.

To the Honorable Mayor and City Commission of the City of Pierre, Hughes County, South Dakota.

Gentlemen:

On May 9, 1929, Northwestern Public Service Com-[com]pany, filed with the City Auditor a proposal offering to purchase Pierre's Electric Utilities. This proposal was submitted to the electors of Pierre on September 3rd, 1929 and was defeated together with our franchise the same being Ordinance No. 387 of the City of Pierre.

In making our [propsal] last year we purposely did not include the gas utility, for at that time the City Commission had contracted for the drilling of an additional gas well, the success of which at that time no one could predict.

It now appears that there is sentiment to sell both the electric and gas utilities.

In that our Company has never made a proposal to purchase the gas utility, we desire at this time to file our offer for the same, which said offer is herewith submitted:

Northwestern Public Service Company hereby offers to purchase the Gas Utility complete including gas wells, mains, services and meters owned by said city and all appurtenances in connection with said system and to pay therefor the sum of On Hundred Twenty-five Thousand

Dollars ($125,000.00) payable in cash upon delivery of proper instrument of transfer conveying legal title to said property free and clear of all liens and encumbrances.

This offer is contingent upon the passage and approval in the manner provided by law of a franchise granting to said company the right and privilege to construct, maintain and operate within the corporate limits of the City of Pierre, a gas plant and distribution system for the manufacture and distribution of gas for commercial, industrial and domestic purposes.

* * * * * * *

This proposal is contingent on the purchase of the electric utility as covered by our proposal dated May 9, 1929, which is on file with the City Auditor of the City of Pierre, providing for the payment of $325,000.00 in cash, plus the city's indebtedness to its customers for meter deposits, for the electric utility, contingent only on the granting of a franchise to said company to maintain and operate an electric system within the corporate limits of the City of Pierre.

Paragraph —4— of our proposal on file recites that Pierre would be given the benefit of any rate reductions made. Since our last proposal the rate for water pumping has been reduced to 2¢ per KWH a reduction of 20%. This reduction would be available to Pierre.

In addition to this Pierre would be guaranteed of rates always equal to those in Aberdeen, Redfield, Huron, Mitchell and Yankton.

If the City Commission so desires we will deposit with the City Treasurer a certified check for $25,000.00 or furnish a Surety Bond for 10% of the combined bid of $450,000. as evidence that the company will carry out the terms of its proposals.

Because of the fact that Northwestern Public Service Company is the largest electric and gas utility operators in South Dakota we believe that Pierre can be more advantageously served for both electricity and gas by our company [that] any other company.

Because we have not previously offered to purchase the Gas Utility, we file this proposal at this time.

Respectfully submitted,

NORTHWESTERN PUBLIC SERVICE CO.

By C. J. STRIKE,

Vice President.

Mr. Fellows: We offer in evidence Exhibit 55-5, which is taken from Exhibit 55 in evidence here.

Mr. Royhl: The defendant objects to Exhibit 55-5, as being wholly incompetent, irrelevant and immaterial; not within the issues in this case; no proper foundation laid; incompetent for any purpose; at a time remote by at least seven years from the times involved in this litigation.

The Court: Overruled. Received.

RALPH E. MAUCH was called as an adverse witness by the plaintiff, sworn, and testified as follows:

Cross-Examination, by Mr. Fellows.

Q. Mr. Mauck, what is your connection with the defendant company?

A. I am assistant secretary and assistant treasurer.

Q. You are assistant to Mr. Buckmier? A. Right.

Q. Did you get together these various things demanded by the subpoena, collect and assemble them in order to bring them into court? A. Part of them I did, yes.

Q. Did you bring Exhibit 216 and the various papers that go to make it up? A. Yes, I did.

Q. Were they taken from your files? A. May I explain?

Q. Yes.

A. When this litigation first started, Mr. Sanborn told me to gather as many of the files together, dealing with relationship between these companies, as I could find.

Q. Regardless of when you did it, did you bring those in here from your files? A. I did.

Q. And they are part of the files of your company?

A. Right.

Q. And have been kept in the regular course of business through the years? A. Right.

(Exhibit 216-A marked for identification.)

Q. Exhibit 216-A, which is one of the sheets of 216, state whether or not you brought that from the files in your office? A. I think I did.

Q. Don't you know you did? A. Yes, I did.

Q. Compare that with this fourth page of our Exhibit 58, and state whether or not they are identical copies, one with the other?

Mr. Royhl: Objected to as the instruments themselves are the best evidence of that.

The Court: We will take an answer.

A. I would say yes, they were.

Q. Do you know what the purpose of making up 216-A was?

A. I would assume by the title that it bears, the purpose was to show savings by reason of operating the systems of Northwestern Public Service Co., North Dakota Power & Light Co., and Northern Power & Light Co., as interconnected system.

Q. Was that for the purpose of filing with some commission?

Mr. Royhl: Objected to as calling for the opinion and conclusion of the witness.

Mr. Fellows: Some place in the corporation there is some responsibility and knowledge on the part of the officers.

By Mr. Royhl:

Q. When did you first become employed by the Northwestern Public Service Co., or the interconnected companies?

A. I was first employed in the summer of 1940, and until in 1942.

Mr. Royhl: May I renew our objection.

Mr. Fellows: I haven't offered anything.

By Mr. Fellows:

Q. When you got this sheet, 216-A out of your files, did you find this letter of July 15, 1936, attached to it. That is the letter certified to by the North Dakota board?

A. I could not be positive that it was attached to it. I don't know.

Q. If it was attached to it, what became of the letter of July 16, 1936, inasmuch as it is not in 216, which was produced here?

A. If it were attached I would assume that it was not considered to be a study.

Plaintiff's Exhibit 216-A was received in evidence and reads as follows:

Plaintiff's Exhibit
216-A (Page 425) is
shown on Card 11

Blank Page

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Q. Did you go through there and take some letters or other things which were attached out of the file?

A. No sir. Generally speaking. when I went through and assembled these files I tried to leave everything that was attached together.

Q. Can you account for the non-presence in 216 of the letter of July 15, 1936, which states, "The operations of the entire system are in the load dispatcher which keeps control in Northwestern Public Service Co."? Can you account for it not being there in 216 attached to the same exhibit which is attached to the letter?

Mr. Royhl: Same objection.

The Court: Overruled. The question can be answered by yes or [not]. Can you account for it?

A. The only way I can account for it, it was not considered to be a study.

Mr. Fellows: [Plaintiff's] offer in evidence Exhibit 216-A.

Mr. Royhl: The defendant objects to the offer of Exhibit 216-A for all of the reasons and all of the grounds urged in the objection to Exhibit 58.

The Court: Overruled.

Mr. Fellows: That is all.

Examination by Mr. Royhl.

Q. Mr. Mauck, in assembling these various records and files that have been brought into court by the defendant, can you say whether or not Exhibit 216, and in particular, 216-A, were a part of the Northwestern Public Service Co. files, or of the interconnected company files?

A. They were files that I gathered together from—I tried to gather all of the files—some of them came out of the basement, some of them came out of different offices, some of them had been Mr. Sandstedt's. Some of them I was not even sure who had handled them or whose they were. They appeared to be general office files. I suppose you could say they were, generally speaking, joint management. I imagine they would be so classified.

Mr. Fellows: Plaintiff offers the following portions of the deposition of C. J. Strike, taken pursuant to stipulation on the 6th day of May, 1947, at Boise, Idaho, now on file in the office of the Clerk of this Court, and which deposition was taken on behalf of the defendant.

C. J. STRIKE, being duly sworn, testifies:

(Direct Examination, by Mr. Royhl, read by Mr. Fellows:)

Q. Your name is C. J. Strike? A. Correct.
Q. How old are you, Mr. Strike? A. Fifty two.
Q. Where are you residing at the present time?
A. Boise, Idaho.
Q. Is that residence permanent? A. Yes.
Q. How long have you resided in Boise?
A. Since June 11, 1938.
Q. What is your business?
A. I am Chairman of the Board of Directors, President and General Manager of the Idaho Power Company.
Q. How long have you been in the power utility business? A. All my business life—that dates back to 1915.
Q. And have you been at that work continuously since 1915? A. Yes.
Q. Did that include construction work, incident to the power utility business?
A. Yes, sir. I started out originally as an electrical contractor, building power plants, transmission lines, distribution systems, and then that led me into the utility business, about 1921, I have forgotten which year it was, 1919 to 1921, somewhere along in there.
Q. And where was it that you went into the business?
A. At Webster, South Dakota, that is where the offices were located. We took over the properties of the bankrupt Dakota Northern Power Co., and organized the Consumers Electric Service Co., serving communities in that area.
Q. Did you put together in this company a number of stations?
A. We consolidated the bankrupt company in that organization, and almost coincident with that program, I joined the Albert Emanual organization, when they organized the Northwestern Public Service Co., and acquired the

properties at Aberdeen, South Dakota, Mitchell, South Dakota, Yankton, South Dakota, Huron, South Dakota, Columbus, Nebraska, North Platte, and subsequently they acquired my property, the Consumers Electric Service Co., I believe in 1927.

Q. When were you first employed by the Albert [Emanaual] Co.? A. 1924.

Q. And where were you located?

A. I was living at Webster, South Dakota at that time, which was the office of our little company, the Consumers Electric Service Co., and also the office of our electrical contracting company, known as the Midwest Electric Co. I entered the employ of Albert Emanual and the following year, 1925, I moved to Huron, where the offices of the Northwestern Public Service Co. were located, which company was organized by Albert Emanual to consolidate all of the properties I have just described.

Q. During this period of time you have been in the work of management of power utilities?

A. I might just trace that chronologically. My first job was that of new business manager in acquiring properties. I acquired practically all of the properties that made up the Northwestern Public Service Co., except the initial purchase of the nucleus company. I moved from that position into the position of Vice-President and General Manager, and in 1937, as I recall, into the position of President and General Manager.

Q. When did you sever your connections with the defendant company, the Northwestern Public Service Co.?

A. In June of 1938, coincident with my accepting the position with the Idaho Power Company which I previously described, and which position I now hold.

Q. You stated that with the Northwestern Public Service Co. you held the position of Vice-President and General Manager. Is that correct? A. Yes.

Q. For what years were you such?

A. I will have to rely upon my memory, there were some changes in title through there, but my recollection is that it was 1931 or 1932, when I moved from the new business end into the operating end. Now the titles are not always made of record exactly at the time you move into those positions, but that is about the time.

Q. From that time on were you continuously the operating head of that company?

A. Yes, I was the operating head of the Northwestern Public Service Co. from that time, which was about 1931 or 1932, until the time I moved to Idaho, which was 1938.

Q. When did you first become connected with the North Dakota companies, the North Dakota Power and Light Co., to be referred to hereafter in this testimony as the North Dakota Co., and the Northern Power and Light Co., to be hereinafter referred to as the Northern Co.?

A. In the early fall of 1929, when the Middle West Utilities Co., which was the holding company for the Northwestern Public Service Co., acquired the control of the United Public Service, which was the top holding company for the North Dakota Power and Light, the Northern Power and Light, and Knife River Coal Mining Co., which property happened to be contiguous to the Northwestern Public Service Co. territory. We were notified by telegram, as I recall it, by L. B. Bredlove, Assistant to the President of the Middle West Utilities Co., stating that they had acquired United Public Service Co. control and instructing us to take charge of the subsidiaries that I have just described, namely, the North Dakota Power and Light Co., Northern Power and Light, and Knife River Coal Mining Co. That was, as I recall, about the first of October, 1929.

Q. Do you remember what office you held with those three companies you have mentioned, the North Dakota Company, the Northern Company, and the Knife River Coal Mining Co.?

A. I was Vice-President of those companies up until the time I became President of the Northwestern Public Service Co., and coincident with that I became President of those companies. The officers of the Northwestern Co. and those U. P. U. subsidiaries were practically the same. There was a little differential, as I recall it, in the directorate of the Knife River, I have forgotten what it was, but I was Vice-President.

Mr. Benson: Have him identify what he means by "U. P. U."

Q. When you speak of the "U. P. U.", what company is that?

A. That is the United Public Utilities, which was the underlying holding company under the United Public Service. That was the direct parent of the North Dakota Power and Light Company, the Northern Power and Light Co., and the Knife River Coal Co.

Q. From 1929, the time of your election, who was the operating head or general manager of those three named companies, the coal company, the North Dakota Co. and the Northern Co.?

A. At the time we were instructed to take over the property, each of those companies had a general manager of their own. Mr. Warren was General Manager of the Northern Power and Light Co., Mattison was General Manager of the North Dakota Power and Light, and Mr. Kraft was the General Manager of the Knife River Coal Mining Co. Our first move was to discontinue general offices, general management, on the property as such, and to consolidate the general management in Huron under the staff of the Northwestern Public Service Co. At that time Mr. T. T. Parker was president of the Northwestern Public Service Co.

Q. He was also made president, during his time there, of the North Dakota Co., was he not? A. Yes.

Q. That is, the operating company you referred to?

A. Yes.

Q. Did you, following Mr. Parker's resignation as president of those companies, become the General Manager of the three operating companies in North Dakota?

A. I really became the General Manager prior to Mr. Parker's resignation. Mr. Parker moved to Omaha, and set up executive offices as president of all the companies, at the same time he was made president of the Central Power Co., which was another subsidiary of the Middle West Utilities Co., and coincident with that move, I was made General Manager of all of the operating properties, and all operations centered under the Huron office.

Q. Did you continue in that relationship with all of the operating companies named in North Dakota, and also the defendant corporation until approximately June, 1938?

A. I continued in that same relationship—Mr. Parker's resignation brought in Mr. Krusei, who succeeded Mr. Parker as president of all of these companies, and so I continued as Vice-President and General Manager and operating head, of all of the properties, until 1937, when Mr. Krusei resigned, and I became President and General Manager, and our executive office, which was then at Grand Island, Nebraska, was closed.

Q. And everything then was centered in Huron, South Dakota?

A. Everything was centered all through the years in Huron, so far as operations were concerned, but the executive office, the President, was first in Omaha, and later moved to Grand Island.

Q. Then following your election to the offices mentioned, in the year 1929, of the three operating companies of North Dakota, did you make a survey of those companies, their territory, and their facilities? A. Yes.

Q. Did that survey include management, and past management?

A. The survey included an analysis of economies that could be effected by closing the general management offices of the three companies, which I have previously described, setting up what we in the industry choose to call divisional operating offices, and a centralizing of general bookkeeping and customer billing, in the one office at Huron, South Dakota. That was the first analysis that was made, to get the immediate benefit of economies which could be obtained merely by shifting people.

Following that analysis, and those changes, which took place over a period of weeks and months, we made an analysis of generating capacity, transmission facilities, and service problems, that affected the companies which came under our jurisdiction at that time. This particularly applied to the Northern Power and Light Co., which served all of the little towns between Bismarck and Aberdeen, and because of its far flung transmission system, a tremendous service problem was involved, and we made an analysis to determine the program to [followed]. I might add at this point, that at the time we were instructed to take over the operations of the properties we were told by our

holding company, the Middle West Utilities Co., that it was their plan to merge the North Dakota Power and Light and the Northern Power and Light into the Northwestern organization. That was our instruction, and our thinking and our analysis followed that general instruction.

Q. Well, can you state what conclusion you came to, following this survey, as to what would be done?

A. The conclusion we came to was that the properties of the Northern Power and Light Co. were scattered over such a wide area that the location of new generating equipment in any one location couldn't possibly meet the service problems that confronted us. As an example, you had an area around Mobridge, you had an area around Gettysburg, and you had an area around Ellendale, and by locating the generating equipment in any one place, you had the problem of transmitting that energy into this far flung system of small towns, and the conclusion was that system service could best be protected by three interconnections—and interconnection with the Northwestern Public Service Co. at Gettysburg, which gave a feed into that area, and an interconnection west of Aberdeen, at Ipswich, which gave a feed into that area, and an interconnection north of Aberdeen, at Barnard, which fed into the Ellendale area. By that plan, we could give reasonable service over the transmission facilities of the Northern Power and Light, which were not stable for that area. The transmission lines from Steele, North Dakota, south through Wishek, and Eureka, Bowdle, thence south to Gettysburg, and west to Mobridge, was a very light line, poorly constructed, and we had tremendous transmission service problems, and the interconnections that we concluded enabled us to maintain service, whereas if we hadn't had the interconnections, we would have been confronted with rebuilding of our main bone transmission lines from the North Dakota Power and Light System. I might state there that the basic source of power for the Northern Power and Light was the North Dakota Power and Light System.

Q. Did you eventually construct those interconnections you have spoken of at Ipswich, Gettysburg and Barnard?

A. We eventually made all three connections—the

Northwestern Public Service Co. financed, built and owned the three connections.

Q. Were these interconnecting facilities completed prior to the time that Mr. White became connected with the company?

A. My remembrance is that the interconnecting facilities were completed prior to the time that Mr. White became actively engaged in his work. I might be approximating the time, but my recollection is that we had no discussion with Mr. White as to the facilities. I might add that those facilities were built by the Northwestern, based upon the statement that it was the intention of the Middle West Utilities Co. to merge those electric properties into Northwestern, and that probably accounts for our not asking anybody's opinion, or authority, or permission, from the United Public Utilities side of the matter.

Q. Was that put into effect?

A. That was put into effect—pardon me, you say what was put into effect?

Q. The handling of the Beulah generating plant in accordance with your conclusion?

A. Yes. We had a centralized dispatching system, with dispatchers located at Aberdeen, who dispatched all of the service of the Northwestern Public Service Co. in South Dakota, and the North Dakota Power and Light and the Northern Power and Light, and their instructions were, of course, to follow this pattern I have just described in the operation of the system, and assuming no transmission difficulty the Beulah station was operated at full capacity, up to the ability to transmit over the transmission lines of the system.

Q. Did you consult, as this matter progressed, during the time Mr. White was connected with the North Dakota Company, with him concerning these matters?

A. Yes, we consulted with Mr. White. I would say that in most instances our consulting was that of submitting our recommendations. I want to make clear that we didn't ask Mr. White to tell us what to do, or anyone in the Middle West organization. Our own staff, on those properties, determined what, in our opinion, was the most practical and economical thing to do, and then we made definite recommendations, not only to Mr. White, and his

holding company, but to the Middle West Holding Company.

Q. Subsequent then, and after such recommendations were approved by those connections, did you proceed along the lines indicated?

A. Yes. We occasionally would have some modifications on something we proposed, due to the result of compromise, but we ultimately would conclude whatever it was and proceed.

Q. That brings us to another phase of this case. During your connection with the companies in the capacities that you have already mentioned, did you cause departmental heads of the companies to make surveys with respect to the generating necessities of the several companies?

A. Yes.

Q. Was the natural load, and the condition of the generating plants, such as to necessitate such a survey?

A. Well, of course, you are dealing with a constantly changing condition, and the engineers were instructed to follow the load curve, and the capacity of the system, so that we could plan additional system capacity for future requirements. Our studies at that time, in the period involved, between 1930 and 1936, were based upon this assumption, that neither group had built any power plant for the benefit of the other. The interconnections of transmission lines were to get the best possible diversity element between the two systems. We recognized that some place along the line, either the Northwestern Public Service Co. or the United Public Utilities property, which was the North Dakota Power and Light and the Northern, would have to provide additional generating capacity, and as I remember we set up the mechanics to study those conditions and to make recommendations, so that each additional unit of generating capacity would be determined at the time in the light of the facts as they existed, and a basis for allocating fixed charges was outlined. But there was nothing concluded, during my regime, in the way of definite recommendations for additional capacity, although the studies were under way.

Q. Did that in your mind naturally raise the question of reserve capacity charges, inter-company?

A. Yes, but we disabused our minds of that question, on

we made recommendations and suggestions, and I recall making up, or having made up, under my direction, an estimate of the securities of the Northwestern Public Service that we could give the United Public Utilities Company for their property. We were hopeful that we could work something out, but nothing materialized.

Q. Well, do I understand you to say that energy flowed across your interconnection facilities up to the neighborhood of Steele, North Dakota?

A. There were times when we would pick up the territory clear back to Bismarck. It would all depend upon where your line trouble would come in.

Q. Was that true prior to 1936?

A. That was true prior to 1936.

Q. And was that true after you made the 1936 contract?

A. That is correct. The purpose of the interconnection was to give that feed-in from the south. Under normal operations, the North Dakota power system was able to take care of practically all of Northern's requirements, even over the peak, during my regime, and that was the point concerning which I testified this morning, that is, the reason the Northwestern Public Service Company was obliged to maintain banked boilers at its Aberdeen station, or maintain rolling capacity, was to pick up not only what they might be buying from Northern Power and Light, but to pick up Northern Power and Light Company's own business in case of line trouble. I am sure you will find, in the current log records, many many instances where Northwestern performed that service. Sometimes it would be through north of Aberdeen, sometimes up to Gettysburg, depending upon where the line trouble would exist.

Q. Did power from time to time come out of the Aberdeen generating station, and go west to Ipswich, through Bowdle, and then on down to the Northwestern Public Service Company's property?

A. It very seldom would go that way. The normal operation was that the Northern Power and Light Company's line tied through the Aberdeen station, so that the line coming from Ellendale south merely cut through the station, and went on west to Ipswich, and on to Mobridge, and so assuming that the North Dakota and the Northern,

in the aggregate, had enough power to meet all of their requirements, if it was merely a bus-tie, and the Northwestern was tied into the bus, and if they had surplus power, there would be a flow onto the Northwestern system—if they would be short for a period of time, Northwestern would feed into the bus-tie. Have I made myself clear? This was merely a tie through the station. The Northwestern had a 33,000 volt system, and the Northern Power and Light had a 38,000 or a 22,000 volt "Y" connected system. So assuming that the North Dakota and the Northern had enough generating capacity to carry their load, they merely fed through the Aberdeen substation, and there was no interchange of power between the two.

Q. Then if the Northern had had a line across from Barnard to Ipswich, it would have worked just the same?

A. Yes—that was the original Northern conception prior to the time that the property was acquired by the Middle West. They intended to build across from Barnard to Leola, down to Ipswich.

Q. Where did the Beulah power go—I know you smile just like all engineers smile when I ask them where power goes—where did it go?

A. Well, the bulk of the Beulah power, of course, fed into the Bismarck area. All power on the entire system fed into the transmission network, it was a problem of controlling frequency, and the Beulah station, because it was one we were trying to get a high load factor on, was taking the lead in system control. During the peak, the Beulah power might not get very far beyond Bismarck, but, on off peaks, some Beulah power might actually make it to Aberdeen, or get down into Gettysburg, such places as that. It all depended upon the hour of the day, and the capacity of the line.

Q. Did you make any studies to determine line loss on the North Dakota Power and Light Company system?

A. Yes, we made numerous studies, and we were always balancing line losses against freight rates on coal. It was a question of how much loss we could sustain in the transmission of energy and still do a more economical job than paying freight on coal, to send the Kilowatt hours down

(Mr. Benson) Q. Do you have the subpoena that was served on you by the—was a subpoena served on you by the defendant in this case? A. No, sir.

Q. What? A. No, sir.

Plaintiff's Exhibit 59, which was received in evidence and is referred to also in White's deposition as Exhibit 66 therein, reads as follows:

Plaintiff's Exhibit 59.

February 6 9

Production Statistics

Northwestern Public Service Co., Northern Power & Light Co. and North Dakota Power & Light Co.

J. H. Buell & W. R. Gazin:

O. C. Stokke.

Enclosing copies of graph sheets showing annual net KWH outputs, and unit production costs of the respective companies and of the combined systems of the three operating companies.

Operating as we do, in the interconnected system with North and South Dakota, on the basis of a socalled "power pool", we have endeavored to operate at lowest possible operating costs, taking into consideration thruout each year, (a), the most economical production costs of the several stations, (b), the location of generating station and transmission distances, which involve line losses and ultimate delivered cost of transferred or delivered energy, and (c) the reliability of service thus available to all communities of the respective companies in the North and South Dakota Power Pool.

To insure such reliability of service it becomes necessary at most periods to operate the several most efficient and low cost fuel station generating units, and to take care of peak periods with standby diesel generating units and most responsive and efficient steam turbo-generators, at various

plant locations, thereby avoiding excessive loading on substation equipment and transmission lines.

During the past year, we find that the principal steam stations show an increased output and the diesel stations a decrease in output. Economies were obtained to some extent by such dispatching of plant generation. The Knife River Station at Beulah shows a substantial increased output, totaling 41,170,000 KWH gross generation, an increase of 2,600,000 KWH output over the previous year. Aberdeen and Mitchell plants show increased output in 1938 over previous year. No energy purchased from hydro-plants in Nebraska during past year 1938. Generation by the Cody plant was increased proportionally due to 12 month full operation of 1938.

Unit Cost of fuel to the various plants shows some increased cost per ton, or per gallon, due to rising prices of coal and fuel oil. However, the unit fuel cost per KWH net generated has remained steady or with slight reductions in some stations.

Maintenance cost was held down to a reasonably low unit cost in spite of considerable repairs and replacements during the year. We are endeavoring to make essential repairs as required and feel that such work is necessary, regularly thruout the year. For the pending year of 1939, we will likely catch up on some deferred repainting jobs in the power plants. Housekeeping in all plants has been quite satisfactory as we observe this phase of operations.

The increased cost of maintenance shown in the maintenance graph for N. D. Power & Light Co. is largely due to extra maintenance costs in the Bismarck plant and to #1 boiler reconstruction in the Beulah plant.

Labor costs, in my judgment, are still satisfactory considering the labor laws and other things affecting labor relations between company and employees. The management of these three operating companies has taken care of all wage matters in due course of time and with upward adjustments in salaries wherever justified.

As reported to you previously we would estimate that the power plant properties, as a whole for each company,

are in about 85% condition—electrically, mechanically and structurally. General appearances we believe shows an improvement in the plant properties over the systems of the three companies.

We are looking forward to a visit this spring from Mr. Buell or Mr. Gazin. The middle of March should bring favorable traveling weather.

O. C. STOKKE.

OCStokke/t

Cc to A. B. Sanborn
S. W. White

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the fact that neither company had built any generation for the benefit of the other. We took two groups of companies, and lumped them together, so to speak, with such facilities as they had. We saw no justification for a power plant capacity charge between the two systems, either way, until such time as some company, either the Northwestern or the United Public Utilities Co., actually built a big plant for the benefit of both parties.

Q. Then in anticipation of such construction by one or another of these three operating companies, did you open negotiations and discussion with the owners of these companies [oncerning] a probable charge to be made for reserve capacity?

A. Yes, we determined, as I recall, the approximate cost of adding generating capacity in that area. My recollection is that it was about $125.00 a kilowatt. We set up a formula of fixed charges, taxes, interest and depreciation, on that type of investment, and said, in our recommendation, that $1.10 per kilowatt of capacity per month was a fair charge either way. In other words, if the Northwestern Public Utilities Co. was to build power facilities, one-half of which was for the benefit of the United Public Utilities property, that was the basis upon which you would allocate fixed charges. We had set up the mechanics for such an arrangement in our engineering studies. I do not remember whether it was ever reduced to writing in a contract, but there was a definite basis established. It is my recollection that Sargent and Lundy were studying capacities, and additional generating requirements, and where they should be located, at the time I left the property.

Q. In your power utility business and relationships, is a reserve capacity charge deemed a just and reasonable charge, in this company?

A. By all means, a reserve capacity charge is a justifiable charge, and in the industry a plan similar to that I have just outlined is in effect with all companies. We have it in effect out here in the Pacific Northwest—Reserve capacity is vital in any system. In other words, the interpretation of firm power is that power which you have with your biggest generating unit out of service, and that means that every system must have within its own confines re-

serve capacity, or available reserve capacity through interconnection with other companies, and the question in this particular instance, which I have previously testified to, was that we took the position that neither of these groups of companies, the Northwestern or the United Public Utilities, had built capacity for the benefit of the other, and so we took the condition as it existed and said, there shall be no distribution of fixed charges of reserve for that which existed at that time, but we set up the mechanics for the future, so that engineers could determine when and where it was most economical to put in additional capacity when it was required, and in that way we arrived at $1.10 per kilowatt month, or $13.20 per kilowatt year, of a capacity charge, that would work either way."

Mr. Fellows: This is cross examination.

"Q. Did you have a campaign on to get a franchise at Pierre, North Dakota, in 1936? A. We had no—

Q. I mean 1929.

A. We had no campaign particularly, we attempted to purchase the municipal electric light plant at Pierre—it was after '29.

Q. I wonder if your recollection is correct on that?

A. I could be off on that, but my remembrance is that it was after '29.

Q. Did you prepare any of the materials to be used in the attempt to purchase that property?"

Mr. Royhl: Objected to as incompetent, irrelevant, and immaterial; too remote, not within the issues in this case; incompetent for any purpose.

The Court: We will take the answer.

Mr. Royhl: May we have the same objection appear as to all examinations concerning Pierre transactions.

The Court: The general objection may stand.

"A. I do not recall whether I prepared it, whether I made any suggestions, I imagine it was prepared by our sales department, or publicity department, I couldn't tell without looking at it whether I did or not.

Q. Mr. Parker was President?

A. Mr. Parker would have been president. I wasn't made President until '37. I was Vice-President at that time.

Q. Mr. Parker's office was at Grand Island, not at your office?

A. Mr. Parker was originally in Huron, later moved to Omaha, about 1931 or 1932, and then was moved from Omaha to Grand Island.

Q. Was Mr. Parker maintaining his main office in Huron in May, 1929? A. My recollection is that it was.

Q. And in September, 1929? A. That is my recollection.

Q. Did you attend the meeting of the Mayor and the City Commissioners of the City of Pierre, May 6, 1929?

A. I can't tell you that.

Q. Well, were you there in April, 1929?

A. I can't tell you. I was around Pierre a lot of times, but what particular months or days, or what meetings—I took in a number of meetings with the Mayor and City Council, and other groups in Pierre.

Q. You do not recall what date you were in Pierre on this proposal to purchase their plant?

A. No, I don't recall what date I was there.

Q. You don't keep a diary? A. No.

Q. You didn't keep any diary?

A. I didn't and I don't today.

Q. Do you have a recollection of how you are going to serve Pierre if you bought the municipal plant, what the plan was?

A. Well, we were going to interconnect in with our system west of Huron, and I have forgotten whether we planned some generation equipment at Pierre. My recollection is that we planned to take over their plant, make some additions to it, and make it one of our generating stations on the system.

Q. You intended to tie in the system with Pierre?

A. Tie Pierre into the Northwestern Public Service Company system.

Q. And you would do that, as you said, west of Huron?

A. That is correct.

Q. So that the line would have been Huron, Highmore, Blunt—

A. Well, we were out as far as Highmore with a 33 K. V. line, and we had a 6.9 K. V. line from Highmore west to Harrold. We were that close to Pierre with our circuits at that time, and Blunt was a local direct current plant that was bought by the Northern Power and Light Company prior to the time that we acquired control of the property.

Q. Now you didn't desist after the adverse election in the fall of 1929?

A. I do not remember the date—we certainly did not desist, no.

Q. What steps did you take after the first election to try to get Pierre?

A. I do not recall any particular steps. We certainly were interested in purchasing the property if it could be acquired, but we never called for a second election.

Q. Can't you recall what you did in the way of communications with the city concerning attempts to acquire the property? That is, after the election in 1929?

A. I couldn't, without refreshing my memory from the files.

Q. How far were you, in miles, from Pierre?

A. I previously testified that our 33 K. V. line was at Highmore, and I would guess that Highmore was probably around 40 miles from Pierre.

Q. Did I understand from your testimony this morning that you said that when Mr. White became Receiver you thought that then the consolidation of the properties, of the Northwestern Public Service Company, the Northern Power and Light Company, and the North Dakota Power and Light Company, would be long delayed?

A. I testified that when the Middle West went into receivership, and the United Public Utilities, both of them in receivership, it then appeared to me that it would be of long duration, and that we had better make up our minds that the consolidation wouldn't go through for some time, if ever. You see, we had two separate holding companies, and two separate receiverships, separate receivers.

Q. Did you give up the idea then of a possible consolidation of those properties?

A. From our point of view, we always pressed the case,

via the coal route. Depending on how much energy we were trying to put through there, we would get those losses up as high as 33⅓ and 40 percent at times, just shoving it over those lines, and you could absorb those losses and still beat paying freight on the coal—ship it down to Aberdeen, and make your kilowatt hours there. Now the losses on the Northern system would vary, depending upon where the feed came from. If all energy came in from the North Dakota Power and Light end, over to Bismarck, you run into very high losses, because you had to feed clear down into the Ellendale and Mobridge areas, but if a part of that feed was coming off of the Northwestern, you were dividing that loss and you would have less losses on the system. There was quite a variation in Northern's losses. North Dakota Power and Light losses were rather comparable for the industry, but the losses on the Northern were higher than for the industry.

Q. You didn't draft any form of interchange capacity agreement between the companies?

A. The documents you have had marked as exhibits here today, I think I had my finger in the drafting of those agreements.

Q. You are talking about the interconnection facilities?

A. Yes.

Q. I had in mind the interchange capacity agreements?

A. No, I do not recall having had anything to do with the contract on that, because it wasn't a question at that time—it was coming into to intervene, but we hadn't really gotten into the question, because there was no emergency.

Q. When you make power contracts, for substantial use, you have something like a standby charge, or demand charge, in those contracts?

A. It depends upon the nature of the contract. In a firm power contract, you either embody it all in an energy rate, in the rate per kilowatt hour, or you have what is known as the two part rate, a demand rate, and an energy rate. Sometimes you put the kilowatt hours into the demand. In other words, you have a rate which might read $2.50 per kilowatt of demand, for which you will get 100 kilowatt hours per kilowatt, but, in answer to your question, it depends upon what you are selling, or buying, as the case may

be. In a firm power contract, you have a capacity charge, plus what we choose to call an energy charge, and that is the basis upon which these are made. Now to illustrate my point in connection with the subject matter here. As I have previously testified, we took the position that neither company had built for the other, in whatever they had, and therefore we made no capacity charge at the time we started this arrangement. The only charge we made was the energy charge, which was related to fuel costs, not the total production costs. While Aberdeen's fuel cost was 5.7 mills, the total production cost was probably 7.7 mills. So that was related to the fuel cost of the station.

Q. You expressed the opinion, as I recall, during your direct examination as to $13.20 being a fair demand charge. Is there some magic in the $13.20?

A. No. I qualified it by saying that it was based upon $125.00 investment per kilowatt of capacity, for which at that time we believed you could build on either the North Dakota, the Northern, or Northwestern.

Q. Where do you get the $13.20?

A. You take your fixed charges, taxes, interest, and depreciation, and as I remember it, it was 11 percent fixed charges, or 10½, or whatever it figured out, and we arrived at $1.10 per kilowatt month, which is $13.20 per kilowatt year, which is a capacity charge for which no kilowatt hours flowed. You pay for the kilowatt hours on the energy rate. So you really would have a rate of $13.20 per kilowatt of demand per year, or $1.10 per kilowatt of demand per month, plus 5 mills per kilowatt hour for the energy flowed through."

Defendant admitted in interrogatories offered and received in evidence that the $70,000 which it admitted receiving in paragraph XIII of its answer to the first cause of action of plaintiff's complaint was received by defendant under and pursuant to the terms of the original of Exhibit B attached to plaintiff's complaint.

Defendant admitted in interrogatories offered and received in evidence that the sums of $22,440 and $9,068.40, which the defendant admitted that it received in paragraph IV of its answer to the third cause of action in

plaintiff's complaint, were received by the defendant under and pursuant to the terms of the original of the contract of which a copy is attached to the plaintiff's complaint as Exhibit C.

Mr. Royhl: As a part of the testimony of Mr. Strike just read by counsel in plaintiff's case, we desire to place in the record the stipulation made at the request of the plaintiff at the time of the taking of the testimony, and which was as follows: "It is agreed that the witness, C. J. Strike, is ill with an ailment pronounced by his doctors as incurable, and his early demise is expected, which facts may appear of record herein without the necessity of developing the same by questions asked the witness."

The Court: It may be received.

Mr. Fellows: Your Honor, we are going to offer portions of the deposition of Samuel W. White, the deposition having been taken on September 17, 1947, and subsequent dates, said deposition be on file here with the Clerk.

I am reading from the [direction] examination of the witness by the defendant.

(From the deposition of Samuel W. White, read by Mr. Fellows:)

Q. Mr. White, it is alleged in the complaint in this action, and shown in or illustrated in Exhibit A to that complaint, that you were a director of North Dakota Power & Light Company and of Northern Power & Light Company during the calendar years 1935, 1936, and 1937 and 1938. It is also alleged that you were a director of Northern Power & Light Company until July 1, 1939, and of North Dakota Power & Light Company during all of that year, subsequently to July 1 that was then known as Dakota Public Service Company. It is also alleged you were a director of Dakota Public Service Company for the years 1940 to and including 1944, and during 1945 to October 19th. Were you a director on the boards of those companies during those years and periods? A. Yes.

Q. Now, during that period when those boards of directors met, was it your practice to attend the meetings?

A. No.

Q. I notice Mr. Sandstedt's letter is dated June 26, 1941. Did you have occasion to go over or inspect the Dakota properties prior to that date? A. Yes.

Q. And do you recall the approximate date of that visit?

A. Well, it was prior to June 17th, 1941.

Q. Some time in May or early June? The exact date is not material for my question. I just want you to fix it approximately.

A. It was not long prior to June 17th.

Q. Was there any particular purpose for making that inspection trip? A. Yes.

Q. I know that you previously testified you had made several inspection trips. I wondered if this one had any particular purpose?

A. This one was both a regular inspection trip, such as I have been accustomed to making from time to time, and it was also for general review of the operating system out there, with respect to two subjects in particular, namely the—first, the operation of the interconnected system, and second the possibility, to which I was giving consideration at that time, of recommending to my board the purchase by Dakota Public Service Company of the common stock of Northwestern Public Service Company.

Q. Did you have in 1941 a cottage at Detroit Lakes, Minnesota? A. Yes.

Q. During the fall of 1941 did you at any time have a conversation with Mr. Sandstedt regarding the subject matter of the proposed term contract between Northwestern Public Service Company and Dakota Public Service?

A. Yes.

Q. Do you recall when that conversation occurred?

A. Yes.

Q. Well, when was it, please?

A. Early in September of 1941, in my cottage at Detroit Lakes, Minnesota.

Q. Who was at that conversation besides you and Mr. Sandstedt, if anybody?

A. Mr. Karl Goldsmith, of Pierre, South Dakota.

Q. Who was Mr. Goldsmith, please?

A. Mr. Goldsmith was an attorney who represented both Dakota Public Service Company and Northwestern Public Service Company.

Page 451 is shown on
Card 11

Page 453 is shown on
Card 11

Page 455 is shown on
Card 11

Q. Now, Mr. White, referring to Exhibit 66, do I understand that this exhibit was written on or about February 6, 1939. A. Yes.

Q. At least you received it about that time?

A. Apparently, from the date on the letter.

Mr. Benson: Well, I only saw a 9.

The Witness: Yes, it refers, however, to data for 1938, the full year.

(Mr. Benson) Q. The J. H. Buell named in this exhibit is the same James H. and Major Buell you have talked about in your testimony? A. That is right.

Q. What was he doing in 1939, in February?

A. He was head of the engineering department of Middle West Service Company, of which our Dakota subsidiaries were a client.

Q. Who was W. R. Gazin?

A. W. R. Gazin was an engineer in Mr. Buell's department and under Mr. Buell in authority and rank.

Q. He had been there continuously since when?

A. About January or February, 1935, according to my recollection.

Q. Referring to Exhibit 66 for identification, what was the longest period of time you spent on the properties of North Dakota Power & Light Company and Northern Power & Light Company and Northwestern Public Service Company at any one time? A. Five days, approximately.

Mr. Royhl: Let the record show this is Mr. Benson's cross examination.

(Read by Mr. Fellows.)

Q. Now, are you an engineer? A. No, sir.

Q. In 1939 were you familiar with the engineering records of the company so that you can give us in detail what constituted the engineering records of the North Dakota Power & Light Company? A. No sir.

Q. Or Northern Power & Light Company? A. No sir.

Q. Or Northwestern Public Service Company?

A. No sir.

Mr. Fellows: Examination by Mr. Stafford.

Q. Did you ever discuss or do you recall ever discussing with anyone, any operating personnel, or on the properties, preliminary figures similar to the figures which actually went into a load diagram, on any occasion? A. No.

Plaintiff's Exhibit 60, which was received in evidence, is referred to also as Defendant's Exhibit 74 in White's deposition and the last paragraph of page 4 and the first paragraph of page 5 read as follows:

Effective September 1, 1933, your Receiver has cancelled the contract under which his three receiverships paid a fee aggregating $25,000 a year to the Receivers of Middle West Utilities Co., for the services of their staff, in connection with the accounting of holding companies under his direction and technical assistance in the supervision of operations of subsidiaries. In lieu of this contract, arrangements cancellable by either party on short notice have been made, whereby, for a total fee of $6,000 a year, the accounting and most of the statistical work of these receiverships is done by employees of Middle West Utilities Co., while technical assistance to your Receiver in supervising the management of the operating subsidiaries is paid for by those subsidiaries (as it properly should be), at the rate of ¾ of 1% of operating revenues, excluding sales of merchandise, coal, steam-heating, transportation, and all inter-company sales or sales to other units of Middle West Utilities Co.

The current effect of this change is to increase the total payments to Middle West Utilities Co. by companies in the United Public Service System, in an aggregate annual amount of about $19,300 above the total fee of $25,000 previously paid. It is the opinion of your Receiver, however, that under this revised arrangement, the total cost of services received is substantially less than the cost would be for him to maintain a competent central organization of his own, to accomplish the necessary direction of the business of the System.

Q. I show you now a document marked Defendant's Exhibit 74 for identification, purporting to be a copy of the third report filed by you as receiver, with the District Court of the United States, for the Northern District of Illinois, Eastern Division, in an action entitled Howard J. Umland, Complainant, versus United Public Service Company, a corporation, of New Jersey et al., Defendant, in Equity, No. 11652, and I will ask you to examine the same and state whether or not that is a true, accurate and correct copy of the said report filed by you?

A. That is a printed report in the same form as the printed report that was filed with the Court, except that the signatures have been conformed.

Q. Did you file it on or about the date of this report, to-wit: May 31, 1934? A. Yes.

(Read by Mr. Fellows.) (Questions by Mr. Stafford.)

Q. Now, Mr. White, how long did you continue those arrangements between the receivers of Middle West Utilities Company and the operating subsidiaries of the companies of which you were then receiver? Was it through the balance of your receivership?

A. Through the balance of my receivership, I continued the arrangement for $6,000 a year—

Q. Yes.

A. (Continuing) —for the three holding companies of which I was receiver. For the subsidiary companies I retained the arrangement under which the subsidiary companies paid a fee directly to the receivers of Middle West Utilities Company throughout the remainder of the receivership of Middle West Utilities Company. United Public Utilities Corporation—

Q. I was coming to that. Now, you mentioned, beginning January 1, 1935, United Public Utilities Company receivership was terminated, and United Public Utilities Corporation took over its assets and commenced business. Is that right? A. Yes.

Q. And what were the arrangemennts between United Public Utilities Corporation or the subsidiaries thereof, namely, the Dakota subsidiaries, in connection with the arrangements which you have just described? Specifically, were they continued or were they changed?

A. Beginning with the entry of United Public Utilities Corporation into business, on January 1, 1935, I had an arrangement between United Public Utilities Corporation and either the trustee of Middle West Utilities Company or the receivers of Middle West Company.

Q. Whichever was then operating?

A. Whichever was then operating; Under which United Public Utilities Corporation paid a fee of $5,000 a year for accounting and statistical services. As previously testified, I made no change in the arrangement between the receivers—between the subsidiaries of United Public Utilities Corporation until the receivership and the trusteeship of Middle West Utilities Company was terminated, and that company was reorganized into the Middle West Corporation on November 27, 1935. When Middle West Service Company started business on January 30, 1936, the arrangement for the services which had been performed by Middle West Utilities Company for United Public Utilities Corporation—

(Mr. Stafford) The receivership and trusteeship, to keep the record straight.

(The Witness) Receivership and trusteeship of Middle West Utilities Company, yes, were transferred over to Middle West Service Company for the same consideration, and also after that time the supervisory and advisory services which had previously been rendered to the operating subsidiaries of United Public Utilities Corporation by the receivers or trustee of Middle West Utilities Company—will you read that? I have lost myself.

Mr. Royhl: All of this testimony is objected to, concerning the holding corporation, as not within the issues in this case; there being no fraud predicated upon any action except the actions of the individuals composing the board of directors of the associated companies, and the charge being fraud of interlocking officers and directors, and not the fraud of the holding corporation or the service corporation.

The Court: Objection overruled.

Mr. Royhl: May the same objection be shown—

The Court: The record may show the same objection with the same ruling to all of this line of testimony.

A. (Continuing) —were contracted for from Middle West Service Company by the subsidiaries of United Public Utilities Corporation, at a cost which, to the best of my recollection, varied slightly from the [thre-quarters] of one per cent charge previously made.

(Mr. Benson) Eight-tenths.

(The Witness) That amount was eight-tenths of one per cent, beginning in January, 1936.

(Mr. Stafford) Q. You say they were contracted for by the operating subsidiaries. By that do you mean that the operating subsidiaries entered into formal contracts with Middle West Service Company calling for those services at that rate?

A. Yes, each of them.

Q. And that was true with reference to the Dakota subsidiaries of United Public Utilities Corporation?

A. It was true to the same extent that such arrangements had existed prior to the reorganization—prior to the organization of Middle West Service Company.

Q. Did North Dakota Power & Light make such a contract?

A. Yes.

Q. And did Northern Power & Light make such a contract?

A. Yes.

Q. How about Knife River Coal Mining Company?

A. It made no such contracts, nor had it had such a contract prior to the formation of Middle West Service Co.

Q. Were the contracts made by North Dakota Power & Light Company and Northern Power & Light Company with Middle West Service Company submitted to the board of directors of United Public Utilities Corporation?

A. Yes.

Q. Now, Mr. White, having read that portion of the minutes, does that refresh your recollection as to whether or not at that meeting the contracts between North Dakota Power & Light Company and Northern Power & Light Company and Middle West Service Company were sub-

mitted to the board and included within the resolution as stated in the minutes.

A. It does.

Q. Were they so included?

A. Yes.

Q. Was that resolution adopted, do you recall?

A. Yes, it was.

Q. Do you recall the terms of those contracts of Middle West Service Company with the two Dakota subsidiaries?

A. Yes.

Q. Will you tell us what they were?

A. You mean the contracts as originally—

Q. These contracts we have just been talking about, between North Dakota Power & Light and Northern Power & Light and Middle West Service Company.

A. The contracts provided for the Middle West Service Company to render the supervisory and advisory services outline in the contracts.

Q. No, I don't mean terms. I mean the duration of the contracts. Were they about a year?

A. Pardon me.

Q. No, I don't mean the provisions.

A. In effect they ran until cancelled, on—

Q. 90 days? I think the minutes state 90 days.

A. 90 days' notice.

Q. Did you approve those contracts, Mr. White?

A. Yes sir.

Q. And did you instruct the two Dakota subsidiaries or the officers thereof to enter into them?

A. I had previously consulted with the chief executives of each of the operating subsidiaries of United Public Utilities Corporation as to the desirability of those contracts from the standpoint of their companies, and had been advised by each of the subsidiaries that they—each of the management of the subsidiaries, that they wanted to arrange for the service of Middle West Service Company, except that the management of Knife River Coal Mining Company recognized no need for the services, and therefore when the contracts were submitted I sent them to each of the operating subsidiaries, including North Dakota Power & Light and Northern Power & Light, and excluding Knife River Coal Mining Company, together with a request that they be executed by the operating subsidiaries.

Q. You said you consulted with the operating management, the heads of the operating subsidiaries. Did you mean to include there operating subsidiaries in addition to North Dakota Power & Light and Northern Power and Light?

A. Yes.

Q. And the managing heads of those operating subsidiaries informed you they desired the services of the Middle West Service Company?

A. That is correct.

Q. And also, I take it, the operating personnel and heads of the North Dakota Power & Light and the Northern Power & Light at that time also stated that they desired to continue those services?

A. That is correct.

Q. Mr. White, the 1936 interconnection contract, Exhibit B to the complaint, bears the date October 7, 1936. Was that contract executed on or about that date, if you know?

A. Yes.

Q. And did you know of its execution and approve the same? A. Yes.

Q. Mr. White, I will show you a document marked Defendant's Exhibit 20 for identification, consisting of three pages, the first of which purports to be a copy of a consent and waiver of notice to a special meeting of the board of directors of Northern Power & Light Company, dated October 7, 1936, the remaining two pages purporting to be a carbon copy of the minutes of that special meeting of that board of directors, held on the same day. I will ask you whether you have produced that document for me from your files, at my request? A. Yes.

Q. From whom did you receive this carbon copy?

A. From the secretary of Northern Power & Light Company.

Q. And it has been in your files since your receipt of it?

A. Yes.

Plaintiff's Exhibit 61, which was received in evidence, is also referred to as Defendant's Exhibit 20 in White's deposition and reads in part as follows:

Plaintiff's Exhibit 61.

Northern Power and Light Company.

Minutes of a special meeting of the Board of Directors of Northern Power and Light Company, held at the office of the Company, National Bank of Huron Building, Huron, South Dakota, on Wednesday, October 7th, 1936, at 11:00 o'clock A. M.

There were present:

Messrs. F. E. Kruesi
C. J. Strike
C. L. Sandstedt

There were absent:

Messrs. M. C. Blackstun
S. W. White

The Chairman stated that at the Annual Meeting of the Board of Directors held on April 22nd, 1936, a resolution had been passed approving, ratifying and confirming the action of the officers in executing an agreement for the interchange of power between Northwestern Public Service Company and Northern Power and Light Company, dated April 22nd, 1936.

Upon motion duly made and seconded, it was unanimously

Resolved: That the resolution referred to above in regard to the agreement for the interchange of power be and it hereby is rescinded.

The Chairman then presented to the Board an agreement dated October 7th, 1936, for the interchange of power between Northwestern Public Service Company and Northern Power and Light Company.

Upon motion duly made and seconded, it was unanimously

Resolved: That the action of the officers in executing the agreement dated October 7th, 1936, for the interchange of power between Northwestern Public Service Company and Northern Power and Light Company be and the same hereby is fully and in all respects approved, ratified and confirmed.

The earnings statement, balance sheet and work order reports for the month of July and August, 1936, were presented and read and upon motion duly made and seconded these reports were approved and it was ordered that they be filed with the records of the Company.

Plaintiff's Exhibit 61-A, which was received in evidence, consists in part of the following:

Plaintiff's Exhibit 61-A

12/14/36—Mr. White suggested that we file the attached—
(Nothing has been done about it).

M. MILLER.

Northwestern Public Service Company

For Company Business Only

Date May 12, 1936.

Subject Waiver of Notice

Location Northwestern Public Service Company

To S. W. White

From C. L. Sandstedt

Please sign and return the enclosed Consent and Waiver of Notice for Northern Power & Light Company and North Dakota Power & Light Company.

C. L. SANDSTEDT.

f.
Encl.

Northern Power and Light Company

Annual Meeting of the Board of Directors

Consent and Waiver of Notice

We, the undersigned, being all of the Directors of Northern Power and Light Company, a Delaware corporation, do hereby waive notice of the time and place for holding the annual meeting of the Board of Directors of said corporation, and do consent to holding of said meeting at the office of the Company in the City of Huron, South Dakota at 10:30 o'clock A. M., on Wednesday, April 22nd, 1936, for the purpose of electing officers of the Company and transacting any other business which may be taken up at this meeting.

Dated April 22, 1936.

C. L. SANDSTEDT,
C. J. STRIKE,
F. E. KRUESI,
M. C. BLACKSTUN.

Northern Power and Light Company

Annual Meeting of the Board of Directors

Minutes of the Annual Meeting of the Board of Directors of Northern Power and Light Company, held on April 22, 1936, at 10:30 o'clock in the morning, at the office of the Company, National Bank of Huron Biulding, Huron, South Dakota.

There were present:

Messrs. F. E. Kruesi
C. L. Sandstedt
C. J. Strike

There were absent:

Messrs. M. C. Blackstun
S. W. White

The Chairman presented to the Board an agreement dated April 22, 1936, for the interchange of power between

Northwestern Public Service Company and Northern Power and Light Company.

Upon motion duly made and seconded, it was unanimously

Resolved: That the action of the officers in executing this agreement be and the same hereby is fully and in all respects approved, ratified and confirmed.

The earnings statement, balance sheet and work order reports for the months of February and March, 1936, were presented and read and upon motion duly made and seconded these reports were approved and it was ordered that they be filed with the records of the Company.

(Read by Mr. Fellows)

Q. Do you know what N. P. Zech's office was with Middle West Corporation?

Mr. Royhl: Objected to as incompetent, irrelevant and not the best evidence.

The Court: The question calls for the knowledge of the witness. Overruled.

(Mr. Benson) Q. Wasn't he comptroller?

A. He was comptroller of the service company, and I believe that he was comptroller of the old Middle West Utilities Company. He came in shortly after the receivership, the Middle West Utilities Company was brought in by the receivers.

Mr. Royhl: This is cross examination.

Q. Mr. White, I am looking at the minutes of a regular meeting of the board of directors of United Public Utilities Corporation, held at 1335 Land Title Building, Philadelphia, Pennsylvania, on August 1, 1940, at 10:00 o'clock a. m. This begins on the second page and extends over onto the third page. Pursuant to the stipulation made, I will read the following:

"The president read a letter outlining an agreement for sharing the expenses of the Wilmington office between the

following companies: The Middle West Corporation, Central and Southwest Utilities Company, American Public Service Company, North West Utilities Company, United Public Service Corporation, United Public Utilities Corporation.

"In accordance with this arrangement, 15% of the joint expenses will be charged to United Public Utilities Corporation. It is estimated that United Public Utilities Corporation's share of these expenses will amount to about $3,850 annually. On motion duly made and seconded the agreement was approved and the letter ordered filed with the minutes."

I will ask you to look at the documents I have in hand, and state for me whether what I have read is in the original minutes of the directors of United Public Utilities Corporation for the date that I have stated.

Mr. Fellows: It is offered in evidence and objected to.

Mr. Royhl: To which the defendant objects for the reason it is incompetent, irrelevant and immaterial; not within the issues in this case; there being no fraud charged against anyone except the interlocking officers and directors; hearsay.

The Court: Received.

(Read by Mr. Fellows)

Q. Central & Southwest Utilities Company referred to in the portion of the minutes which I read was at that time a subsidiary of The Middle West Corporation?

Mr. Royhl: Same objection in full.

The Court: Same ruling.

A. It was a holding company, in which Middle West owned over 50 per cent, at least two classes of stock; yes.

Q. What was American Public Service Company?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. That was a holding company that owned some stock of one of the southwest operating companies. I don't re-

call whether it was a subsidiary of Central & Southwest Utilities Company or of Middle West, but I believe in any event it would be called a sub-holding company, subsidiary of Middle West.

Q. It was affiliated in some way with the Middle West Corporation? A. Yes, very closely.

Q. North West Utilities Company was also a subsidiary of The Middle West Corporation? A. Yes.

Q. And you have heretofore testified as to the status from time to time of United Public Service Corporation and United Public Utilities Corporation, I think? A. Yes.

(Mr. Stafford) Q. Do you know Mr. Frank Kruesi? A. Yes.

Q. And did you know Mr. Kruesi in the latter part of 1933 or in January of 1934? A. Yes.

Q. And directing your attention to that period, was Mr. Kruesi at that time an officer in any capacity for either North Dakota or Northern, if you recall?

A. Yes, he became president of North Dakota and Northern and Northwestern and Knife River Coal Mining Company in June, 1933.

(Mr. Benson) Q. North Dakota, Northern, Northwestern and Knife River in June when? A. 1933.

Mr. Benson: I think I heard you say Frank Kruesi.

Mr. Stafford: I understand that's his name.

Mr. Benson: He has a middle initial.

The Witness: E.

Mr. Benson: So it sometimes appears on the record as Frank and sometimes F. E. Kruesi?

Mr. Stafford: I think so, yes.

(Mr. Stafford) Q. In other words, Frank Kruesi and F. E. Kruesi is one and the same person?

A. That is correct.

Q. Do you recall, Mr. White, whether you ever requested Mr. Kruesi to check the arrangement under which the electrical energy was interchanged between North Dakota, Northern and Northwestern? A. Yes.

Q. And do you recall about when that was?

A. Just before he went out there to become president of those companies I asked him to check with special care on all intercompany relationships.

Q. And do you recall whether or not he rendered any report to you as to the results of that check?

A. No, he rendered no report that I can recall; but I visited those properties and went over them, [accompanies] by Mr. Kruesi, and we discussed on those trips the operations and the intercompany relationships, including the joint management arrangement.

Q. When would you place the time that you made this trip with Mr. Kruesi over the properties?

A. In that interval from 1933 up to about 1944 or 1945.

Plaintiff's Exhibit 63, which was identified and produced by White, was received in evidence, and is also referred to as Defendant's Exhibit 5 in White's deposition. It reads as follows:

Plaintiff's Exhibit 63

Northwestern Public Service Company

For Company Business Only

Date January 4, 1934.

Subject Interchange Of Electric Energy.

Location————————

Mr. Samuel W. White.

I have checked the arrangement under which the electric energy is interchanged between North Dakota Power and Light Company, Northern Power and Light Company, and Northwestern Public Service Company and I am satisfied that the present arrangement is fair to all three companies. North Dakota Power and Light Company and Northern Power and Light Company are [benefitted] by the arrangement. I think it can be said that Northwestern Public Service Company is not receiving any material benefit.

I also have checked the prices under which Northwestern Public Service Company is purchasing coal from the Knife River Coal Mining Company and believe it to be a fair price under present conditions. Northwestern is paying Knife River as high a price as they can without penalizing the company over what they could buy competitive fuel at. It is very much to Knife River Coal Mining Company's interests that Northwestern Public Service Company continue to buy this coal.

Yours very truly,
F. E. KRUESI.

FEK/B

C. C. To Mr. Geo. A. Mills.

Q. Looking at the document, refreshing your recollection from the document, do you now have a present recollection as to whether Mr. Kruesi did advise you with reference to the fairness of the arrangement between the three companies? A. Yes.

(Read by Mr. Fellows)

Q. You say that the signature at the bottom of this document is F. E. Kruesi?

Mr. Royhl: This is by Mr. Benson. A. Yes.

Q. On January 4, 1934, do you know what Mr. Kruesi's official position was insofar as Northwestern Public Service Company was concerned? A. He was president of it.

Q. And you said something about asking him to examine into the situation as to the Dakota properties before he went out to Dakota to become president of these properties, I think. A. Yes.

Q. Now, what was his employment at the time, that you had in mind, when you said you spoke to him before he went out to North Dakota to become president?

A. He was vice-president of Middle West Utilities Company.

Q. This document, Exhibit 5, says down in the lower left hand corner, "c.c. to Mr. George A. Mills." Do you know

the meaning of the letters "c.c."? That means "carbon copy" does it? A. I would assume so, yes.

Q. Did you know George A. Mills? A. Yes.

Q. Who was George A. Mills?

A. He was connected with Middle West Utilities Company in connection with the—his function was to supervise and advise on operations of operating companies, which the U. P. U. subsidiaries were part. His duties were as a sponsor of a certain group of operating companies, including the companies in the U. P. U. system.

Q. You mean the Middle West Utilities Company had utilities all over the country owned directly or indirectly through various subsidiaries and sub-holding companies, and they divided the territory up and gave a group of utilities to one man to supervise, like Mr. Mills had in your case, and other men in other situations, is that it?

A. That's correct.

Q. I see. They reported to official of Middle West Utilities Company?

A. In this particular case Mr. Mills reported to me on the operations of our companies.

Q. Did he report to anybody representing Middle West Utilities Company? A. That I cannot say.

Q. You don't know. He was working for them. You were not paying him anything.

A. No, not directly. I was paying for his services.

Q. Well, you mean under a service agreement— A. Yes.

Q. (Continuing)—with the receivers of Middle West Utilities? A. That's right.

Q. The service agreement you have heretofore described?

A. Yes.

Q. And did Mills only have your properties under consideration? A. No. He had other companies.

Q. What other companies?

A. That I don't know. I know that he had other companies.

Q. Did he have Northwestern Public Service Company under his jurisdiction? A. I am very sure that he did.

Q. Did he report to you on Northwestern Public Service?

A. No.

Q. And to whom did he report on that company?

A. That I cannot say.

(Mr. Stafford) Q. Mr. White, you testified that Mr. Kruesi became president of North Dakota and Northern Power & Light in June of 1933. Was he also president of those two companies on January 4, 1934? A. Yes.

(Mr. Robinson) Q. Mr. White, during the year 1936, and particularly prior to the end of June of 1936, did you cause any other engineering studies to be made of the properties of Northern Power & Light Company or North Dakota Power & Light Company?

A. I authorized such a report to be ordered.

Q. By "report" you mean an engineering study?

A. An engineering examination, study and report.

Q. Who did you authorize to cause such a study to be made?

A. The president of North Dakota Power & Light Company and Northern Power & Light Company.

Q. Do you know whether such a study was made?

A. Yes, it was.

Q. Did you receive copies of such a study? A. Yes.

Q. Who made such a study?

A. Sargent & Lundy, Chicago.

Q. What was the purpose of the study that you caused to be made at that time?

A. To determine the position of North Dakota Power & Light Company, Northern Power & Light Company, and Northwestern Public Service Company, with respect to the then current generating capacities and the probable needs and the recommended location of additions to the generating capacities of those companies to take care of foreseeable demands.

Q. Mr. White, do you know who Sargent & Lundy are?

A. Yes.

Q. Who are they, please?

A. They are an engineering firm, with offices in Chicago, that have specialized in power plant design and construction for utility companies.

Q. Did Sargent & Lundy give you a written report or an oral report?

A. A written report, also an oral report in advance of the written report.

Q. Was that oral report given to you on June 26, 1936?

A. That date is approximately correct because it was immediately prior to my departure for Philadelphia, for my directors' meeting.

Q. Well, on or about that date that oral report was given to you, in a conversation, do you recall who was present at that conversation?.

A. I believe that conversation is of record in my correspondence.

(Mr. Benson) Q. Now, will you produce the Sargent & Lundy report?

You have just handed me a document, bound in heavy board paper, with the name of Sargent & Lundy, Incorporated, engineers, Chicago, Illinois, in the lower right hand corner of the front heavy paper cover? A. Yes.

Q. Attached to that report is a statement contained on two sheets of paper, the first one of which looks like a letterhead and bears the name "Sargent & Lundy, Incorporated, Engineers, Chicago, Illinois" in the middle of the top of the page? A. That is correct.

(Mr. Benson) In your testimony or during the taking of your evidence counsel for the defendant called attention to the minutes of the regular meeting of directors of United Public Utilities Corporation held June 30, 1936. I will ask counsel to produce those minutes.

Plaintiff's Exhibit 64, which was received in evidence and is also referred to as Plaintiff's Exhibit 4 in White's deposition, consists of a study of Sargent & Lundy, Incorporated, under date of June 29, 1936, showing the comparative costs of gas versus coal for the proposed installation of additional generating facilities at the Bismarck power station of North Dakota Power & Light Company.

Plaintiff's Exhibit 65, which was received in evidence and is also referred to as Plaintiff's Exhibit 5 in White's deposition, reads in part as follows:

Plaintiff's Exhibit 65.

Sargent & Lundy
Incorporated
Engineers
Chicago, Illinois

Report SL-391
Job 876

Report
on
Proposed Increase in
Generating Capacity
for the
North Dakota Power and Light Company
By
Sargent & Lundy, Inc.
June 26, 1936

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Introduction, Summary & Conclusions

In accordance with Mr. O. E. Stokke's request we have made a careful study of your power situation in order to determine if added capacity is required at this time, and if so where such additional capacity should be located and what size units should be used.

You will note from Exhibit 2 that the peak hour demand on your system last December was 6285 kw and that the cold weather effective capacity was 8870 kw, leaving a excess of 2585 kw. Also that the Northern Power & Light Company's peak was 3150 kw with an effective capacity of 1865 kw, leaving a deficiency of 1285 kw, and that the two companies had a peak of 9435 kw with an effective capacity of 10,735 kw, leaving an excess capacity of 1300 kw. It is necessary to include the Northern Power & Light in this picture as this company is being supplied largely with power from your generating stations. We have also considered the available capacity and the load of the Northwestern Public Service Company all of these three systems being interconnected by high tension transmission lines, but Northwestern Public Service Company's power stations are located far away from the load centers on your system and those of Northern Power & Light Company.

Also the fuel costs of the plants of the Northwestern Public Service Company are considerably higher than those of your plants so that [is] is uneconomical to transmit any appreciable amount of power from the south to your system. It seems to us that the transmission system will be used primarily for reserve on the various load centers and for local distribution.

It is difficult to predict accurately the probable load increase on your system as the recent depression has made such prediction very unreliable, but it should be noted that the kw-hr output from your plants in 1935 was 34,772,000 kw-hr and in 1934 30,475,000 kw-hr, showing an increase of 14.2%. For the Northern Power & Light Company this increase was 69%, for the Northwestern Public Service Company 6.6%, and for the three companies combined, 11.8%.

From the above it is apparent that additional capacity should be provided as soon as possible in order to safeguard your power supply.

We have given consideration to four possibilities of increasing your system capacity as follows:

Scheme	Addition	Capacity Added	Invest. Cost	Cost of Power Produced Mills/kwh	Fuel Cost Mills per kwh
A	750 hp boiler at Beulah Station ...	1000 kw	$141,250	5.92	3.01
B	New 750 hp boiler & 4000 kw turbine at Bismarck Sta..	4000 kw	397,400	6.01*	1.42**
C	New 600 hp boiler & 3000 kw turbine at Bismarck Sta..	3000 kw	344,850	5.52	1.395**
D	New station on Missouri River...	3000 kw	399,275	7.74*	3.01*

* @ 2000 kw average load.

** Only 15% of steam for 9 mos. operation chargeable to power.

Scheme "A" covering a new boiler in the Beulah Station is not desirable at this time as this boiler would not increase the available capacity of the system, but would merely permit you to increase the kwh output from the Beulah Station. As we see it, it is capacity that you require rather than kwh output.

The Beulah Station is located practically at the Northernmost end of your system and most of the power from the station must be transmitted over high tension transmission lines to Bismarck and other points south. For large outputs the transmission line losses are appreciable and there is also the possibility that the transmission lines from this station may be out of service. This would cripple your system seriously.

In Schemes "B" and "C", we have considered adding capacity in the present Bismarck Station, Scheme "B" being based on a 4000 kw turbine, Scheme "C" on a 3000 kw turbine, each provided with a suitable sized boiler; the turbines being of the automatic extraction condensing type to take care of the steam heating system in the City of Bismarck. It will be noted from Exhibit 2 that the City of Bismarck and Mandan are pretty close together being approximately six miles apart. These two cities had a peak load last year of 3,075 kw, which is approximately ½ of the peak load on your entire system. It would therefore appear very desirable to provide additional capacity at Bismarck in order to safeguard this important load center. The principal objection to additional capacity in the present station at Bismarck is lack of circulating water and dust and cinder nuisance from the stack gases; this station being located very close to the business center of the City.

It appears possible that sufficient deep well water might be made available for the condenser. If not it will be necessary to install cooling towers. Suitable arrangement can be made to reduce the nuisance from the stack gases to a minimum, either by installation of a high stack or by suitable cinder catchers. With the arrangement above outlined the objections to locating new capacity in the present Bismarck Station will be reduced to a minimum.

We have also considered building a new station on the Missouri River about two miles from the present station. The cost per kw on the new station would be considerably more than the cost per kw of added capacity in the present station, as indicated by the above tabulation. Furthermore, it would be necessary to have a complete operating personnel duplicating the operating personnel in the pres-

ent Bismarck Station, which would have to run in order to supply the heating system as the new station would be too far away to supply heating steam. The new station would be somewhat more efficient because of the better vacuum due to ample supply of circulating water, but it would be necessary to operate the old Bismarck Station during the heating season, which would, of course, reduce the kw-hr output from the new station. When this is considered, a new unit in the present station would be more economical. In view of the above and also because of the uncertainty of the load growth we favor the installation of a new unit in the present Bismarck Station. This new unit would practically carry the present load in Bismarck and Mandan, leaving the old turbines (one 1000 kw and one 1250 kw unit) as reserve. These old units could also be used to take care of increased load in these two cities as well as the system, the new unit being a very good machine running condensing only, and under such conditions the old machine would take care of the heating system in good shape.

As to the size of the new unit in the present Bismarck Station it seems to us that a 3000 kw unit would be preferable to the 4000 kw machine because of the lower initial investment and also because as far as we can see a 3000 kw machine will take care of your requirements for some time to come and is better proportioned to the system load. We have gone into the matter of stability of the system somewhat and it is our feeling that the larger machine would not increase the stability materially and certainly would not justify the increased cost over the smaller machine.

We recommend that a 3000 kw unit and a 600 hp boiler built for 450 lb. pressure 750° total temperature be installed in the present Bismarck Station as soon as possible; the turbine and the boiler being installed together, which will reduce the cost of the installation to a minimum. In this connection we should state that the equipment and material prices are rising and there would be no advantage as we see it to defer the installation of the turbine until next year.

I. Load Situation.

In order to fully analyze your power problem, it is necessary to also consider the systems of the Northern Power & Light Company and the Northwestern Public Service Company, as these three companies are tied together into one transmission system and there is a great deal of interchange of power between them. The location and type of capacity available in each of these three interconnected system is shown below.

Operating Co. & Location	Installed Cap.—KW—Steam	Internal Combustion	Cold Weather Effective Capacity July 1, 1936	Remarks
North Dakota Power & Light Co.				
Beulah	6000		5800	
Bismarck	2710		1850	Heating sys.
Mandan	710		400	" "
Dickinson	500	724	1000	
Mott		240	200	
Northern Power & Light Co.				
Hazelton	0	0	0	
Lemmon		252	200	
Mobridge	1000		1,200	Bleeder type condensing—very good machine
Ellendale	425		200	
Gettysburg		150	140	
Northwestern Public Service Company				
Aberdeen	6500		6500	
Redfield	500		450	Heating system
Huron	200	1167	1300	
Mitchell	8250		6500	
Faulkton		116	50	
Highmore		180	140	
Webster		780		
Watertown	0	0		
Yankton	0	1604	1500	

The capacity and peak loads last December of the three systems are as follows:

	Cold Weather Effective Capacity KW	Peak Coincident Demand 6-7 PM—12/23/
North Dakota Power & Light Co...	8,870	6,285
Northern Power & Light Co.....	1,865	3,150
	10,735	9,435
Two Northern Districts Northwestern Public Service Co....	16,130	12,950
Total.....	26,865	22,385

From the above table it will be seen that the reserve on your system as of last December was 2,585 kw. On the Northern Power & Light Company there was a deficiency of 1,285 kw. Considering these two systems together the reserve was 1300 kw. The reserve on the Northwestern Public Service Company system was 3180 kw, and for the three companies 4480.

From Exhibit 2 it will be noted that with 10% annual increase the present stations of your Company and the Northern Power and Light Company will be loaded to capacity without reserve by 1937, and with 5% increase by 1938.

If one of the units at Beulah should be out of service, or even one of the boiler, it would be a serious matter for you to be able to carry the load. Considering the probable increase, even with all the stations on the three systems running at capacity except one of the 5000 kw units either at Mitchell or Aberdeen, you would find it difficult to handle the load.

The operating costs of the Beulah and Bismarck steam stations are much lower than the operating costs of the stations of the Northwestern Public Service Company because of the difference in fuel costs, and it therefore is uneconomical to transmit any appreciable amount of power from the south to your Company. Also the transmission lines are very long and the losses would be prohibitive.

From the above it is very evident that additional capacity must be provided as soon as possible.

II. Load Growth.

The net yearly power output by each of the three systems for the years 1934 and 1935 are as follows. (Less Nebraska Division and inter-company sales)

	1934	1935	% Increase 1935 over 1934
North Dakota Power & Light Co.....	30,475,000	34,772,000	14.2
Northern Power & Light Co.....	2,205,000	3,725,000	69.
Northwestern Public Service Co.....	38,117,000	40,640,000	6.6
Total	70,797,000	79,137,000	11.8
Average Load—KW.....	8082	9040	

Net output from Beulah and Bismarck Stations

	1934	1935
Beulah	26,090,200	29,971,120
Bismarck	3,763,230	4,199,540
Total	29,853,430	34,170,660

You will note from the above table that the power output in your plants was 14.2% greater in 1935 than in 1934. The increase for the Northern Power & Light Company was 69% and the Northwestern Public Service Company 6.6%. The total increase for the three companies was 11.8%. It should also be noted that the output from the Beulah and Bismarck Stations was about equal to the yearly power output for your system, and that by far the greater portion of your output was handled by the Beulah Station, which is your most economical Station.

It is difficult to forecast the probable increase in load on your system and it therefore appears to us that the expenditures for new capacity should be kept to a minimum consistent with adequate reserve. Exhibit 2 shows increase of peak load for 10 year period based on 5% and 10% annual growth as mentioned elsewhere in this report.

III. Schemes for Load Increase.

We have made the following studies as means of increasing the generating capacity for your systems.

A. Add a 750 hp bent tube type boiler at Beulah to bring up the available capacity of the plant approximately 1000 kw.

B. Install a 750 hp bent type tube boiler and a 4000 kw automatic extraction-condensing type of turbine in the present Bismarck Station.

C. Install a 600 hp bent tube type boiler and a 3000 kw automatic extraction-condensing type of turbine in the present Bismarck Station.

D. Construct a new station of 3000 kw capacity with one 600 hp boiler on the Missouri River about two miles from the present Bismarck Station.

IV. Scheme A—Boiler at Beulah Station.

The following is a list of the principal equipment in the Beulah Station:

1—2500 kw G. E. turbine 80% 2300 v. 3 phase, 60 cycle generator

1—3500 kw G. E. turbine 80% 2300 v. 3 phase, 60 cycle generator

2—750 hp B&W Stirling type boilers 250# ga, 175° superheat (185% rating maximum)

2—Harrington stokers per boiler

1—Badenhausen air heater per boiler

1—Sturtevant induced and one forced draft fan per boiler Link Belt coal conveyor and weigh larry

1—Double effect evaporator—Schutte & Koerting

2—Boiler feed pumps, one motor driven (150 gpm) and one turbine driven (250 gpm)

2—Exciters—one steam and one motor driven Coal bunker 65 ton effective capacity

At the present the boiler capacity at Beulah is only sufficient to develop 5800 kw on the turbine plant (installed capacity 6000 kw @ 80% P. F.). Records show that the power factor in the neighborhood of the Beulah Station is high and an additional output of 1000 kw could be obtained with another boiler. It is also to be noted that while fuel cost is low—10¢ per million Btu, the water conditions are unsatisfactory.

The addition of another boiler will provide adequate reserve against boiler outage. With one of the present boilers down only 3000 KW can be taken out of the plant. With a new boiler there will be no reduction of capacity due to boiler outage. However, there will be no additional capacity in kilowatts made available for peak loads since a turbine may be out of service. Added kilowatt hour can be obtained however and we estimate that 1000 KW more capacity or a maximum of 8,760,000 kilowatt hour can be made available.

In this connection it should be noted that the system lacks reserve in KW and not KWH since the capacity factor is low.

The addition of a boiler to the Beulah plant would unquestionably be the final construction at this site and the boiler should be arranged as shown in Exhibit 3. This will necessitate removing the east wall and building a boiler room extension. Also as shown in the cross section, it will be desirable to move the present coal bunker away from the boiler front to provide clearance for access to the front boiler tubes for cleaning. It is also desirable to raise the present fuel conveyor over the bunker to give adequate (24 hr) storage.

These changes would involve an investment cost as shown in Exhibit 4. The economics of the situation is shown in Exhibit 5, and indicates that the added capacity output can be obtained for 5.92 [mils] per kwh if the 1000 kw capacity be considered loaded 100% of the time, i. e., 100% capacity factor. This is not conclusive since the major load is down state and power must be transmitted toward Bismarck over high tension lines. Two lines are available; one, a #4/0 aluminum line and the other, a #6

copper line. At 15 per cent power loss and a p. f. of 80% at receiving end for 80 miles transmission over the copper line only some 500 kw can be transmitted, and over the aluminum line only some 5000 kw can be transmitted, without taking into consideration the stability of the system. In so far as the stability of the system is concerned the [located] of the new capacity at Bismarck would be much more advantageous than at Beulah.

To summarize this situation, it will not pay to bring up the capacity of the Beulah plant because this added capacity cannot be made available in the load district without excessive transmission losses.

V. Scheme B.

The following is a list of the principal equipment in the Bismarck Station:

1—1000 kw non-condensing G. E. turbine #13149

1—1250 kw bleeder type condensing G. E. turbine #27652

1—500 kw Lentz engine driven generator (may be run in emergency)

1—200 kw Buckeye engine driven generator (cannot be used)

1—600 hp Stirling type boiler (Blr. #7) and Badenhausen tubular air heater. Boiler built for 200 lb. but operated at 170 lb. ga. and 490° F. total temperature. Maximum rating possible is 225%

6—Franklin type boilers. Boilers 1 & 2 are rated at 480 hp together and may be used as a reserve for several years. Boilers 3 & 4 rated at 308 hp each are doubtful as the drum on No. 4 is cracked. Boilers 5 & 6 rated at 308 hp each have been condemned and can only be used to supply the heating steam.

1—Schutte Koerting 2-effect evaporating plant

1—Deep well pump for boiler and spray pond make-up. Well is 169 ft deep 8″ casing, and water level about

60 ft below ground level. Pump is set 140 ft below ground level. The well has been tested to 520 gpm with no appreciable draw down

1—Dual drive (motor and turbine) forced draft fan and one (1) induced draft fan also dual drive for the 600 hp #7 boiler.

There is only one good boiler in this plant (#7). The older boilers are held in reserve and run when #7 is out of service.

Another scheme is to install in the present Bismarck Station a 4000 kw automatic extraction and condensing type of turbine with one new boiler. This turbine would generate power and also supply the heating steam by extraction at one stage at a pressure of 6# ga. The pressure would be maintained constant irrespective of load variation by a suitable grid type of extraction valve. In order to obtain good economy the steam conditions would be 425# ga and 750° F at the turbine throttle.

The exhaust pressure on the turbine requires careful consideration. Since the Missouri River is about 1½ miles away river cooling water is out of the question. As a choice between cooling towers and deep wells we find that the cost of adequate capacity in either involves practically the same investment cost. Only 10° F to 15° F cooling is possible with a cooling tower placing a definite limitation on the possible vacuum.

From test recently conducted on the present deep well it appears possible to obtain sufficient condenser circulating water from deep wells. But it will be difficult to get rid of the condenser discharge water as the present city sewers may not be adequate and a new discharge flume or conduit to the river would be very expensive. This matter should however be checked into further.

We have based our calculations on an average of 2" Hg absolute exhaust pressure which can be obtained with a cooling tower.

The heating system demand is about 155,000,000 to 160,000,000 lbs. per year. It is not expected that this demand will be increased. The peak has been established at 55,000

#/hr. Based upon U. S. Weather Bureau records we have assumed a nine months heating season, corresponding to 25,000 #/hr. average extraction load on the turbine. With regard to the electrical load, the present load on the station averages only some 700 kw, and we have assumed that the new machine would be loaded up to at least fifty per cent capacity factor corresponding to an average load of 2000 kw. During the summer months the turbine would operate condensing with one extraction heater for feed water heating.

The plan of rearrangement for the new 4000 kw turbine and the new boiler is shown in Exhibit 6. Certain building changes are also involved for a condenser pit, pulling condenser tubes, and a new Chief Engineer's office. The investment cost of these additions is $387,400 as shown in Exhibit 7.

Several heat balances have been prepared showing the annual operating economy under various load conditions. For the greater portion of the year the turbine will operate at 2000 kw average load and 25000 #/hr extraction as shown in Exhibit 8. One stage of extraction at 6# ga for feedwater heating will improve the heat cycle and necessitate no additonal turbine extraction openings. For the balance of the year the performance will be in accordance with Exhibit 9. Another heat balance, Exhibit 10, shows the best possible heat rate on the plant when the unit is fully loaded, and no extraction for the heating system, the only extraction being for feedwater heating.

The cost of producing power under this scheme is shown in Exhibit 11, under which scheme power can be produced at 50% load for 6.01 [mils]/kwh.

In connection with this installation consideration must be given to the reduction of dust and cinder nuisance either by the construction of a high stack or the installation of suitable cinder catchers. Our estimate is based on a new stack but this matter will be further considered if the job is authorized.

VI. Scheme C

Another possible scheme is to install a 3000 kw automatic extraction turbine unit in the present Bismarck Station. This machine will take care of about 45,000 lbs of steam for the heating system and will produce 2300 kw. A desuperheater to reduce the superheat in the turbine extraction steam will produce an additional 4500# of steam to the heating system. The operating conditions would be the same as for the 4000 kw, namely 425# ga, 750° F total temperature and 2" hg abs exhaust pressure. The arrangement of this unit should be as shown in Exhibit 6, the turbine being located at the west end of the plant. Also it will be possible to operate this unit at 2" hg absolute pressure with approximately 1500 gpm of deep well water.

The investment cost of this unit and a 600 hp boiler is $344,850.00 as shown in Exhibit 12. Two heat balances for 2000 kw average load both for extraction heating and for straight condensing summer operation are shown in Exhibits 13 and 14. The summary of power costs for these conditions are shown in Exhibit 15, indicating an average cost of power of 5.52 [mils]/kwh. at 2000 kw average load.

VII. Scheme D.

New Power Plant on Missouri River Near Bismarck.

We have considered the desirability of building a new plant on the Missouri River near Bismarck. We investigated the site for such a plant on the east side of the Missouri River between the Northern Pacific Railroad bridge and the City of Bismarck Water Works. We think that this site would be quite satisfactory as the river bank is very well protected above the site of the bridge abutments. The main line of the Northern Pacific Railroad is running quite close to the site and there is also a good highway adjacent to it. Missouri River water at Bismarck is excellent for condenser service, the water being quite clear a good portion of the year with sufficient sand in the water to keep the condenser tubes clean at practically all times. We suggest that you consider buying this site for possible future use, as this site can no doubt be obtained at a very reasonable price at this time.

It appears to us that it is not advisable to build a new plant at this time as the investment cost would be considerably greater than making an addition to the present Bismarck Station. Also the boiler situation in the Bismarck Station is not entirely satisfactory as far as available capacity is concerned to the heating system.

We have considered a 3000 kw capacity plant which would fit into the present system demand very nicely. A station [new] Bismarck would also improve the stability of the system since the capacity would be nearer the load. Because the electrical interconnections provide adequate reserve in case of emergency, a unit plan with one boiler and one turbine is contemplated. The generator should be a 2300/4000 volt machine so that it will fit into the present electrical system. Initially if installed in the new station the generator can be operated at 2300 volts. Later the generator can be reconnected for 4000 volts, 3 phase, 4 wire if you decide to change or raise the distribution voltage. As shown in the electrical line diagram Exhibit 16, Fig. 16B the voltage would be stepped up at the new plant using the old 3000 kva transformer bank. The bulk of the new capacity could then be transmitted more directly and into the load district. At the same time it would be necessary to tie the new plant on the river to the present plant with two feeders or ties at generator voltage. These ties however would be limited in capacity to about 500 kva each. The proposed plant arrangement is shown in Exhibit 17. The coal handling will be simple as indicated, only a conveyor being necessary from the track hopper to bunker storage.

The operating conditions for this plant would be 425# ga and 750° F at the turbine throttle and a back pressure of 1" Hg in the condenser. To improve the heat cycle two stages of extraction are employed. The performance of the plant at 2000 kw average load and full load (3000 kw) is shown in Exhibits 18 and 19. The heat economy of this plant is better than that of a 3000 kw automatic extraction plant. As shown in Exhibit 20 the investment cost of this plant for the first unit is $399,275, or approximately $133 per kw and for the second unit $337,800 or $112.60 per kw.

In setting up figures for the cost of power from the new station we have assumed that because of its efficiency it

will carry an average load of 2000 kw. The operating costs have been drawn from comparison with other plants of similar capacity and operating conditions and the cost of power will be as shown in Exhibit 21.

In connection with this scheme the heating plant at the present Bismarck Station should also be put into first class operating condition, possibly with one additional deep well pump to supply circulating water for the 1250 kw bleeding condensing turbine. This will then take care of the local heating load and the new station will supply the necessary power to take care of load increase as well as provide an efficient base load station.

If this new station were built the present Bismarck Station would operate to supply steam to the heating system. The power output being secondary. Deep well water only could be used on the condenser for the 1250 kw unit by possibly some redesign of the condenser which would eliminate the nuisance of the spray pond. It would be necessary to arrange Boilers 3 to 6 inclusive to operate directly on the heating system (6# gauge) for emergency use in case boiler #7 is out of service. The operation under this condition would be as follows:

No power will be available from the plant.

A maximum heating system demand 55,000 #/hr.

Boiler No.	Boiler Rating HP	Output at Rating	% Rating to carry full heating System Demand
3	308	9240	150%
4	308	9240	
5	308	9240	
6	308	9240	
		36,960	

SARGENT & LUNDY.

Exhibit 5.

SL-391

Beulah Station

Yearly Cost of Power
From Added Capacity

Steam Conditions	250 lb ga—170° superht
Load on Unit #1	3000 kw
" " " #2	4000 kw
Water rate, Unit #1	12.85 #/kwh
" " " #2	12.0 "
Average weighted water rate	12.35 "
Auxiliary power (from oper. records)	8.5%
Average boiler efficiency	72%
Plant water rate	18.6 #/kwh
Plant heat rate	29,470 Btu/kwh
Steam required for 1000 kw load	13,600 #/hr
Equivalent fuel @ 7000 Btu/#	4,210 "
Cost of lignite in boiler room coal bunker	$1.43/ton

Yearly Production Power Cost

Output at 1000 kw average load		8,760,000 kwh/yr
Fuel cost per yr		$26,280
Labor		No additional labor necessary
Supplies .00026 × 8,760,000 =		2,280
Maintenance (new boiler)		1,500
		$30,060

Investment Cost

From Exhibit 4	$141,250	
Fixed charges @ 15%		21,190
Total yearly cost		$51,250

Total Power Cost/KWH 51,250/8,760,000	5.92 mills/kwh

(End of Portions of Plaintiff's Exhibit 65.)

Q. I show you the document marked Plaintiff's Exhibit 4 for identification, one marked Plaintiff's Exhibit 5 for identification, and ask you whether those two exhibits are the Sargent & Lundy report which was the final report which was to come, according to the minutes of the directors of United Public Utilities Corporation held June 30, 1936?

A. That is the same report mentioned in those minutes.

Q. You mean that is the final report you were expecting at the time of the meeting? A. Yes.

Q. Have you had any other reports from Sargent and Lundy any written reports in addition to Plaintiff's Exhibit 4 for identification and Plaintiff's Exhibit 5 for identification?

A. Not to my knowledge, and, if we have, they were not on that subject.

Q. You mean they were—

A. They were on isolated construction problems.

(Read by Mr. Fellows)

(Mr. Stafford) Q. I will refer you to the minutes of the regular meeting of the directors of the United Public Utilities Corporation, held in Philadelphia, Pennsylvania, on January 29, 1936, and I will further refer you to the tenth page of those minutes, and I point out to you that it is there stated: "The president reported that Northern Power & Light Company is building its Venturia-Ashley line at an estimated cost of $16,000 and an estimated saving in maintenance of $340.00 per annum; that Northwestern Public Service Company is asking for an annual payment to it by Northern Power & Light Company of $20,000 or $20 per annum for 1,000 KW firm power by way of return upon its investment of $340,000 made to serve Northern Power & Light Company;" I will ask you whether that refreshes your recollection as to the time and place as to which you referred this matter to your board of directors?

A. Yes.

Plaintiff's Exhibit 66, which was identified and produced by White and is also referred to as Defendant's Exhibit 45 in White's deposition, was received in evidence. It reads as follows:

Plaintiff's Exhibit 66.

Dakota Public Service Company
General Offices
Huron, South Dakota

June 26, 1941.

Mr. Samuel W. White, President
United Public Utilities Corporation
20 North Wacker Drive
Chicago, Illinois

Dear Mr. White:

I have been out of town almost continuously since I last discussed with you the interconnection agreement and I

have just gotten around to working up a revision of Article VIII—Transmission Line Charges, along the lines we discussed.

Northwestern's investment in the interconnection facilities is $325,000 and I am proposing that the $20,000 per year rental charge that has been in effect since January 1, 1936 be assumed to cover interest, depreciation and maintenance on one-half of the total investment as follows:

Depreciation and maintenance—3½% of the total investment

Interest—5% per annum on the unpaid balance.

On this basis Dakota's share of the investment will be amortized in 1953 and if the contract is continued after that date the rental charge will cover only depreciation and maintenance. I have tried to base this on our actual costs and it seems to me that something along this line is defensible from the standpoint of both parties.

You mentioned that you had some other changes to suggest in the way of clarification and that possibly Mr. Scheetz would have other changes to suggest at the time he went over the agreement. If you will furnish Mr. Buell and also this office with a tabulation of the changes you propose we shall be glad to incorporate them in the agreement and furnish you with copies for your final approval.

Yours very truly,

C. L. SANDSTEDT,
Vice President & Treasurer.

CLS/f

Encl.

Plaintiff's Exhibit 67, which was identified and produced by White, and also referred to as Plaintiff's Exhibit 6 in White's deposition, was received in evidence. It consists of a tabulation of computations regarding the amortization of $162,500 commencing January, 1936, and ending in 1952 by applying on such amortization the portions of the monthly payments of $1,666.66 remaining after applying

3½% for maintenance and 5% for interest, the said amount of $162,500 being stated as (Dakota Public Service Company's share of interconnection facilities).

Q. After you received Plaintiff's Exhibit 6 did you have further meetings with any of the joint management staff from the Huron office concerning the amount to be amortized using the 3-1/2 per cent and the 5 per cent interest shown in Plaintiff's Exhibit 6 for identification?

A. As I recall I did.

Q. Do you recall where the first of those meetings, if there was more than one, was held? A. No.

Q. Do you recall whether there was more than one meeting with the staff between the time you received Plaintiff's Exhibit 6 for identification and the time when Exhibit F to the complaint, the original of that exhibit, was put in final form in which it was signed?

A. To the best of my recollection all of the meetings or talks that I had in that interval were exclusively with Mr. Sandstedt, and I cannot recall the number, the times or the places.

Q. Now, when I look at Plaintiff's Exhibit 6 for identification and the figures dealt with in Exhibit F to the plaintiff's complaint, particularly Section 3 of Article V of the 1941 contract, which I again show to you, I see that instead of retiring some fund in a period expiring in October, 1952, as shown on Plaintiff's Exhibit 6 for identification, Section 3 provides for the last payment to be made, in the amount of $1,348.82, on the first day of July, 1950, and then provides beginning August 1, 1950, and continuing monthly thereafter such monthly payments shall be $442.53. Will you explain how the period to be covered by the payments in Section 3 of Article V of the 1941 contract came to be changed to expire as I have stated in my statement of what I have observed?

A. Because at some date, subject to conversations—subsequent to conversations, in which it had been agreed that Mr. Sandstedt was to prepare the figure appearing in Plaintiff's Exhibit 6 for identification, a smaller amount than $162,000 was agreed upon as the amount to be amor-

tized under the formula which, when applied to that reduced amount, would determine the duration of the period in which the monthly payments of $1666.66 were to be made.

Q. Now, you say a smaller amount was agreed upon?

A. Yes.

Q. Between yourself and whom? A. Mr. Sandstedt.

Q. You do not recall when that was agreed upon?

A. I don't.

Q. Approximately when, can you tell?

A. No. I don't even recall whether or not it had been agreed upon before I actually received this computation shown on Exhibit 6.

Q. You think the smaller amount might have been agreed on before you saw Plaintiff's Exhibit 6 for identification?

A. I think it may, because I have a general impression that this computation was late in reaching me.

Q. When Mr. Sandstedt and you agreed upon the smaller amount, did he explain to you how that smaller amount was made up?

A. Unfortunately my recollection on that point is very vague, and my correspondence files have nothing in them from which I can refresh my recollection. To the best of my recollection, however, the suggestion of the smaller amount came from Mr. Sandstedt, and he volunteered the basis of its determination.

Q. What did he volunteer?

A. That a smaller amount was warranted.

Q. I thought you meant he volunteered how it was made up and the details of it?

A. I think he did. He gave me the reasons why. Well, now, I don't even recall now that he did. He must have given me the reasons why this smaller amount was warranted, and I cannot recall nor do I have anything in my files to tell me now what the basis of calculating that smaller amount was.

Q. Do you recall whether he advised you when the payments would retire, whatever the smaller amount was?

A. No, except that I know that a shorter period does appear in the final contract as executed.

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TRANSCRIPT OF RECORD

(Pages 497 to 736)

Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER,

vs.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

Vol. II.

Pages 497 to 736, Inclusive.

RECORD.

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EIGHTH CIRCUIT.

No. 13,887
CIVIL.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

FILED DECEMBER 20, 1948.

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Q. Do you recall who put the amounts in the blanks in Section 3, of Article V of the original of Exhibit F to the plaintiff's complaint, being the contract of July 1, 1941? Do you know who filled in those apparent blanks? A. No.

Q. Did Mr. Sandstedt tell you what the amount to be returned consisted of in the aggregate; that is, did he say it was one half of the cost of the interconnection facilities to Northwestern as of January 1, 1936?

A. I don't recall that the figure was represented to me on exactly that basis, but—

Q. I am showing the witness the supplement to Exhibit F, being a supplemental agreement date March 13, 1943, which supplemental agreement is attached to plaintiff's complaint as a part of Exhibit F. See that (Indicating)? Do you want to read it?

A. I was looking at the wording. I see that, and I now note for the first time that it contains a representation which I had consistently insisted should not be included in previous agreements, namely, any representation by Dakota Public Service Company, as to the fact of a cost—

Q. To Northwestern?

A. (Continuing) —to Northwestern, for the property that it had purchased, or built.

Q. All right. Now can you tell me when, prior to the hearing this afternoon, if ever, you first heard from anybody that the investment of Northwestern in the interconnection facilities as at January 1, 1936, was $303,449.26?

A. No, I cannot tell you the time when I first heard of it.

Q. Had you ever heard of it before the hearing this afternoon?

A. In trying to refresh my recollection on that point, the only statement of the exact amount that I found of record in my files was in the supplemental agreement itself.

Q. So that since the time you began to collect data for this case, your effort to recollect when any representation was made to you as to the investment by Northwestern in the interconnection facilities, resulted in no ability on your part to recall whether there was any representation made to you, other than the $325,000 mentioned in Plaintiff's Exhibit 6 for indentification.

A. And I do have a distinct recollection that the $325,000

had been used more than once in conversation, letters and what-not, as the presumed cost of those facilities. I was aware that that period of amortization payments had been shortened during the course of our conversations about the 1941 agreement, before a final agreement was signed. I could not recollect the reduced amount that was used as a basis for shortening the period of those payments, and I have been unable to find in any correspondence mention of that exact amount, except in the supplemental agreement of 1943.

Q. That is the supplement to Exhibit F to plaintiff's complaint to which you refer? A. Yes.

Q. Now, did anybody work out for an amortization table of a smaller amount?

A. As I recall that there was another similar calculation on another basis, and I have not found in my files similar sheets to show such an amortization.

Q. When you said another table on another basis, you didn't mean on another basis. You mean with another principal amount? A. That's right.

Q. Now, let's go back to one of the first questions I asked you. The 5 per cent interest figure came to you from Mr. Sandstedt?

A. That's right. It was proposed as a fair figure.

Q. As a fair rate, and the 3-1/2 maintenance figure appearing at the top of one of the columns on the first page of Plaintiff's Exhibit 6 for identification came to you from Mr. Sandstedt? A. That's right.

Q. Now, did he give you any breakdown of the 3-1/2 per cent maintenance figure?

A. I do not recall. I found nothing on the subject in my files.

Q. Without remembering or attempting to recall the breakdown of that figure, can you tell us whether any explanation was given to you by Mr. Sandstedt as to what he meant by the term "maintenance"?

A. As I recall, that included taxes, insurance, maintenance and replacements, and all operating expenses, the principal of which I believe would be maintenance.

Plaintiff's Exhibit 68, which was identified and produced by White, and is also referred to as Defendant's Exhibit 15 in White's deposition, was received in evidence. It reads as follows:

Plaintiff's Exhibit 68.

Subject: Additional Generating Capacity

Location United Public Utilities—Dakota Subs.

To: F. E. Kruesi

August 14, 1936.

We have carefully reviewed the Sargent & Lundy report of June 26, 1936 and herewith give our conclusions and recommendations.

This report emphasized the need for additional generating capacity and makes three specific suggestions for the location; namely,

1. An additional boiler in Beulah Station—Est. Cost $141,250.

2. A boiler and turbine in the present Bismarck plant—Est. Cost—$397,400.

3. A new power plant to be located on the Missouri River between Bismarck and Mandan—Est. Cost $399,275.

The 1935 coincident 15-30 minute peak demands of the system were as follows:

North Dakota Power & Light Company	6,285 KW
Northern Power & Light Company	3,150 KW
Total	9,435 KW

The effective generating capacity of the combined companies is 10,490 KW and the maximum rated capacity is 11,880 KW, which leaves a very narrow margin of reserve.

The combined companies serve 18,300 customers and 94 towns with 1,256 miles of transmission line, so it can be

appreciated that the territory is sparsely settled. The rates charged for service will not justify a substantial investment in stand-by generating equipment and we have always gotten along with a minimum of reserve equipment.

Consideration has been given to purchasing the additional requirements but there is no adequate source within reasonable distance and the situation resolves itself into accepting one of the three suggestions made by Sargent & Lundy.

Upon receiving Sargent & Lundy's report a conference was held with our Engineering Department, load dispatchers, Messrs. Blackstun, Renden, Sandsted and the writer. After carefully considering and weighing all of the possibilities it was unanimously agreed that a new boiler be installed in the Beulah plant for the following reasons.

1. The territory has been exceptionally hard hit by drouth which will probably have an effect on future loads and revenues.

For this reason we are of the opinion that capital expenditures should be kept at a minimum until we have a better idea of what the future holds in store for us.

2. The present Beulah plant has two boilers and two turbines rated at 2500 KW and 3500 KW. Neither of the boilers is large enough to carry both turbines and when a boiler is off the line we lose approximately 2800 KW.

During these periods it is necessary for Northwestern Public Service Company to furnish emergency service, which taxes the other plants to the limit. We are continuously faced with a serious interruption to service if a 5000 KW turbine was out of service at either Aberdeen or Mitchell at the same time a boiler is out of service at Beulah.

During the past year a boiler has been out of service every month for repairs for a total of 2,144 hours. During this period it has been necessary to operate inefficient equipment.

3. We have a substantial investment in the present Beulah station and transmission lines and the addition of another boiler will enable us to utilize this investment to the fullest extent.

By keeping both turbines on the line the output can be increased approximately 8,760,000 KWH annually at a savings of approximately 3 mills per KWH, making a total saving of approximately $26,000 annually. In addition, boiler maintenance will be reduced approximately $2,000 a year. This saving represents a return of approximately 18% on the investment of $150,000. This does not include the profit to Knife River Coal Mining Company on the additional coal which is mined at a cost of approximately 50¢ per ton and sold to North Dakota Power & Light Company for $1.40 per ton.

4. Sargent & Lundy's report gives an investment cost of $397,400. for a boiler and turbine to be installed in the Bismarck station and based upon past experiences we are not convinced that it is wise to invest that amount in this station. This plant is located on one of the principal business streets and we have had trouble on account of fly ash and spray from the cooling pond.

Bismarck has had an artificial boom owing to the concentration of Federal employees and we are not convinced that the present trend of increased loads will continue. The boiler at Beulah will add approximately 2800 K. W. to the capacity of the system which will be ample under almost any conditions until 1938. This will give us an opportunity to more accurately estimate future conditions. If additional capacity is needed at some later date we are inclined to favor an entirely new plant on the Missouri River between Bismarck and Mandan. The investment cost for a new plant is approximately the same as for the improvements suggested at the Bismarck station and the saving in taxes would offset the payroll costs of operating the Bismarck plant for steam heat purposes.

Attached hereto is a cash estimate which can be briefly summarized as follows:

Cash Balance August 1, 1936		$166,000
Operating Receipts for remainder of year		397,500
Total cash and receipts		$563,500
Disbursements:		
Operating expenses		$217,700
Taxes		18,200
UPU Co. Interest		59,000
Total		$294,900
Balance for Construction and Dividends		268,600
Dividend Requirements per original budget		136,900
Amount needed to maintain minimum bank balances		30,000
Balance available for construction		101,700
Estimated cash requirements for construction		
Beulah boiler	$150,000	
Pump & Con. #1 Turbine [(Bismrck)]	2,300	
Concrete stack—Bismarck Plant	16,000	
Feeder regulators—Bismarck Dist. System	15,000	
Rebuild Bismarck Dist. System	10,000	
" Mandan " "	7,000	
" Mott " "	4,000	
" Dickinson " "	8,600	
" Hebron " "	3,500	
Total	$216,400	
Less Est. Overhead	20,000	$195,600
		$362,500
Additional Cash Required		93,900

You will notice that we propose paying a common dividend of $136,900, which is the entire amount of our estimated income for the year. We have shown the entire amount of construction to be expended this year, when as a matter of fact some of this work will probably be carried over until next year. The amount of new money required will therefore be something less than the $93,900 shown above. It is immaterial to us whether we pay the entire amount of income available to you in dividends and then obtain a loan from you, or pay the net amount of cash that we have after taking care of our other obligations.

f.

Q. Mr. White, again referring to Defendant's Exhibit 15 for identification, I note that in the minutes of the meeting of August 28, 1936, the memorandum is described as having been prepared by vice president Strike of North Dakota Power & Light Company, addressed to F. E. Kruesi of the same company. As president, do you know of your own knowledge whether or not memorandum of which Defendant's Exhibit 15 is a copy, was prepared by Mr. Strike?

A. Yes.

Q. Was it so prepared? A. Yes.

(Mr. Stafford) Q. Mr. White, do you have any recollection at the present time of what Mr. Strike told you was the rate in force on the interchange of energy between those companies at that time? A. Yes.

Q. Well, directing your attention specifically as to November, 1932?

A. That was the time of the study that was made during my receivership.

Q. Do you know who made the study?

A. Mr. Gazin, who was an engineer for the company.

Q. Now, you say you do have a recollection of what rate was then told to you which was in force on the interchange of energy between the companies? A. Yes.

Q. Will you please state what that rate was?

A. 3½ mills per kilowatt hour from North Dakota to Northern Light & Power; 5 mills per kilowatt hour from Northern Power & Light to Northwestern Public Service

Company; and 5 mills per kilowatt hour from Northwestern Public Service Company to Northern Power & Light.

Q. You have referred to a study made during your regime as receiver, in November, 1932, or about that time, by Mr. Gazin. I will show you this document, which has been marked Defendant's Exhibit 4 for identification, which is headed "Intercompany rate analysis between Northwestern Public Service Company and North Dakota Power & Light and Northern Power & Light Company," and ask you to examine the same and tell me whether or not that is a true, accurate and correct copy of that rate analysis? (Handing document to the witness) A. It is.

Plaintiff's Exhibit 69, which is also referred to as Defendant's Exhibit 4 in White's deposition, was identified and produced by White and received in evidence. It reads as follows:

Plaintiff's Exhibit 69.

Inter-Company Rate Analysis

Northwestern Public Service Company
North Dakota Power & Light Company
Northern Power and Light Company

November 22, 1932.

A study has been made of the rate set up covering the sale of energy between the three companies in the interconnected system of North and South Dakota.

The system layout is such that the mouth of mine station at Beulah, North Dakota, which has by far the lowest production costs, is in position to produce certain energy requirements for all three companies, thereby greatly improving Beulah station load factor and lowering all system "out of pocket" fuel costs.

The plan of operation followed, therefore, is to carry all load possible at Beulah. This at once brings up the problem of rates for this energy transferred. Starting with a study of the costs at Beulah station and working out over the system, the rates finally adopted as a result of this study are as follows:

North Dakota Power & Light Co.,
Sales to Northern Power &
Light Co. .....Flat $0.0035 per KWH

Northern Power & Light Co.
Sales to Northwestern Public
Service Co. .....Flat $0.0050 " "

A summary outline of the study which brought out this rate set up follows:

Beulah Station

Present Operation

Ave. Monthly N KWH Gen.....	2,100,000
Ave. Fuel Cost per N KWH.....$0.00255	
Ave. Increment Maint. Cost.....$0.0001	
Unit excess Cost of Energy produced $0.00265	

Operation without Inter connection to Northern Power & Light Company:

Without any inter-connection with Northern Power & Light Co., and indirectly, Northwestern Public Service Co., the N KWH required for North Dakota Power & Light Co. would be as follows:

Ave. Monthly KWH Sales (Excl. Inter-Co.).....	950,000	KWH
Ave. Percent Losses—System (Light Load).....	18%	
Required N KWH.....	1,160,000	N KWH
Ave. Monthly N KWH Gen. by Standby and Steam Heat Plant (Mainly Bismarck).....	300,000	
	860,000	N KWH
Fuel Cost Beulah Station on 860,000 N KWH Load (from records and fuel cost curves).....	$0.00385	
Fuel and Added Maint. Costs present load.....	$0.00265	
Unit fuel cost saving due to improved load factor....	$0.00120	
Ave. Yearly N KWH required N. D. P. & L. Co. only, 1,160,000 × 12	13,920,000	N KWH
Annual Savings to N. D. L. P. Co. Production Expense by Inter-Connection 13,920,000 × .0012.....	$16,704.00	

Northern Power & Light Company.

While this Company does not have a station which would even approximate the product costs at Beulah, it does furnish the bulk of the added load by virtue of which the Beulah Station is able to reach the low fuel cost under which it is now operating. There is no doubt, but that Northern Power & Light Co. could have installed capacity which would produce low cost energy but the decision has been made to throw this load to Beulah in return for a low energy rate and generating capacity. In consequence of this, the Beulah station was built up to handle this load and thereby effect the savings in power cost to North Dakota Power & Light Co., set out above. This [Companies] system, therefore, in effect can be considered as par of the North Dakota Power & Light Company.

Cost of Current to Northern Power & Light Company.

System peaks of Northern Power & Light Company during peak load season are met by output of Beulah Station and Mobridge Station. The peaks and output are as follows:—

Annual KWH Required for N. P. & L. Co.		10,000,000 KWH
System Peak of Year (Hourly)	2200 KW	
Carried by Mobridge Station (During Heating Season) (Max. Hr.)	700 KW	
Allocated to Beulah Station	1500 KW	
Fixed Charges of Beulah Station Chargeable to N. P. & L. Co.		
1500 KW × $125.00 per KW cap. × 12%		$22,500.00 per yr.
Energy Cost to Serve:		
10,000,000 × .00265		26,500.00 " "
Total		$49,000.00 " "
Savings to N. D. P. & L. Co. Due to Increased Load Factor		16,700.00 " "
		$32,300.00 per yr.
Unit Cost: —32,300 / 10,000,000 =		$0.00323
Energy Rate Set at		0.0035
Gross Income to N. D. P. & L. Co.		
10,000,000 × .0035		$35,000.00 per yr.
Net Gain to N. D. P. & L. Co.		2,700.00 " "

Northwestern Public Service Company.

The sale of current to this Company is considered only as the excess current available from Beulah over and above that required to supply North Dakota Power & Light Co., and Northern Power & Light Co. There is little value to this connection from the view point of standby capacity to Northwestern Public Service Company, for the reason that over peak hours there is no available capacity from Beulah to the Northwestern Public Service Co., the current passing over Bus tie at Aberdeen during peaks being practically zero. This current is considered "Dump Current" and is valuable primarily to improve Beulah load factor and to reduce fuel costs over the entire system by generating current during off [peaks] hours at that station.

The value of this current does not include any plant fixed charges for the reasons outlined above and does not include transmission line fixed charges since Northwestern Public Service Co. made the entire investment for this inter-connection.

The rate evolves into a question of cost to deliver to Aberdeen Bus tie and what N. W. P. S. Co. can afford to pay for such off peak energy.

Cost to Deliver Current to Bus Tie.

Purchase Price by Northern Power & Light Co.	.0035
Losses over High tension system.....	20%
Del. Cost of Energy.....	.0044

Aberdeen Station Costs:

Ave. Monthly N KWH.....	1,300,000	
Ave. Fuel Costs per N KWH.....	$0.0066	per N KWH
Bank Boiler Expense (18 Hrs. per Day)		
2½ tons per day @ $3.00 — $7.50 per day		
$7.50 × 30 = $225.00 per month		
225		
1,300,000 Bank cost per N KWH = Per N KWH	.0017	
Current	.0048	per N KWH
Energy Rate Set at (sale by N. P. & L. Co. to N. W. P. S. Co.)	.0050	per N KWH

The above rate allows a slight margin of Profit to Northern Power & Light Co., (.005 — .0044) and at the same time is comparable to Production Costs possible on Northwestern Public Service Co. system. As stated this sale of excess current to Northwestern Public Service Co. does reduce fuel cost outlay for the entire system and at the same time improves costs of power to North Dakota Power & Light Co., and all of these advantages are obtained without placing any unfair expense on anyone of the three companies of the group, with arrangements shown for rates of energy transferred from Company to Company.

W. T. GAZIN.

Mr. Benson: We offer in evidence the deposition of K. D. Carpenter, which was taken in this proceeding and returned to the Clerk of this Court in this proceeding, together with the exhibits. We offer the exhibits that were offered at the same time, and returned with the deposition.

Mr. Royhl: Exhibits 18 to 27, both inclusive, that are offered as part of the deposition now being offered in its entirety, we, of course, would like, in an orderly way, to make objections to those exhibits as they are offered.

The Court: Do I understand the exhibits are offered with the deposition?

Mr. Royhl: We would like to have an orderly ruling by the Court.

The Court: If the exhibits are referred to in the deposition, there is no jury here, and I am inclined to admit the exhibits in full, but you may make your record.

Mr. Stafford: To which offer the defendant objects on the ground the entire line of testimony or interrogation of this witness, together with all answers thereto, are incompetent, irrelevant and immaterial in this case for any purpose; they have no bearing on any issue made under the pleadings in this case; there is no sufficient or other foundation laid for any of the documents which are [offers] as exhibits, Plaintiff's Exhibits 18 to 27 in the deposition, inclusive; there is no charge in the complaint as to any fraud or other improper dealing in connection with any of the

contracts that comprise said exhibits; the said contracts in this evidence not bearing upon any of the charges asserted in the complaint, and do not effect such charges insofar as they relate to defendant or any of the individuals against which the charges of fraud are brought.

The Court: Objection overruled.

Mr. Royhl: May we show the same objection to each of the exhibits as offered in the deposition, being in the deposition marked Exhibits 18 to 27, both inclusive, and have that same objection stand as to each of said exhibits?

The Court: Yes, you can have that if you want to, and the same ruling of the Court.

Mr. Benson: Plaintiff offers in evidence the deposition of Chester F. Sargent, which was taken pursuant to stipulation between the parties and was duly returned to the Clerk of this Court, and we offer therewith an exhibit which was returned with the deposition and marked as Plaintiff's Exhibit 28, and the exhibit which was returned with the deposition and marked as Plaintiff's Exhibit 29, and the exhibit which was returned with the deposition and marked as Plaintiff's Exhibit 30.

Mr. Stafford: To which we make the same objections as interposed to the offer of the deposition and exhibits of the witness, Carpenter, last stated.

The Court: Same ruling.

Plaintiff's Exhibits 18 to 27 in Carpenter's deposition, and Plaintiff's Exhibits 28 to 30 in Sargent's deposition were identified and received in evidence as Plaintiff's Exhibits 70 to 81, both inclusive.

K. D. CARPENTER, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and deposed as follows:

Direct Examination, by Mr. Benson:

Q. What is your full name, Mr. Carpenter?
A. K. D. Carpenter.

Q. Mr. Carpenter, what is your business?

A. I am president of Middle West Service Company.

Q. How long have you been such president?

A. Since February, 1946.

Q. Prior to that were you an officer or employee of Middle West Service Company? A. Yes.

Q. How long have you been with that company?

A. Since I was an employee, beginning March, 1938.

Q. And have you been with that company continuously since that time? A. I have.

Q. Can you tell us some of the offices, other than president, which you have held in the Service Company?

A. Yes. My first office was the election as assistant to the president, in September, 1942. I was elected secretary in November, 1943. In February, 1946, I resigned those offices, assistant to the president and secretary, and secretary, and was elected president of the Service Company.

Q. And you had been with Middle West Corporation or the Middle West Utilities Company prior to going with Middle West Service?

A. I was never an employee or officer of Middle West Utilities Company or Middle West Utilities Corporation, or the Middle West Corporation.

Q. Were you able to find the contracts between Middle West Service Company and North Dakota Power and Light Company for services of Middle West Service Company? A. Yes, I was.

Q. Can you produce them here?

A. There is the contract. (Handing document to counsel).

Q. Was there only one contract between Middle West Service Company and North Dakota Power and Light Company for services?

A. That was the only contract I was able to find.

Q. Were you able to find any contracts between Middle West Service Company and Northern Power and Light Company?

A. Yes, this is the contract. (Handing document to counsel.)

Q. Were there any other contracts in addition to this contract which you have produced, between those two companies?

A. That was the only contract I was able to find.

Plaintiff's Exhibit 70, which is identified and produced by Carpenter and is also referred to as Plaintiff's Exhibit 18 in Carpenter's deposition, was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 70.

Suite 2100
20 North Wacker Drive
Chicago, Illinois

February 16, 1937

North Dakota Power & Light Company,
Huron,
South Dakota

Gentlemen:

It is proposed, effective at the close of business on December 31, 1936, that the services herein described of the supervisory staff of the central organization maintained by the undersigned shall be made available at all times to your company and to the extent from time to time desired by you, shall be furnished to your company. These services include the services rendered to operating companies by the following departments:

1. Executive and Operating Department. The executive and operating department is composed of men of wide experience in the public utility field. These executives will assist the officers and staff of your company in the solution of major problems and in the formulation of plans and policies regarding the affairs of your company.

Field executives of the operating department will follow the operation of the companies to which they are assigned and by frequent visits and correspondence will assist the local staff of the operating company in the solution of operating problems and will coordinate the work of the various departments of our central organization with the work of the staff of each operating company.

2. Treasury Department, maintained to advise with operating companies regarding depositaries and to make upon request disbursements of their Chicago and New York funds; to assist in finding profitable and satisfactory in-

vestments for surplus funds of operating companies; to advise regarding financial conditions in the territory served by operating companies; to advise concerning general collection and credit activities of operating companies; to confer with operating companies regarding their sinking fund and other mortgage provisions and to assist in arranging bank loans and in securing credit from vendors.

3. Corporate Finance Department, maintained to advise and assist in the modification or the adjustment of capital structures of operating companies in order to reduce fixed charges and/or taxes and in meeting, anticipating or extending maturing obligations; to analyze new capital requirements and to suggest appropriate financial structures; to maintain relations with investment bankers, insurance companies and financial and statistical agencies presently or prospectively interested in the securities of operating companies and with stock exchanges, publishers of manuals and technical magazines; to assist in negotiation and preparation for the market of new issues of securities; to make special analyses of and report upon outside investments of operating companies; to assist in the preparation of annual reports of operating companies in standard form and to furnish information to the public about earnings, dividends and other items of major interest relating to operating companies.

4. Commercial Department, maintained to develop effective sales policies of operating companies and through frequent visits to such companies to plan sales programs; to aid in special campaigns to secure new business; to increase the use of services by present customers; to regain lost business; to assist in retaining business; to maintain up-to-date data and to keep operating companies informed with respect to new uses of utility services, new appliances and current developments in merchandising methods.

5. Rate Department, maintained to analyze rate structures of operating companies; to aid in the formulation of rate policies and in the coordination and revision of rate structures and in the adjustment of rate schedules; to assist in compiling and presenting information, studies and exhibits requested in rate proceedings before regulatory commissions; to make studies and comparisons of rates in

effect in the industry generally and to distribute pertinent information to operating companies; to analyze the service needs of various classes of customers and the conditions and costs with respect thereto; to assist in connection with negotiations of large power contracts and in dealing with competitive situations.

6. Engineering Department, maintained to consult with the management of operating companies with respect to devising methods for supplying increased loads at minimum costs, improving operating conditions of physical properties and dealing with problems of extension and rehabilitation; to analyze expenditures for constructions, investment, maintenance and retirements in order to assure the maximum benefit to operating companies; to inspect the properties of operating companies; to assist in dealing with the contracts and engineering problems of operating companies in order to obtain the greatest operating efficiency and uniformity of engineering practices.

7. Purchasing Department, maintained to study the aggregate requirements of the operating companies; to negotiate appropriate syndicate and general purchasing agreements for the exclusive benefit of operating companies and to check the participation of such companies in such agreements; to distribute information useful in local purchasing and, on request, to act as purchasing agent of the operating companies in specific negotiations; to assist the operating companies in keeping at a minimum their investment in materials and supplies; to maintain a general list of useful, idle and surplus equipment and to facilitate disposal of the same to affiliated companies or to other buyers.

8. Secretarial Department, maintained to arrange for calling and holding meetings of stockholders and/or directors of operating companies when held at points removed from the principal offices of such companies; to prepare agenda for such meetings; to conduct the same and to notify the operating companies of action taken; to inscribe minutes and to supply certified copies to trustees, registrars and transfer agents and to maintain supplies of stock certificates and to arrange for the replacements of lost certificates.

9. Statistical Department, maintained to collect, compile and tabulate operating and statistical information for distribution to operating companies; to maintain a general library and files on statistical information and conditions of the public utility industry; to distribute appropriate information to operating companies and to assist in the preparation of statistical information for operating companies.

10. General Accounting Department, maintained to advise and assist in the accounting practices and procedure of operating companies; to study and assist in the accounting preparation and distribution of construction, retirement and maintenance work orders; to analyze financial statements of all operating companies and to advise local accounting staffs relative to proper presentation of results; to consolidate and compile balance sheets, and income and other statements of operating companies in order to determine results and trends for guidance in operation and management; to make researches and studies of other public utility accounting forms and reports and make suggestions and recommendations with respect thereto for operating companies serving diversified territories.

11. Insurance And Safety Department, maintained to supervise and administer for operating companies all forms of insurance including fire, tornado, boiler, machinery, workmen's compensation, public liability, automobile, group, life, burglary, robbery and forgery insurance and fidelity and surety bonds; to make surveys and inspections for the purpose of obtaining the most favorable forms of coverage at minimum rates and to assist in the adjustment of claims and losses; to render personal service through safety engineers for the prevention of accidents and fires by means of inspections of physical properties, recommendations as to preventative equipment and instruction and education of personnel in employee safety groups; to prepare and distribute safety rules and safety literature; to analyze the causes of accidents; to make recommendations for the elimination of unsafe practices and unsafe conditions and to assist the operating companies in creating and maintaining interest in their accident and fire prevention programs.

12. Budget Department, maintained to assist in preparing and following up forecasts of cash receipts and dis-

bursements of operating companies and in preparing income, operating, sales and construction budgets in order to conserve cash receipts and to control expenditures; to analyze current operating trends in relation to budget forecasts and to study economic data of territories served by operating companies in order to detect conditions which would necessitate revision of budgets.

The compensation to be paid to the undersigned for the services of said departments, as above outlined, shall be:

(a) Eight-tenths (8/10) of one per centum (1%) of the gross operating revenue of your company after (1) excluding revenue received from jobbing and merchandising operations, transportation, sales of coal and steam heating, and (2) deducting from such gross operating revenue all payments for purchases made for resale purposes by you from any other company where such payments constitute revenue to such other company upon which it is then obligated to pay a supervision fee under an agreement similar hereto then in force between such other company and the undersigned; provided, however, that if the cost of maintaining, and rendering the services of, said departments, as determined by the Auditor of the undersigned (whose determinations and allocations of cost it is agreed shall be binding upon both parties hereto) shall for any month or months exceed eight-tenths (8/10) of one per centum (1%) of your gross operating revenue, determined as aforesaid, then the undersigned shall bill and you shall pay the cost (determined as aforesaid) of maintaining, and rendering the services of, said departments during said month or months, but it is agreed that if at any time the cost of maintaining, and rendering the services of, said departments, as billed you by the undersigned, shall exceed eight-tenths (8/10) of one per centum (1%) of your gross operating revenue, (determined as above provided), then you may at your option, cancel and annul this contract at the end of the month in which such bill is received by giving the undersigned written notice of your intention so to do; and

(b) The out-of-pocket travelling expenses incurred by the personnel of the staff incident to the services rendered to you.

Special Services: In addition to the departments above mentioned, the company also maintains an Income Tax Department and a Traveling Auditing Department the services of which are available to you. As the character and extent of the services rendered by these departments will vary in accordance with your requirements, you shall pay for services rendered to you at your request by these departments as follows:

Income Tax Department:

$75.00 per diem, each, for the services rendered by the attorney and the auditor of the Income Tax Department;

$50.00 per diem for the services rendered by the manager of the Income Tax Department;

$35.00 per diem for the services rendered by the seniors in the Income Tax Department;

$25.00 per diem for the services rendered by the semi-seniors in the Income Tax Department;

$10.00 per diem for services rendered by stenographers and typists in the Income Tax Department.

In addition to the above per diem charges, you will be billed for out-of-pocket expenses, plus traveling expenses, of the individuals.

The per diem charges include all overhead costs such as rents, income tax services, stationery, printing, etc., and therefore you will not be billed in addition for such overhead costs.

Traveling Auditing Department:

$25.00 per diem for services rendered by traveling auditors.

In addition to the above per diem charge, you will be billed for out-of-pocket expenses, plus traveling expenses, of the individuals.

The per diem charge includes all overhead costs such as rents, stationery, printing, etc., and therefore you will not be billed in addition for such overhead costs.

Other Special Services: For other special services not specifically covered herein but rendered to you at your request, you shall pay as mutually agreed upon between us for such special services.

It is agreed that no liability shall exist or be asserted against the undersigned on account of any services or advice furnished pursuant to the terms hereof.

This agreement (unless terminated pursuant to some preceding provision hereof) shall remain in effect until terminated at the end of any month by either party hereto by mailing to the other party ninety days' prior written notice of such termination and shall not be assignable by either party without the consent of the other.

All previous agreements between you and the undersigned or between you and the Receivers or Trustee of Middle West Utilities Company are hereby cancelled and terminated as of the date this agreement takes effect, as hereinbefore stated, except that any amounts payable or to be credited under said agreement shall be paid and credited according to the terms thereof.

If the foregoing meets with your approval, please indicate your acceptance hereof by executing the form of acceptance set out below.

Very truly yours,

MIDDLE WEST SERVICE COMPANY,
By D. C. GREEN,
President.

(Seal)

Attest:

GAIL BELDEN,
Secretary.

We hereby accept and agree to the foregoing.

NORTH DAKOTA POWER AND LIGHT CO.,
By C. J. STRIKE,
Vice President.

(Seal)

Q. Have you made an endeavor to find in the files of Middle West Service Company any other contracts between North Dakota Power and Light Company and Middle West Service Company?

A. Yes sir. I had a search made for any contracts and all contracts between these two parties to the contract I just mentioned.

Q. You have been unable to find any contracts between those parties, except for Plaintiff's Exhibit 18 for identification? A. That is correct.

Q. Plaintiff's Exhibit 18 for identification is the agreement under which Middle West Service Company rendered services to North Dakota Power and Light Company, is it?

A. Yes, sir.

Q. Plaintiff's Exhibit 18 for identification was taken from the regular files of Middle West Service Company?

A. Yes.

Q. Kept in the regular course of that company's business? A. From its corporate files.

Q. This Exhibit 18 was withdrawn from those files for the purpose of bringing it to this proceeding? A. Yes.

Mr. Benson: I show you Plaintiff's Exhibit 18. Do you know the signature of the last page of that exhibit?

A. Yes sir.

Q. Can you state the signature under the name of each company?

A. Mr. D. C. Green signed on behalf of Middle West Service Company, as president. Mr. C. J. Strike signed as vice president in behalf of North Dakota Power and Light Company. The signature of Mr. Green was attested by Mr. Gail Belden, then secretary of Middle West Service Company.

Q. And was the seal attached to that Document? Was the seal attached to that document?

A. There were seals of both companies attached to the document.

Q. Imprinted seals? A. Yes.

Q. You recognize all those signatures? A. Yes.

Q. Do you recognize the seal as being the seal of Middle West Service Company? A. I do.

Plaintiff's Exhibit 71, which was produced and identified by Carpenter, is also referred to as Plaintiff's Exhibit 19 in Carpenter's deposition, was received in evidence with his entire deposition, and is identical with Plaintiff's Exhibit 70, except that it is a contract between Middle West Service Company with Northern Power and Light Company.

Q. Was it executed about the date that it bears, or don't you know, of your own knowledge, or did you have sufficient knowledge to know at that time what was going on with reference to these contracts?

A. I was not associated with Middle West Service Company at that date—

Q. I see.

A. (Continuing) —of the contract,

Q. Do you recognize the signatures on the last page of the agreement? A. I do.

Q. What signatures are they?

A. D. C. Green signed for, as president, of Middle West Service Company attested by Gail Belden, secretary of Middle West Service Company. And C. J. Strike as vice-president signed for the Northern Power and Light Company.

Q. And there are two corporate seals on that last page?

A. There is.

Q. Do you recognize one of them?

A. I do. That of Middle West Service Company.

Q. Where did you get it?

A. From the corporate files of the Middle West Service Company.

Q. The files were kept in the usual and regular business of that corporation? A. Yes, sir.

Plaintiff's Exhibit 72, which was produced and identified by Carpenter and is also referred to as Plaintiff's Exhibit 20 in Carpenter's deposition, was received in evidence with his entire deposition. It is identical with Plaintiff's Exhibit 70, except that it is a contract between Middle West Service Company and Dakota Public Service Company dated July 1, 1939; made effective at the close of business on June 30, 1939; the word "you" in the first line of the

next to the last paragraph is "your predecessor company"; and it is signed on behalf of Middle West Service Company by F. E. Kruesi, President, and attested by Oliver McCormick, Secretary, and on behalf of Dakota Public Service Company by A. B. Sanborn, President, and attested by J. F. Buckmier, Secretary.

Q. Where did you get it?

A. From the corporate files of Middle West Service Company.

Q. Kept in the usual and the regular course of business of the Middle West Service Company? A. Yes sir.

Plaintiff's Exhibit 73, which was identified and produced by Carpenter and is also referred to as Plaintiff's Exhibit 21 of Carpenter's deposition, was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 73.

Suite 3518
20 North Wacker Drive
Chicago 6, Illinois

September 4, 1945.

Dakota Public Service Company
Huron, South Dakota

Gentlemen:

As of July 1, 1945, you became an indirect subsidiary of The Middle West Corporation and as such are entitled, under the provisions of the Public Utility Holding Company Act of 1935, to receive the services of Middle West Service Company at cost.

We, therefore, propose that the present agreement between us, dated July 1, 1937, be modified by the following supplemental agreement:

The sum to be paid to Middle West Service Company for maintaining, and for the services of, the Executive and Operating Department, Treasury Department, Corporate Finance Department, Commercial Department, Rate Department, Engineering Department, Purchasing Depart-

ment, Secretarial Department, Statistical Department, General Accounting Department, Insurance and Safety Department, Budget Department, and Income Tax Department, as outlined in the agreement of February 16, 1937, shall from and after June 30, 1945 be as follows:

(a) The cost of maintaining and rendering the services of said departments, as determined by the Auditor of Middle West Service Company (whose determinations and allocations of cost shall be binding upon both parties hereto) in accordance with the applicable rules, regulations and orders of the Securities and Exchange Commission; and

(b) The out-of-pocket travelling expenses incurred by the personnel of the staff incident to the services rendered to your company.

The cost (determined as aforesaid) of maintaining, and rendering the services of, said departments shall be paid for monthly whether or not the available services shall be fully utilized by you.

Except as modified by this letter, the agreement of July 1, 1937 is hereby confirmed.

If the foregoing meets with your approval, please indicate your acceptance hereof by executing the form of acceptance on the attached copy of this letter and returning same to us.

Very truly yours,

MIDDLE WEST SERVICE COMPANY,
By F. E. KRUESI,
President.

Attest:
K. D. CARPENTER,
Secretary.

We accept and agree to the foregoing.

DAKOTA PUBLIC SERVICE COMPANY,
By A. B. SANBORN,
President.

Q. Where did you get it?

A. In the corporate files of Middle West Service Company.

Q. Corporate files kept in the usual and regular course of that company's business? A. Yes, sir.

Mr. Benson: Plaintiff's Exhibit 21 is a modification of Exhibit 20? A. Yes.

Q. You made charges against Dakota Public Service Company for services subsequent to September 4, 1945? (Handing document to the witness.) A. Yes.

Plaintiff's Exhibit 74, which was identified and produced by Carpenter, is also referred to as Plaintiff's Exhibit 22 of Carpenter's deposition, and was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 74.

Middle West Service Company
20 North Wacker Drive
Chicago, Illinois

North West Utilities Company,
902 Market Street,
Wilmington, Delaware.

Gentlemen:

This will confirm our agreement that, pursuant to the provisions of the Public Utility Holding Company Act of 1935 and the rules adopted by the Securities and Exchange Commission pursuant thereto, all services rendered and to be rendered by Middle West Service Company in accordance with your request or requirements will be billed by us and paid for by you at the cost of such service, including out-of-pocket expenses incurred in connection therewith. The determination of such cost and expense by the Comptroller of Middle West Service Company will be accepted as establishing the cost, subject to such modifications or corrections, if any, with respect to methods or amounts that may be lawfully made from time to time by the Securities and Exchange Commission.

If the foregoing conforms to your understanding, please confirm by signing and returning to us the attached copy.

Dated as of September 9, 1939.

MIDDLE WEST SERVICE COMPANY,

By P. L. SMITH,
Chairman of the Board.

NORTH WEST UTILITIES COMPANY,
By GAIL BELDEN,
President.

Q. You recognize the signatures on that document?
A. I do.
Q. Whose are they?
A. P. L. Smith signed as chairman of the board of Middle West Service Company and Gail Belden signed as president of North West Utilities Company.
Q. P. L. Smith was chairman of the board of Middle West Service Company on September 9, 1939, was he?
A. He was.
Q. Gail Belden was president of North West Utilities Company on September 9, 1939, was he?
A. I assume he was.
Q. You don't know directly of your own knowledge?
A. I do not.
Q. After September 9, 1939, did Middle West Service Company make charges against North West Utilities Company? A. Yes.
Q. Where did you get Plaintiff's Exhibit 22 for identification?
A. From the corporate files of Middle West Service Company.
Q. Kept in the usual and regular course of the business of that company? A. Yes, sir.

Mr. Benson: In the files of Middle West Service Company were there agreements between Middle West Service Company and the Northwestern Public Service Company?

Mr. Stafford: That is objected to as irrelevant and immaterial.

A. Yes.

Q. And did you find agreements between Middle West Service Company and Northwestern Public Service Company for services?

Mr. Stafford: The same objection.

A. Yes.

Plaintiff's Exhibit 75, which was identified and produced by Carpenter, is also referred to as Plaintiff's Exhibit 23 in Carpenter's deposition, and was received in evidence with his entire deposition. It is identical with Plaintiff's Exhibit 70, except that it is dated August 18, 1934; is a contract between defendant and Daniel C. Green, temporary trustee of Middle West Utilities Company; is signed by said Green and by F. E. Kruesi as president for defendant; and except for the first paragraph and the material commencing "The compensation to be paid" and continuing through the balance of said Plaintiff's Exhiibt 70, in lieu of which Plaintiff's Exhibit 75 contains the following:

By order of the United States District Court for the Northern District of Illinois, Eastern Division, the undersigned has been appointed Temporary Trustee of Middle West Utilities Company, pursuant to Section 77-A and 77-B of the Bankruptcy Act and, as of the close of business on July 24, 1934, has taken over from the Receiver of the Company the property and assets then held by the Receiver. Included among these assets is the supervision contract between the Receiver and your company. As Trustee the undersigned proposes to maintain the supervisory staff of the central organization heretofore maintained by the Receiver and carry out the supervision agreements made by the Receiver. It is thought desirable, however, to terminate the agreement with the Receiver and to substitute therefor this agreement with the undersigned as Trustee.

It is, therefore, proposed, effective at the close of business on July 24, 1934, that the services herein described of the supervisory staff of the central organization main-

tained by the undersigned as Temporary Trustee (herein referred to as "Trustee") shall be made available at all times to your company and to the extent from time to time desired by you, shall be furnished to your company. These services include the services rendered to operating companies by the following departments:

The compensation to be paid to the Trustee for the services of said departments as above outlined, shall be:

Seven-tenths (7/10) of one per cent (1%) (or such less per cent as the Trustee at its option for any reason may fix at any time or from time to time) of the gross operating revenue of your company after (a) excluding revenue received from jobbing and merchandising operations, transportation, sales of coal and steam heating, and (b) deducting from such gross operating revenue all payments for purchases made for resale purposes by your company from any other company where such payments constitute revenue to such other company upon which it is then obligated to pay a supervision fee under an agreement similar hereto then in force between such other company and the undersigned; and

The out-of-pocket traveling expenses incurred by the personnel of the staff incident to the services rendered to your company.

Special Services: In addition to the departments above mentioned the Trustee also maintains an Income Tax Department and a Traveling Auditing Department the services of which are available to you. As the character and extent of the services rendered by these departments will vary in accordance with your requirements, you shall pay for services rendered to you at your request by these departments at rates to be agreed upon between us as the services are renderd.

This agreement shall remain in effect until terminated by either party hereto by mailing to the other party ninety days prior written notice of such termination and shall not be assignable except that it shall inure to the benefit of any successor trustee or trustees and to the benefit of the Receiver of Middle West Utilities Company in the event

the assets of that company are returned to the possession of the Receiver and may be assigned to any corporation organized to take over the assets of Middle West Utilities Company on reorganization or to any subsidiary of such company organized to render services of the kind provided for in this agreement. Unless assigned or transferred as above provided, this agreement shall terminate upon the final discharge by the Trustee or Trustees of Middle West Utilities Company.

The existing agreement between you and the Receivers of Middle West Utilities Company is hereby cancelled with the understanding that any amounts remaining unpaid under that agreement shall be paid to the undersigned.

If the foregoing meets with your approval, please indicate your acceptance hereof by executing the form of acceptance set out below.

Q. I show you Plaintiff's Exhibit 23 for identification and ask you whether you produced that document from the files of Middle West Service Company for the purpose of testifying in this proceeding? A. I did.

Q. Did you find it in the usual and regular corporate files of Middle West Service Company kept for the purpose of taking care of the service contracts and similar documents? A. Yes.

Q. Will you look at the last page of Plaintiff's Exhibit 23 for identification and tell me whether you know the signatures of the people on that page? A. I do.

Q. Who are they?

A. Daniel C. Green signed as temporary trustee of Middle West Utilities Company, and F. E. Kruesi signed as president of Northwestern Public Service Company.

Q. You produced Exhibit 23 from the regular corporate files of Middle West Service Company, as I understand it?

A. Yes.

Plaintiff's Exhibit 76, which was identified and produced by Carpenter, is also referred to as Plaintiff's Exhibits 24 and 25 of Carpenter's deposition, and was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 76.

October 23, 1934.

We enclose herewith notice of reduction of fee for Supervision Services from 7/10 of 1% to 6/10 of 1% effective at once, to be applied against October revenues.

This reduction has been made possible by certain changes and economies which we have been able to put into effect in this office. It is our desire that the scope of the work and the necessary personnel be limited to the needs of the operating companies in order that these services may be provided at minimum expense.

As you know, the purpose of maintaining a supervision staff in this office is primarily for the benefit of the operating companies, and we are pleased to advise you of this reduction.

Yours truly,

D. C. GREEN,
Trustee.

October 23, 1934.

Subject: Supervision Agreement.

Dear Sirs:

In accordance with contract covering Supervision Services between your company and Daniel C. Green, Trustee of Middle West Utilities Company, please be advised that the supervision fee is hereby reduced to 6/10 of 1% effective with the October revenues and payable in November. Fee should be calculated on this basis until further notice.

Yours truly,

D. C. GREEN,
Trustee.

Q. Where did you get them?

A. From the corporate files of Middle West Service Company.

Q. And did you find them in the corporate files where Plaintiff's Exhibit 23 was found? A. Yes.

Q. Are those files kept in the usual and regular business of Middle West Service Company? A. Yes.

Q. Have you had occasion to make any investigation as to the history of Mr. Green's dealings with Northwestern Public Service Company or other companies with reference to services rendered by Mr. Green, pursuant to agreement between him and the operating utilities, to ascertain whether or not Mr. Green amended agreements from time to time with such operating utilities? A. Yes.

Mr. Stafford: Wait a minute. We object to that as irrelevant, immaterial, an opinion and conclusion of the witness, and it is indefinite and uncertain.

Mr. Benson: Did you find that Mr. Green amended the rate of charge to the operating utilities during the time he was rendering service to operating utilities as receiver of the Middle West Utilities Company?

Mr. Stafford: The same objection.

A. Yes.

Plaintiff's Exhibit 77, which was identified and produced by Carpenter, is also referred to as Plaintiff's Exhibit 26 of Carpenter's deposition and was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 77.

Middle West Service Company
Chicago

For Company Business Only

Date July 15, 1938.

Subject Income Tax Department Services
Location
To Executives—cc Auditors
From N. P. Zech

This is to advise you that effective May 1, 1938, the cost of services of the Income Tax Department on current work will be absorbed in the general supervision costs.

In the event that work arises of a special and not of a current nature which makes it necessary for you to request special services from that department, you will be billed at cost for such services.

N. P. ZECH

Q. Where did you find that exhibit?

A. In the corporate files of Middle West Service Company.

Q. Files kept in the usual and regular transaction of that corporation's business? A. Yes.

Q. Did you find this Exhibit 26 in the same files as Plaintiff's Exhibit 23, the agreement with Northwestern Public Service Company? A. Yes.

Q. Do you know that Plaintiff's Exhibit 26 was sent to Northwestern Public Service Company, or a duplicate thereof, on or about the date of Plaintiff's Exhibit 26?

A. Yes.

Q. Is that a fact? A. It is a fact.

Plaintiff's Exhibit 78, which was identified and produced by Carpenter, is also referred to as Plaintiff's Exhibit 27 in Carpenter's deposition, and was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 78.

This agreement, by and between The Middle West Corporation, a Delaware corporation, (hereinafter referred to as the "Corporation"), and Middle West Service Company, an Illinois corporation (hereinafter referred to as the "Service Company").

Witnesseth:

Whereas, the Corporation has acquired by virtue of the Plan of Reorganization of Middle West Utilities Company, Debtor, and the Decree of Court confirming same, certain contracts entered in by the Trustee of said Debtor or the Receivers of said Middle West Utilities Company with operating companies providing for the maintenance of a

supervisory staff and the making available of the services thereof to such operating companies on the terms stated in said contracts; and it is desired, on the terms hereinafter stated, to transfer and assign said contracts to the Service Company;

Now, Therefore, in consideration of the premises and of One Dollar ($1.00), each to the other in hand paid, and of other valuable considerations, receipt of which is hereby acknowledged, the Corporation hereby transfers and assigns to the Service Company all right, title and interest of the Corporation in and to any and all contracts entered into between the Trustee of Middle West Utilities Company, Debtor, or the Receivers of Middle West Utilities Company and operating companies, providing for the maintenance of a supervisory staff and the making available of the services thereof to the operating companies, including, without restricting the generality of the foregoing, all such contracts made with the following named companies:

Arkansas-Missouri Power Company
Arkansas-Oklahoma Gas Company
The Bradford & Gettysburg Electric Light & Power Company
The Brookville and Lewisburg Lighting Company
The Buckeye Light & Power Company
Cap F. Bourland Ice Company
Central Illinois Public Service Company
Central Power Company
Central Power and Light Company
City Ice Company of Kansas City
Consolidated Coach Corporation
Consumers Ice Company
Copper District Power Company
East Missouri Power Company
The Eaton Lighting Company
Fort Smith Gas Company
Great Lakes Power Company Limited
The Greenville Electric Light and Power Company
Industrial Oil and Gas Company
The Kansas Electric Power Company

The Kansas Power Company
Kentucky Power & Light Company
Kentucky Utilities Company
Knife River Coal Mining Company
Lake Superior District Power Company
Lexington Ice Company
Lexington Utilities Company
Louisiana Ice and Coal Company, Inc.
Michigan Gas and Electric Company—Northern Division
Michigan Gas and Electric Company—Southern Division
Michigan Public Service Company
Missouri Edison Company
Missouri Gas & Electric Service Company
Missouri Public Service Company
The New Madison Lighting Company
North Dakota Power & Light Company
Northern Power & Light Company
Northwestern Public Service Company
Oklahoma Power and Water Co.
Old Dominion Ice Corporation
Old Dominion Power Company
Ozark Natural Gas Company
Pecos Valley Power & Light Company
Peoples Ice Company
Public Service Company of Oklahoma
Southern Gas Producing Company
Southern United Ice Company
Southwestern Gas and Electric Company
Southwestern Light & Power Company
Southwestern States Gas Company
Twin City Pipe Line Company
Weleetka Pipe Line Company
Western Ice Service Company
Western Ohio Public Service Company
Western Oklahoma Gas Company
West Texas Utilities Company
Wisconsin Power and Light Company

No contracts with holding companies are included in this transfer and assignment.

This transfer and assignment is made as of January 1, 1936, and the Corporation agrees to transfer and pay over to the Service Company all payments heretofore or hereafter received by it under said agreements for the period beginning January 1, 1936, and the Service Company agrees to assume and pay to the Corporation all costs incurred or charged by it on its books for the performance of said contracts for the period beginning January 1, 1936.

In Witness Whereof, the parties hereto have caused this agreement to be duly executed by their respective officers and their respective corporate seals to be hereto affixed, attested by their respective Secretaries or Assistant Secretaries, this 29th day of January, 1936.

THE MIDDLE WEST CORPORATION,
By D. C. GREEN,
President.

(Seal)

Attest:
GAIL BELDEN,
Secretary.

MIDDLE WEST SERVICE COMPANY,
By D. C. GREEN,
President.

(Seal)

Attest:
GAIL BELDEN,
Secretary.

Q. You have not been able to find the original of Plaintiff's Exhibit 27? A. No.

Q. Where did you find Plaintiff's Exhibit 27?

A. In the corporate files of Middle West Service Company.

Q. You made a search for the original?

A. In the Middle West Service Company files.

Q. Yes. You have had occasion from time to time, particularly when you first came to Middle West Service Company, to ascertain the basis or charge to Northwestern Public Service Company and other companies? A. Yes.

Q. And in making your search or ascertaining the basis for the agreement under which such charge was made, did you have occasion to look for and examine an agreement between the Middle West Corporation and Middle West Service Company? A. Yes.

Q. Have you had occasion in the past, since you came to work for Middle West Service Company, to ascertain whether there was any agreement between Middle West Service Company and Northwestern Public Service Company concerning any services by Middle West Service Company to Northwestern Public Service Company? A. Yes.

Q. Since you have been with Middle West Service Company has Middle West Service Company rendered services to Northwestern Public Service Company? A. Yes sir.

Q. The nature of these [serviced], please.

A. Middle West Service Company has provided the services that are outlined and set forth in the agreement, which is Plaintiff's Exhibit—whatever it is.

Mr. Benson: (Handing document to the witness) Down at the bottom. A. 23.

Mr. Benson: Has Middle West Service Company rendered to Northwestern Public Service Company, since you became associated with Middle West Service Company, advice to the executive and operating departments of Northwestern Public Service Company? A. Yes.

Mr. Benson: They gave advice to the treasurer of Northwestern Public Service Company? A. Yes.

Q. To the commercial department of Northwestern Public Service Company? A. Yes.

Q. To the rate department of Northwestern Public Service Company? A. Yes.

Q. To the engineering department? A. Yes.

Q. To the purchasing department? A. Yes.

Q. To the accounting department? A. Yes.

Q. And other departments of Northwestern Public Service Company?

A. Yes; such as they requested upon the part of the Service Company.

Q. You know that services were rendered by Middle West Service Company to Northwestern Public Service Company subsequent to the time you came to Middle West Service Company? A. Yes sir.

Q. And continuously from the time you came to Middle West Service Company up to and through 1945? A. Yes.

Q. On Plaintiff's Exhibit 27, page 2, there is a long list of names. Do you know what those names represent?

A. They are the names of the companies with which service contracts were held by the trustee of Middle West Utilities Company, and assigned to the Service Company.

Mr. Benson: I show you Plaintiff's Exhibit 27. Do you know whether the names of the companies listed on page 2 of Exhibit 27 were all subsidiaries of the Middle West Corporation, as of the date Exhibit 27 is dated?

Mr. Stafford: That is objected to as incompetent, irrelevant, and immaterial, calls for the conclusion of the witness, not sufficient foundation laid.

A. No, I don't know that.

Q. You do not know that? A. No.

Q. Do you know whether any of them were?

Mr. Stafford: The same objections.

A. Some of them I know were.

Q. In order to expedite your answer, will you look at page 2 of Exhibit 27 and state which of those you know were at that time subsidiaries of the Middle West Corporation, directly or indirectly?

Mr. Stafford: The same objection.

A. I believe they were all affiliated with Middle West Corporation at this time.

Mr. Stafford: The same objections, and also that the answer is not responsive to the question, and we move to strike out the answer.

Q. Middle West Service Company rendered services from time to time for a large number of utility operating companies, did it not?

A. They had a number of operating companies with which they had service contracts.

Q. From the time you came to Middle West Service Company was it your practice to make separate charges to the operating utilities with whom you had service contracts, as distinguished from your percentage charge disclosed in these documents that have been offered in evidence?

A. No.

Q. You did not make a separate charge, but charged them for the year on a percentage basis? A. That is right.

Q. Then if you had to spend money for out of pocket purposes, traveling, whether or not a charge was made for that depended upon the terms of the contract with the particular operating utility? A. Traveling expenses, yes.

Q. The Middle West Service Company was organized for the purpose of complying with the requirements of the Public Utility Holding Company Act, with reference to service companies, is that correct? A. I presume it was.

Q. And its principal clients and practically all of its clients were companies that were formerly affiliated with the Middle West Utilities Company?

Mr. Royhl: Objection, calling for the opinion and conclusion of the witness, not the best evidence, no proper foundation laid.

Mr. Stafford: Irrelevant and immaterial.

A. I think that is true.

CHESTER F. SARGENT, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and deposed as follows:

Direct Examination, by Mr. Benson:

Q. What is your name, please?

A. Chester A. Sargent.

Q. What is your business, Mr. Sargent?

A. You mean my connection with the business?

Q. No, I mean what is your personal business?

A. I am a partner of the firm of Sargent and Lundy.

Q. Will you spell that name for the reporter?

A. Sargent and Lundy, S-a-r-g-e-n-t and L-u-n-d-y.

Q. How long have you been a member of the partnership of Sargent and Lundy?

A. Since November 1st, 1940, when the firm was formed.

Q. Prior to November 1st, 1940, there was a corporation that operated under the corporate name of Sargent and Lundy, Inc.? A. Incorporated.

Q. Inc.? A. No, "Incorporated", spelled out.

Q. Sargent and Lundy, Incorporated, was the full name?

A. Yes.

Q. All right. The partnership has carried on the business theretofore carried on by the corporation? A. Yes.

Q. And the partnership now has all the files and records of the corporation? A. Yes.

Q. You were subpoenaed to appear at this proceeding, were you? A. Yes, sir.

Q. You were asked to produce certain books and records, and certain data from your books, and the books of the corporation? A. Broadly so, yes.

Q. Beg your pardon?

A. Yes. Nothing specific, very specific.

Q. Were you an officer of Sargent and Lundy, Incorporated? A. Yes.

Q. And what was your office in that corporation?

A. Secretary and treasurer.

Q. I call your attention to Plaintiff's Exhibit 5. Will you look at the first few pages, so that you identify the document in your mind?

A. (Witness examines document) Yes.

Q. There was some work done in anticipation of the preparation of Plaintiff's Exhibit 5, I assume?

A. I assume so, yes.

Q. And you have looked for your authorization from someone to do that work, haven't you?

A. Just this morning. I did not realize until I came over here that you desired that information.

Q. But you brought a considerable number of correspondence files with you to this hearing room?

A. Yes, but after getting—after seeing that telegram, seeing it, of Northwestern Public Service Company, I assume that there may be some correspondence in the Northwestern Public Service Company's folders, which we have not here, which may have some bearing on this. I was told last night that Northwestern Public Service Company correspondence would not be necessary. I have not gone through that.

Mr. Benson: If the initial correspondence or communications, if there [way] any, concerning undertaking the work referred to in Plaintiff's Exhibit 5 had been filed elsewhere than in a file under "Northwestern Public Service Company", it would have been in the files which you produced here this morning? A. No.

Q. It would? A. No.

Q. Where would it have been?

A. Been in the files of Northwestern Public Service Company.

Q. If you had not filed it in the Northwestern Public Service Company files you would have filed it in the files you brought here this morning? A. Yes.

Plaintiff's Exhibit 79, which was produced and identified by Sargent, is also referred to as Plaintiff's Exhibit 28 of Sargent's deposition, and was received in evidence with his entire deposition. It reads as follows:

Plaintiff's Exhibit 79.

Western Union Telegram

June 1, 1936

Sargent & Lundy
140 South Dearborn Street
Chicago, Illinois

Arrangements approved for the preliminary survey of system requirements by your engineer at Bismarck Beulah etal with our representative stop can meet you Thursday at Bismarck North Dakota to inspect and survey the sys-

tem plants and hiline layout for your study and report stop advise if your engineer arrive Bismarck on Thursday or otherwise.

NORTHWESTERN PUBLIC SERVICE COMPANY STOKKE

Day letter

Q. It was the practice of Sargent and Lundy, Incorporated, to put a receipt stamp on mail and telegrams coming into the office of that corporation? A. Yes.

Q. And it put on such documents coming into that office a stamp routing the document for attention by someone in the corporation? A. Yes.

Q. Do you know who made the pencil notations on Plaintiff's Exhibit 28?

A. Only in respect to the notation, "Bill to North Dakota Power and Light".

Q. Who made that notation? A. I did.

Q. Now, the two stamps in red that show up on the exhibit are stamps that were commonly used by Sargent and Lundy at that time? A. Yes.

Q. Do you find an original telegram with the same message as Plaintiff's Exhibit 28? A. Yes.

Q. That original is in the same file from which you produced Exhibit 28. A. Yes.

Q. After June 1, 1936, did Sargent and Lundy proceed to make a survey of the properties of North Dakota Power and Light Company? A. Yes.

Q. Was the result of that survey incorporated in Plaintiff's Exhibit 5 for identification?

A. To the best of my knowledge, yes.

Plaintiff's Exhibit 80, which was identified and produced by Sargent, is also referred to as Plaintiff's Exhibit 29 in Sargent's deposition, and was received in evidence with his entire deposition. It reads as follows:

Northwestern Public Service Company
General Offices
Huron, South Dakota

July 13, 1936

Sargent & Lundy, Engineers
140 South Dearborn St.
Chicago, Illinois

Attention: Mr. L. Skog, Chief Mechanical Engineer

Subject: Generating Capacity—Steam & Electric

North Dakota Power & Light Company, Bismarck, N. D.

Wish to acknowledge receipt of your letter of July 10th. in which you request additional copies of prints on the Bismarck station such as may be available. We will search the files tomorrow for such detailed prints as are available in addition to copies previously handed you.

We are having a conference tomorrow and general discussion on the situation with respect to new equipment at Beulah or Bismarck, and, as soon as we have our definite ideas together and agreed upon, will likely immediately have conference with the Chicago office on the matter for a final decision.

I am inclined to recommend the plan, or scheme A-750 H. P. Boiler at the Beulah station, for immediate installation this year. That job could be accomplished without interference in operations and completed probably by December 15th. There are substantial savings to be had in the third boiler installation at the Beulah plant, as well as assurances of added generating capacity by means of the two boiler load and serviceability of both turbines. The relative needs, economics and financing of the various schemes will be shortly reviewed and a decision made following our

discussion of the matter with the Chicago office officials and Mr. Kruesi.

Yours very truly,

By: O. C. STOKKE,
Supt. of Production

OCS:MB

Q. There are two stamps in red ink on Exhibit 29. Will you state what those are?

A. One is the date stamp and the other is the routing stamp.

Q. The date stamp indicates when received?

A. When received.

Q. By Sargent and Lundy, Incorporated? A. Yes.

Q. The routing stamp is the reference to someone to take care of the matter? A. Yes, in the office.

Q. You do not know when the pencil notation, partially on the routing stamp, was put on? A. No.

Q. Do you know Stokke's signature?

A. No, I don't. I could not say I really know his signature.

Q. You are chief financial officer of Sargent and Lundy, Incorporated?

A. Yes, during this time, during the time that we are—

Q. In 1936? A. Yes.

Q. And down to the dissolution of the corporation?

A. Yes.

Q. And you now have charge of the finances of Sargent and Lundy, a partnership? A. Yes.

Q. And the accounting records of the corporation were under your supervision and control, and the accounting records of the partnership were under your supervision and control? A. Yes.

Q. Have you made a computation showing the charges from January 1, 1934, to October 31, 1940, made by Sargent and Lundy, Incorporated, against Middle West Corporation, North West Utilities Corporation, Northwestern Public Service Company, United Public Utilities Corporation, North Dakota Power and Light Company, Northern Power and Light Company, Dakota Public Service Company,

Central and South West Utilities Co., Central Power and Light Co., Peoples Ice Co., Public Service Co. of Oklahoma, Southwestern Light and Power Company, Southwestern Gas and Electric Co., American Public Service Co., West Texas Utilities Co., City Ice Co. of Kansas City, Consumers Ice Co., The Kansas Electric Power Co., Kentucky Utilities Co., Lexington Utilities Co., Lexington Ice Co., Lexington Railway System, Old Dominion Power Co., Old Dominion Ice Corp., Michigan Gas and Electric Co., Middle West Utilities Co., of Canada Ltd., Great Lakes Power Co. Ltd., International Transit Co., National Utilities Corp., Ltd., Northern Public Service Corp., Ltd., Winnipeg Heating Co. Ltd., Wisconsin Power and Light Co., Oklahoma Power and Water Co., Pecos Valley Power and Light Co., United Public Service Corp., Kentucky Power and Light Co., Western Ice Service Co., Central Illinois Public Service Co., Lake Superior District Power Co., Missouri Gas and Elec. Service Co., Missouri Public Service Corp., Central Power Co., Arkansas-Missouri Power Corporation, East Missouri Power Company, Commonwealth Light and Power Company, Inland Power and Light Corporation, The Kansas Power Company, Missouri Edison Company, Michigan Public Service Company, Kentucky Securities Company, Southeastern Greyhound Lines, Southern United Ice Company. A. Yes sir.

Q. Do you have that with you? A. Yes, sir.

Q. Did you also make a statement of the charges by Sargent and Lundy, the partnership? A. Yes sir.

Q. Against the same companies, since the formation of the partnership through the year 1945?

A. Yes, it is not set up separately in that accounting; it is included.

Plaintiff's Exhibit 81, which was identified and produced by Sargent, is also referred to as Plaintiff's Exhibit 30 in Sargent's deposition, and was received in evidence with his entire deposition. This exhibit lists the following companies: Middle West Corporation, Northwestern Public Service Company, North Dakota Power & Light Company, Dakota Public Service Company, Central Power & Light Co., Public Service Co. of Oklahoma, Southwestern Gas & Electric Co., West Texas Utilities Co., Middle West Service Co., The

Kansas Electric Power Co., Kentucky Utilities Co., Lexington Utilities Co., Wisconsin Power & Light Co., Oklahoma Power & Water Co., Central Illinois Public Service Co., Lake Superior District Power Co., Missouri Public Service Co., Central Power Co., Arkansas-Missouri Power Corporation, The Kansas Power Company and Michigan Public Service Company, and shows that the aggregate charges of Sargent & Lundy for engineering services to said companies for the entire period from 1934 to 1945, inclusive, were $1,435,403.57. It further shows that defendant was charged during said period of that aggregate amount the sum of $54,847.03, said charges being $19,425.30 (1941), $5,652.88 (1942), $23,106.61 (1944) and $6,662.24 (1945). This exhibit also shows that North Dakota Power & Light company was charged during said period, of that aggregate amount the sum of $20,252.54, said charges being $1,061.23 (1934), $10,692.53 (1936) and $8,498.78 (1937). The exhibit further shows that Dakota Public Service Company was charged during said period of that aggregate amount the sum of $23,055.79, said charges being $8,558.25 (1939) and $14,497.54 (1940).

Mr. Benson: I show you Plaintiff's Exhibit 30 for identification, and ask you what that is.

A. This is a record or listing of the charges made by Sargent and Lundy, Incorporated, and the firm of Sargent and Lundy, during the years of 1934 to 1945, both inclusive, to the companies included on the list.

Q. Some time ago I gave you the names of a considerable list of companies. The only companies in that long list against whom you found charges on the books of the corporation or the partnership are the companies shown on Plaintiff's Exhibit 30 for identification? A. Yes.

Q. Plaintiff's Exhibit 30 for identification is a compilation of all the charges shown for the years stated on Exhibit 30, against the corporation whose name appears opposite and to the left of the charge, on the same line of the exhibit? A. Yes.

Q. Those figures are all taken from the books and rec-

ords of the corporation for the years the corporation was in existence? A. Yes.

Q. And for the firm since the firm was organized?

A. Yes.

Q. And those figures are true and correct statements of the charges for the years indicated against the corporations indicated, as shown by the books of the corporation?

A. Yes.

Q. During the time it was in existence? A. Yes.

Q. And as shown by the books of the firm, since its organization? A. Yes.

Preliminary Examination, by Mr. Stafford:

Q. Mr. Sargent, do these figures also include disbursements made by Sargent and Lundy? A. Yes sir.

Q. In other words, this represents the billing for the services rendered, including out of pocket, your out of pocket? A. Yes.

Examination, by Mr. Stafford:

Q. Mr. Sargent, referring to this compilation marked Plaintiff's Exhibit 30, I take it that this does not purport to represent all of the billings which Sargent and Lundy, Incorporated, and after November, 1940, Sargent and Lundy, a partnership, made to all of their clients for services performed during the years 1934 to 1945? A. No.

Q. Both the corporation and the partnership had other clients during those years? A. Yes.

Q. Did you render services to them during those years?

A. Yes.

Q. And make billings? A. Yes.

Q. Were such other billings substantial— A. Yes.

Q. (Continuing) —in addition to these? A. Yes.

Mr. Stafford: That is all, Mr. Sargent, thank you.

H. M. ELVIG was called as a witness by the plaintiff, and sworn and testified as follows:

Direct Examination, by Mr. Fellows:

Q. Where do you live, Mr. Elvig?

A. Minneapolis, Minnesota.

Q. How old are you? A. 50.

Q. What is your occupation?

A. I am General Auditor, Montana Dakota Utilities Co.

Q. How long have you been doing auditing work for the plaintiff company?

A. I have been employed by the plaintiff company for about twenty-three and one half years.

Q. You have supervision of their auditing? A. Yes.

Q. Are you familiar with the method and the general scheme of record keeping and auditing or records of power companies? A. Yes, I have done that work all of my life.

Q. During this period of time have you worked with the Federal Power Commission? A. Yes, very frequently.

Q. State whether or not the records of power companies are practically uniform because of being under Federal Power Commission classification and rules?

A. Since 1936 they are about as alike as two peas. They are all in exactly the same form.

Q. Are you accustomed to analyzing records of the kind which we have been going over for the last few days here in this court? A. Yes, that is my regular work.

Q. State whether or not you have had experience in allocating costs of construction in power company work?

A. Yes.

Q. And analyzing construction costs? A. Yes, regularly.

Q. Was there a time, after the purchase by the plaintiff company of the Dakota Public Service Co. properties, that the books and records of the Dakota Public Service Co. came into your possession?

A. We got the books about three months after.

Q. It was testified here by one of the officers of the defendant company that it was thought to be about March after the purchase? A. That is right.

Q. That was in 1945, was it not?

A. The purchase was in 1945.

Q. And you received the books early in 1946? A. Yes.

Q. Do you have those books and records in your possession now? A. Yes.

Q. Do they include the books and records of the North Dakota Power & Light Co., and the Northern Power & Light Co. and also the Dakota Public Service Co.? A. Yes.

Q. Are they in the same condition they were when they were turned over to you? A. Yes.

Q. Was there a time within the last couple of years you made a partial audit of the records of the defendant company at Huron, South Dakota? A. Yes.

Q. Did you become familiar with the defendant corporation's method of keeping the records and books?

A. Yes, I did.

Q. State whether or not they are practically the same as the method of the Dakota Public Service Co., in keeping its records and books?

A. They were in identical form, yes.

Q. They were practically the same, were they?

A. That is right.

Q. State whether or not you have made a study over these years of experience and became acquainted with the general operations of public service companies?

A. My earliest experience was with small operating companies and after about two years in the general office in Minneapolis I was sent out to the property at Williston, by Mr. Gamble to develop accounting arrangements at that point. Our division manager at that time was a man who had a number of other interests and was frequently away from Williston, and made it necessary for me to take over the duty of division manager, probably thirty per cent of the time.

Q. Are you familiar with the operating problems of electric utilities companies? A. Yes, I think so.

Q. In addition to their construction problems?

A. I would say I had a very broad general knowledge of the business.

Q. Do you have these books and records which came into your possession that you have just testified to, here in court?

A. We have that portion of the records which we think

will be vital to this case, and all of the records which were included in the subpoena.

Q. Where are they, in the room just off the court room?

A. In the petit jury room, yes.

Q. Did you make an audit of those books and records and make computations from them? A. Yes.

Q. Were the conclusions and computations which you made based on your personal audit of those records?

A. Yes.

Q. And likewise, were they partially based on your examination of the defendant corporation's records at Huron?

A. That is right.

Q. Mr. Elvig, do you have all of the books and records that were turned over and came into your possession of the Dakota Public Service Co., including the Northern Power & Light Co. and North Dakota Power & Light Co., that you testified to here in court?

A. I have those that I referred to, yes.

Q. Do you have all of those from which you have made any deductions or computations of any kind? A. Yes.

Q. Do you have here all of the matters that were called for in subpoena or order to produce that was served upon you by defendant?

A. We have all except such as I notified defendant's counsel I have been unable to locate.

Q. Will you step down here and state to the record as we pass along this bunch of exhibits, the general classification or about what they consist of?

Mr. Fellows: Your Honor, for the sake of convenience I would like to have them marked as Exhibit 82, the whole mass of them.

The Court: Very well.

Q. Will you examine this mass of records contained in the nine boxes and cartons?

A. The first six boxes contain power plant log sheets, and similar power plant records of which I have made an inventory. The seventh box contains, apparently, standby power station logs, or what we call efficiency reports. The eighth box contains stock certificate books of Knife

River Coal Mining Co., Northern Power & Light Co., and North Dakota Power & Light Co. and Hughes Electric Co. It also contains report on form entitled "Monthly Report of Electric Stations." Northwestern Form 11. This box also contains reports to Federal Power Commission on form FPC No. 1. This small box on the chair contains records of North Dakota Power & Light Co. showing sales to the Northwestern Public Service Co., and supporting ledger sheets. It also contains journal vouchers of Northern Power & Light Co. showing its transactions in interchange of power and capacity with Northwestern Public Service Co., and it contains Northern Power & Light journal vouchers covering purchased power. Those five files of statements in heavy cardboard cover contain the operating reports of North Dakota Power & Light Co., Northern Power & Light Co. and Dakota Public Service Co. from January 1, 1930 to October 19, 1945. I should say September 30th. This contains to October 19, 1945. In this pile we have six books heavily bound in what appears to be red leather, one of them blank, is the second minute book of the Northern Power & Light Co. succeeded by the third and fourth volumes. Those three volumes cover the entire period involved in this litigation and up to the time Northern Power & Light was merged with North Dakota Power & Light. The other three books of similar appearance are minute books of Hughes Electric Co., North Dakota Power & Light Co. and Dakota Public Service Co., which is all one corporation with separate names. The fourth minute book is in evidence. I have here three volumes, similar to the others which are financial statements for the month of December for Northern Power & Light Co., North Dakota Power & Light Co. and Dakota Public Service Co. for the entire period from 1930 to 1944, and this blue covered pamphlet is the statement for the period of 1945 ending October 19, 1945. Then we have the power plant ledger sheets showing construction costs of the several power plants. I think that covers all of the records.

The foregoing mass of records described by Elvig was offered and received in evidence without further specific marking or identification as to each document.

Q. Have you made a determination or study to determine the movement from Aberdeen of defendant's energy into North Dakota? A. Yes, I have.

Q. From January, 1937, to the time of purchase of the North Dakota Public Service Co. properties? A. Yes.

Q. From what records did you make such study?

A. To the extent they were available to me. The dispatchers' log books for a limited period of two years. Primarily from the Aberdeen station log.

Q. Were you able to determine from those records such movement of energy into North Dakota? A. Yes.

Q. Can you tell to a certainty from any of such reports and records the movement of such energy? A. Yes.

Q. And from what reports and records?

A. From the Aberdeen station log sheets.

Q. Without giving any figures, can you state whether or not those movements of energy varied during that period of time?

A. It varied a great deal with conditions.

Q. Did it vary from substantial to trivial amounts?

A. Yes.

Q. Just going back a minute. This determination of the flow of energy from Aberdeen to North Dakota. Refer to that. You were able to determine that from these records contained within Exhibit 82? A. Not Exhibit 82, no.

Q. Exhibit 55, that is in evidence.

A. I believe that is the number. These records here.

Plaintiff's Exhibit 83, which was received in evidence, reads as follows:

Plaintiff's Exhibit 83.

Certificate.

I, the undersigned, Secretary of the Public Service Commission of the State of North Dakota, hereby certify that I have custody of the official records and public utility contracts filed with said Commission and that I have custody of the official records and public utility contracts which were originally records of the Board of Railroad Commissioners of said State and that, after diligent search, no record or entry appears of the filing with said Com-

mission or with the Board of Railroad Commissioners of the State of North Dakota of agreements between North Dakota Power & Light Company and Northern Power and Light Company relative to rates charged by North Dakota Power & Light Company against Northern Power and Light Company for energy furnished to Northern Power and Light Company, and that there is in the files of the Public Service Commission of the State of North Dakota no record that said Commission or the Board of Railroad Commissioners of the State of North Dakota ever approved any rate agreements or contracts of any kind between North Dakota Power & Light Company and Northern Power and Light Company.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Public Service Commission of the State of North Dakota this 13th day of October, 1947.

ELMER OLSON,
Secretary of the Public Service
Commission of the
(Seal) State of North Dakota.

Plaintiff's Exhibit 84, which was received in evidence, reads as follows:

Plaintiff's Exhibit 84.

Certificate.

I, the undersigned, Secretary of the Public Service Commission, State of North Dakota, hereby certify that I have custody of official records and public utility contracts on file with this Commission, and that after diligent search, no record or entry appears of agreements of any kind between Northern Power & Light Company and Northwestern Public Service Company, North Dakota Power & Light Company and Northwestern Public Service Company, or Dakota Public Service Company and Northwestern Public Service Company having ever been filed with this Commission or submitted to it for its approval pursuant to the provisions of Section 49-407 of the North Dakota Revised

Code of 1943 or the Session Laws of the State of North Dakota for 1919, Chapter 192, Section 16, being Section 4609c16 of the 1925 Supplement to the 1913 Compiled Laws of the State of North Dakota.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Public Service Commission of the State of North Dakota on this 15th day of September, 1947.

ELMER OLSON,
Secretary of the Public Service
Commission of the
(Seal) State of North Dakota.

Q. Mr. Elvig, state whether or not the records which are Exhibit 82 in evidence, and also which are Exhibit 55, in evidence, disclose the amounts which were paid by the defendant direct to North Dakota Power & Light Co. for energy for June to December, 1930, and January, February and March, 1931? Just say whether or not they do.

A. Yes, they do.

Q. Which of the said records disclose that?

A. Certain ledger sheets and vouchers which I specifically described when I enumerated the exhibits.

Q. Will you produce such vouchers? Are the documents which are included within the rubber band, and the front marked Plaintiff's Exhibit 82-1, the journal vouchers to which you refer? A. Yes, they are.

Plaintiff's Exhibit 82-1 was marked for identification and received. It consists of 8 journal vouchers of North Dakota Power & Light Company for each month during the period from June, 1930 through February, 1931, recording the revenue of said company, including its sales to Northern Power and Light Company and to defendant during said period.

Q. Are the ledger sheets which are bound together under Plaintiff's Exhibit 82-2, the ledger sheets you referred to as also containing this information?

A. All of that side of the transaction which states the obligation of Northwestern Public Service Co. to North Dakota Power & Light Co. This is the one I thought I had.

Plaintiff's Exhibit 82-2 was marked for identification and received. It consists of 17 Subsidiary Ledger Sheets of North Dakota Power & Light Company commencing with January 1, 1930, and continuing through December of 1938 which show therein the obligations of defendant to North Dakota Power & Light Company for energy received by defendant during the period commencing June, 1930, and ending February, 1931.

Q. Are Exhibits 82-1 and 82-2 the records from which you were able to determine the amount paid direct to North Dakota Power & Light Co. by defendant for energy during the periods from June to December, 1930 and January, February and March, 1931? A. Yes, they are.

Mr. Fellows: We offer in evidence Plaintiff's Exhibits 82-1 and 82-2.

Mr. Royhl: To which the defendant objects as being too remote from the matters in issue, and not proof of the reasonableness or unreasonableness of the rates and charges involved in the issues in this litigation and no proper foundation laid upon which a comparative basis or relative basis of the reasonableness of rates in issue with rates as of six directors thereto; no foundation at all as to conditions, terms or restrictions or time of delivery of energy; wholly incompetent, irrelevant and immaterial, and certainly not within the issues of this case.

The Court: Objection overruled.

Q. Are you able to state from those records the rates per kilowatt hour which were paid for such energy?
A. Yes.

By Mr. Royhl: Q. You include March. Do you have any March vouchers here?

A. I included March for the reason that he said purchased and paid. The February revenue was paid in in March. The ledger sheet shows that.

Q. You don't claim, however, any journal vouchers for the month of March, 1931, within the rubber band here that attaches to Plaintiff's Exhibit 82-1? A. That is right.

By Mr. Fellows: Q. State the rate?

Mr. Royhl: We object to this for all the reasons heretofore urged to the exhibits themselves, 82-1 and 82-2, for the reason there is no proof of the terms and conditions or restrictions in the rate charged, and entirely too remote and not within the issues in this case; no proper foundation laid; and not the best evidence.

The Court: Overruled.

A. May I see the entries? The rate for power sold to Northwestern Public Service Co. is three fourths cent per kilowatt hour.

Q. Are you able to determine from these records the amount for each month, beginning June 1930, to December, 1930 and for January, February and March, 1931?

Mr. Royhl: Same objection last made in full.

The Court: Same ruling.

A. Yes.

Q. State whether or not that three fourths cent per kilowatt hour was the rate paid during all of this time?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. Yes, three fourths cent all of the way.

Q. Have you prepared a compilation of the amounts paid for each month during the period you have mentioned? A. Yes, I have.

Plaintiff's Exhibit 85 was marked for identification. It reads as follows:

Plaintiff's Exhibit 85 (Page 553)
is shown on Card 11.

Q. Does Plaintiff's Exhibit 85 contain the compilation or computation or figures I just asked you about? A. Yes.

Q. What portion of it contains those figures?

A. The last five columns.

Q. Was this made from Exhibits 82-1 and 82-2? A. Yes.

Q. And is it correct as the figures were taken for computation purposes? A. Yes, it is accurate.

Mr. Fellows: We offer in evidence Exhibit 85, the last five columns together with the dates in the first column, and the figures in the fourth column.

Q. Are the figures or dates in the first column the months which are extended into the last columns which I have offered? A. Yes.

Mr. Fellows: We offer in evidence Exhibit 85.

Mr. Royhl: May we have the same general objection that has been urged as against all of this line of testimony, concerning sales made inter-company in 1930 and 1931, and any of the records or details with respect thereto?

The Court: The record may show you have the same objection to that line of testimony or evidence and the same ruling of the Court.

By Mr. Fellows: Q. Will you state to the record the amount paid by defendant to North Dakota Power & Light Co. for each of said months, taking a month at a time?

Mr. Royhl: We object to that as not the best evidence, the record of it is in evidence and he is merely reading from an instrument now offered and received in evidence.

The Court: I don't know whether the instruments might be so they can be figured out, but I don't think there should be any objection to having this accountant testify about his finding from the records. Objection overruled.

A. For June, 1930, $296.93; for July, $2,247.00; for August, $714.22; for September, $728.67; for October, $1,735.00; for November, $593.85; for December, $1,974.15; for January, $2,960.19; for February, $2,327.57.

Q. What is the grand total of the payments?
A. $13,577.58.

Q. Do you know when North Dakota Power & Light and Northern Power & Light were interconnected at Keldron and Driscoll? A. Yes, the approximate date.

Q. When? A. In the fall of 1928.

Q. State whether or not, if you know, whether the predecessor to North Dakota Power & Light was Hughes Electric Co?

A. It is the same company with a change of name.

Q. Are you able to state from anything you found in Exhibit 82 when the interconnection facilities started between the defendant company and the northern companies? Construction? A. Not from Exhibit 82.

Q. In what portion of the exhibits can you make that determination? Is it in Exhibit 55?

A. It is in this group of records here.

Q. That is Exhibit 55? A. Yes.

Q. Were you able to find that from Exhibit 55? A. Yes.

Q. From what portion of Exhibit 55?

A. There is a folder here with a number of work orders in it.

Q. From the work orders? A. Yes.

Q. When did the construction of such interconnection facilities start, as shown by those records?

A. The work was completed approximately September, 1930.

Q. Commenced when? A. Along in October, 1929.

Q. Have you read Exhibit B attached to plaintiff's complaint to this action? A. Yes, I have.

Q. State whether or not the facilities, as shown by Exhibit 55, are the same facilities referred to in said Exhibit B to the complaint? A. Yes, they are.

Q. Do you know whether or not the defendant company was making an application for franchise in Pierre, South Dakota? A. Yes.

Q. From what, aside from your independent knowledge, from what, if anything, can you make that statement?

A. Aside from my independent knowledge, it was common knowledge in the industry.

Q. Were you able to find anything in Exhibit 55, or Exhibit 82, that give you any information on that?

A. I have a recollection of my examination of the records of Northwestern Public Service in Huron, about November, 1946.

Q. Where did you get the work order marked Exhibit 55-6?

A. I got it out of an envelope produced by the defendant in Exhibit 55.

Plaintiff's Exhibits 55-6 and 55-7 were each received in evidence. Plaintiff's Exhibit 55-6 is in part as follows:

Plaintiff's exhibit 55-6 (pp.557-559) shown on Card 11.

Blank Pages

558, 560

Plaintiff's Exhibit 55-7 is a carbon copy of the work order included in Plaintiff's Exhibit 55-6 as hereinabove reproduced.

Q. Can you tell the Court generally what Exhibit 55-6 and the carbon copy, Exhibit 55-7, are?

A. It is the construction authorization for construction of part of these interconnection facilities in the general area of Highmore.

Q. Has there been any changes, erasures or alterations of any kind made in either 55-6 or 55-7, from the time they were taken from Exhibit 55, produced by the defendant, in this court at this trial until the present minute? A. No.

Q. You got those from Exhibit 55, did you not? A. Yes.

Q. Were the erasures that appear on Exhibit 55-6 and 55-7 present on each of those at the time you took them from Exhibit 55 here in court? A. Yes.

Q. Are you able to decipher from either one of these exhibits, or both, the words that were erased in the exhibits?

A. Yes.

Q. What word or words were in there at the point of erasure?

A. The words which have been removed from Exhibit 55-6 and 55-7 are "and Pierre".

Q. When did you first see those erasures?

A. When I examined the records of the defendant in connection with my examination authorized by the state court in November, 1946.

Q. That examination was made in the office of the defendant company at Huron? A. Yes.

Q. And were the erasures then the same as they were when you pulled them out of Exhibit 55 here in the court room? A. Yes.

Plaintiff's Exhibit 86, which was received in evidence, consists of 14 pages of certain proceedings taken by the City Commission of the City of Pierre, South Dakota, relating to an application by defendant for a franchise to maintain and operate in said city an electric light, heat and power plant, transmission lines, substations and distribu-

tion systems for the operation, distribution and sale of electricity for light, heat, power and other purposes in and through said city, and fixing the date of such franchise election on September 3, 1929.

Mr. Fellows: This exhibit, Your Honor, being No. 86, relates to the application for the franchise, applied for by the defendant company, in the city of Pierre, which we explained in the opening statement herein, that that was the determining factor for the interconnection facilities contract. We offer in evidence Exhibit 86.

Q. From either Exhibit 82 or Exhibit 55, or both, state whether or not you were able to determine whether energy flowed both ways, from the year 1930 on to and including 1945, at the time of the purchase of Dakota Public Service Co.? A. I don't understand what you mean by both ways.

Q. Were you able to determine whether or not Northwestern Public Service Co. energy flowed up into North Dakota, and Northern Power & Light Co. energy flowed down into South Dakota? A. Yes.

Q. From what records could you make that determination?

A. From the record of the generation of the plants, and from the record of interchange billing between companies.

Q. Do the records show which company, year after year, and each year, got the most or less energy? Whether it was the defendant company or the northern company?

A. Yes, it does.

Q. Do you find in those exhibits some records which will show the amounts and by years, the transmission and receipt of such energy?

A. Yes. I summarized them in a tabulation.

Q. Did you make the compilation of the amounts of such energy, year by year, from the records in Exhibit 82?

A. Yes.

Q. Is Exhibit 87 such compilation you made? A. Yes.

Plaintiff's Exhibit 87 was received in evidence and reads as follows:

Plaintiff's Exhibit 87.

Summary of Interchange of Energy Between Dakota Public Service Company (and Its Predecessor) and Northwestern Public Service Company

Year	KWH to Northwestern	KWH from Northwestern	Net KWH to Northwestern
1930	1,227,395	231,449	995,946
1931	3,535,609	1,051,060	2,484,549
1932	4,491,000	1,724,880	2,766,120
1933	5,781,400	1,574,840	4,206,560
1934	4,826,100	1,893,120	2,932,980
1935	5,854,200	2,180,960	3,673,240
1936	5,091,200	3,591,660	1,499,540
1937	6,239,169	2,590,260	3,648,909
1938	6,251,670	2,142,540	4,109,130
1939	6,676,475	2,421,880	4,254,595
1940	7,044,662	1,982,340	5,062,322
1941	11,314,400	1,380,684	9,933,716
1942	12,102,000	1,006,460	11,095,540
1943	11,621,100	1,319,940	10,301,160
1944	10,883,300	1,428,900	9,454,400
1945	8,847,500	1,265,300	7,582,200

Q. State whether or not this photostatic copy, Exhibit 61, is a true and correct copy of the minutes of the meeting of the directors on October 7, 1936, which is referred to and as they appear in the minute book, No. 3, which I have called your attention to?

Q. (Con't) With the exception of the signatures which are absent from the photostatic copy, Exhibit 61?

A. Yes. I have compared them and they are the same except for signatures.

Plaintiff's Exhibits 82-3 A, B and C were received in evidence, consisting of 3 original pages from the minute book of Northern Power and Light Company and comprising the waiver of notice and minutes of the meeting of directors of that company held October 7, 1936. It is identical with Plaintiff's Exhibit 61 except that the signatures appear on the waiver, which waiver, with signatures, is as follows:

Northern Power And Light Company

Special Meeting Of The Board Of Directors

Consent And Waiver Of Notice.

We, the undersigned, being all the Directors of Northern Power and Light Company, a Delaware corporation, do hereby consent that a special meeting of the Board of Directors of said corporation be held at 11:00 o'clock A. M., on the 7th day of October, 1936, at the office of the corporation, National Bank of Huron Building, Huron, South Dakota, for the transaction of such business as may be brought before the meeting; and we do hereby severally waive all notice of the time, place and object of said meeting.

Dated October 7th, 1936.

F. E. KRUESI
C. J. STRIKE
C. L. SANDSTEDT
SAMUEL W. WHITE
M. C. BLACKSTUN

Q. Do you know from any independent knowledge or from any information you got from these records, they at that time were also directors of the defendant corporation? A. Yes.

Q. Which ones were such dual officers?

A. As near as I can recall, Mr. Kruesi, Mr. Strike and Mr. Sandsteadt.

Q. State what officers of the Northern Power & Light Co. signed the minutes of the special meeting, which are shown as Exhibit 82-3-B?

A. Mr. F. E. Kruesi, president. C. L. Sandstedt, Secretary.

Q. What offices did they hold with the defendant corporation at that time, if you know? A. Same offices.

Q. Were you able to determine from any of the records that came into your possession when the first payment was made to the defendant under the interconnection contract?

A. Yes.

Q. Or any interconnection contract? A. Yes.

Q. From what record did you get that information?

A. The payment reflected on the ledger sheet.

Q. Have you the ledger sheet which reflects the first payment? A. Yes.

Q. Will you get it, please? A. I have it.

Q. When you refer to the interconnection contract, do you refer to the contract which is in evidence as Exhibit 18, and bears date of October 7, 1936? A. Yes.

Q. When was the first payment made on that contract, that contract of October 7, 1936?

A. In February, under voucher, 2-74.

Q. Is that the same contract which the evidence shows here was filed with the Federal Power Commission about two years later, to wit: On December 23, 1938?

A. Yes, it bears their stamp.

Q. Now, you say the first payment was made in February, 1936? A. Yes.

Q. Was that the payment for January, 1936, according to the records?

A. Yes, because that payment closed the account.

Q. Were payments made in each successive month after February, 1936?

A. Yes. The account appears closed each month.

Q. And up to what date were those payments continued each successive month?

A. On Northern Power & Light Co. until the merger.

Q. Give the date of that again? A. June 30, 1939.

Q. What was the amount of each such monthly payment?

A. For two months out of each quarter, $1666.67, and for one month it was $1666.66.

Q. Were you able to determine from some of the records of the company, the flowage of energy from South Dakota to North Dakota and vice versa?

A. Not from the records of the company.

Q. Were you able to ascertain that from any log sheets of the defendant corporation? A. Yes.

Q. Was that from the Aberdeen power plant log sheets?

A. That is right.

Plaintiff's Exhibit 55-8 was offered and received in evidence showing energy exchanged in 1943 between the defendant and Dakota Public Service Company crossed the North Dakota-South Dakota state line, flowing across the line Northerly as well as Southerly.

Q. Can you tell from an examination of the Aberdeen power station log sheets whether or not energy did flow from the defendant company into North Dakota, and from the North Dakota Power & Light Co. in North Dakota into South Dakota? A. Yes.

Q. Is Exhibit 55-8 a computation you made from the Aberdeen station or power plant log sheets, which is a part of Exhibit 55? A. It is the tabulation.

Q. What year does that cover, or what portion of such year?

A. It covers specified hours or specified days throughout the year, as shown in the first and second column on the various sheets.

Q. Were these figures, are they as they appear in that record? A. Yes.

Q. They are accurate, are they? A. Yes.

Q. When were they taken from the record?

A. I took those off, I think, along, it seems to me, last spring. I am not certain when I was there last time.

Q. Does Exhibit 55-8 show the movement of energy from North Dakota to South Dakota and vice versa?

A. It shows information from which positive conclusions can be drawn.

Mr. Royhl: Move to strike that out as not a question of accounting and no proper foundation laid for any expert testimony here concerning foundation for any testimony; not responsive to the question; self serving and hearsay as to this defendant.

Mr. Fellows: He is more than an accountant.

The Court: I don't think the answer is responsive.

Mr. Fellows: We offer in evidence Exhibit 55-8.

Mr. Royhl: As to Exhibit 55-8, we object to that as immaterial.

The Court: Objection overruled.

Q. Will you explain the significance of the entries in the columns of that so it will be plain to the Court?

A. The first column shows the month and the date of the month, and the second column the hour or hours of the day of which I extracted information from the several log sheets. The third and fourth columns have combination heading which reads "Readings from indicating meters in kilowatts." That is divided into two columns, one marked "West Line" and one marked "north line". And these readings that appear opposite the various hours are entries made by the operator in the Aberdeen plant of his observation from instruments in the plant regarding the flow of energy between the Dakota Public Service Co. and dividing that flow between the line going west and the line going north. The last column shows the measured energy for the same specified hours, and that last column shows the total flow on both the west and north line. The readings on the west line and the north line are similar to what you observe on your car if you were riding, the rate over here at which your car was travelling, the reading in the last column is similar to the number of miles you travelled in that area. Beyond that, from having observed all of the load diagrams—

Mr. Royhl: We object to this testimony as no proper foundation laid for this man to testify as an expert concerning the result of the findings that he has tabulated, and it is not responsive to the question.

The Court: He is qualified as an expert accountant in this line of work. He is now being asked to explain how he obtained from certain proffered exhibit the information or findings which he has or expects to testify concerning. Objection overruled.

Mr. Royhl: As I understand it, that does not permit him to testify what the result would have to be by an analysis of them.

The Court: The question was for him to explain from the proffered exhibit in arriving at his findings. He can tell what the exhibit shows to him and how he applied that knowledge in arriving at his conclusion. Objection overruled.

A. (Con't) From an examination of the load diagrams that have been introduced into this record and made available to us, it is an easy matter to determine the peak load on that part of the line north of Aberdeen, which is in South Dakota, and you can also make a determination from that, with ordinary knowledge of the business, what the normal load would be at almost any hour of the day. By a meter—

Mr. Royhl: We object to this for all of the reasons heretofore urged, that he is not testifying concerning his data now. He is testifying concerning something else.

The Court: He is testifying how, from the information in the proposed exhibits, he arrived at his conclusions. He has a perfect right to do it. Objection overruled.

A. (Con't) From the figures which I was quoting just before the interruption, you can determine that there was an excess flow beyond the requirements of the entire market north of Aberdeen to the state line. And this exhibit shows those hours and days when I was satisfied that the flow was sufficient to go into North Dakota. It does not include all of the days but it includes enough of them to show consistency and regularity. This exhibit here is for one year and there are figures available for quite a few years.

Mr. Royhl: At this time defendant moves to strike the testimony of this witness concerning his findings or conclusions, as not responsive to the question first asked, no proper foundation laid therefor, it not appearing that that is predicated upon the Exhibit 55-8, and not appearing by identification as to what he based this opinion upon, and that there is no foundation laid for this witness as an

expert to testify concerning matters covered by this testimony.

The Court: I assume the answer of the witness is an explanation of the exhibit. I don't know what the identifying number of the exhibit was. I assume it was the exhibit that was under consideration when the question was asked. If it is, the objection is overruled. In response to the question that was asked him I don't think he would be justified to put in anything except what he had been considering before. I don't understand he was.

Q. From your examination of these various records and your audit of these various records, did you find service contracts with the receiver of Middle West Co. and Middle West Service Co., covering engineering expense and supervision payments for the years 1933 to 1945?

A. I found some of them.

Q. Are you able to state from any records which you examined or audited in Exhibit 55, or in Exhibit 82, which disclosed the amount of payments each year for engineering expense and supervision, to the receiver of the Middle West Service Co., or its predecessors from 1933 to 1945? A. Yes.

Mr. Royhl: Objected to as immaterial and not within the issues in this case.

Mr. Fellows: The purpose of it, when I develop it, is to show that our companies were not getting independent advice. They were getting advice from defendant's own experts.

The Court: There is an answer in the record. Let it stand.

Q. What records did you find those items of expense in?

A. Vouchers and accounts payable sheets for each company to the Middle West Service Co., and the various organizations in receivership and so on, which had offered that service.

Q. In whose records?

A. In the records of the plaintiff, Northern Power &

Light Co., North Dakota Power & Light Co., and Dakota Public Service Co.

Q. In Exhibit 82? A. That is right.

Q. From what portions of those records were they? Vouchers and what else?

A. Vouchers and accounts payable ledger sheet which ran from the various companies to Middle West and its predecessors, and from the expense ledger sheets. I have a summary of them.

Q. Did you make a computation or summary of those figures? A. I have a tabulation.

Q. Did you make it from this portion of Exhibit 82 you have testified about? A. Yes.

Q. Does it correctly reflect the entry shown in that Exhibit 82? A. Yes.

Q. Does such tabulation appear in Plaintiff's Exhibit 82-4? A. Yes.

Plaintiff's Exhibit 82-4 was marked for identification. It consists of a tabulation of the amounts paid by North Dakota Power & Light Company and Northern Power and Light Company for management and supervision fees by months for the period commencing November, 1933, and continuing to October 19, 1945, such payments being made to the receivers of Middle West Utilities Company during 1933 and 1934, to the temporary trustees of Middle West Utilities Company in 1934, 1935 and 1936, and to Middle West Service Company during the balance of said period.

Mr. Fellows: We offer in evidence Exhibit 82-4.

The Witness: I would like to make a correction in my testimony. I didn't use the vouchers. I used accounts payable ledger sheets and expense ledger sheets.

Mr. Royhl: Objected to as immaterial; not within the issues in this case; no proper foundation laid, there being no indication or identification of the record from which the same was taken.

The Court: Objection overruled.

Q. Will you state from Exhibit 82-4 the amount of such management and supervision fees paid by each year, and as a total, commencing with 1945 and reading backwards?

Mr. Royhl: To which the defendant objects as being unnecessary duplication and encumbrance of the record; not the best evidence; and for all of the reasons urged to the exhibit itself.

The Court: We will take an answer. Overruled.

A. For the fractional portion of the year from January 1, 1945 to October 19, 1945, $9,070.64; for the year 1944, $13,238.07; for the year 1943, $12,386.80; for the year 1942, $12,464.43; for the year 1941, $12,461.77; for the year 1940, $11,966.09; for the year 1939, and prior years, those figures would include Northern Power & Light and North Dakota Power & Light, $11,263.22; for 1938, $10,807.71; for 1937, $10,502.04; for 1936, $5,427.59; for 1935, $7,272.93; for 1934 the exhibit shows two amounts, one for the receivers and one for temporary trustees, which together amounts to $7,764.73; for 1933, $2,723.97, which I believe dates back to August, the first four months are included in the November bill. The total of all of them is $127,249.99.

Q. Did you examine the minute books which contain the records of the directors' meetings of the North Dakota Power & Light Co., Northern Power & Light Co. and Dakota Public Service Co. for those entire periods?

A. Yes, I did.

Q. State whether or not as disclosed by those minutes, Samuel W. White ever attended a single one of the directors' meetings or any one of these companies?

A. The minutes did not disclose that he ever attended a meeting.

Q. Of any one of these companies?

A. Of any one of them.

Q. Can you state from your examination of these records when the first charge for interconnection was made?

A. Yes.

Q. What was the date?

A. The charge was for the month of January, 1936.

Q. Was there any charge as shown by the books made prior to that time? A. No.

Q. Did you find the work orders for the rebuilding of the Bowdle Ipswich line? A. Yes.

Q. Will you produce those, please? Does your record show when that line was rebuilt? A. Yes.

Q. What year? A. 1940.

Q. Does the record show when the Bowdle substation was rebuilt? A. Yes.

Q. At what cost?

Mr. Royhl: May we add to the objection it is incompetent and immaterial, and not within the issues in this case.

Mr. Benson: You have a retroactive contract concerning interchange of excess capacity. We are going to prove that they had excess capacity and you never paid them anything. We are going to prove some other things.

Mr. Fellows: Our purpose is to show on this one item we spent $46,000.00 for interconnection facilities for a line they got the benefit from, upon which we received no credit whatever, at any time, or any kind.

The Court: I have overruled the objection.

Q. At what cost?

A. This substation was built in segments. The total cost $46,529.96.

Q. During what period of time?

A. During 1941 and early 1942.

Q. Now, getting back to this Bowdle Ipswich line, in what year, if at all, does the record show that line was built? A. From Bowdle to Ipswich?

Q. Yes? A. It was rebuilt in 1940.

Q. Do you know whether or not that was a part of the interconnection system?

Mr. Royhl: Objected to as calling for the conclusion and opinion of the witness; no proper foundation laid.

The Court: He asks him if he knew. Objection overruled.

A. Yes.

Q. Was it? A. Yes.

Mr. Royhl: Same objection.

The Court: There is an answer in the record. Let it stand.

Q. Do those same records show whether or not the Dakota Public Service Co. built between Bowdle and Selby a fourth conductor? A. Yes.

Q. In what year was that installed? A. In 1940.

Q. Do they show the cost of such fourth conductor?

A. Yes.

Q. What cost do they show? A. $1928.98.

Q. Were those figures likewise taken from Exhibit 82?

A. Yes.

Q. Do the records show the cost of rebuilding the line from Bowdle to Ipswich in 1940? A. Yes.

Q. What cost do they show that?

Mr. Royhl: May we have the same general objection to this line of testimony?

The Court: I understand you have that in the record, but you can have it again.

A. The work order shows cost, approximately $55,000.00, but there are a number of qualifying entries, so I have selected the final figure, smallest figure, which is $50,851.11.

Q. Do the same records show that Dakota Public Service Co. also changed transformer on the Frederick to state line line? A. There is a record of change of voltage.

Q. Is there an increase of voltage? A. Yes.

Q. What is the approximate total of these figures that you have just given separately for the rebuilding of the Bowdle substation, the Bowdle to Ipswich, rebuilding that line, and the transformer and fourth conductor?

A. About $97,000.00.

Q. What, if anything, do the records show about the rebuilding of the line from Wishek to Bowdle?

A. That was rebuilt in 1935-1936, while the Northern Power & Light Co. was still in existence.

Q. Does it show the cost of that? A. Yes.

Q. What cost does it show?

Mr. Royhl: Objected to as not the best evidence; incompetent, irrelevant and immaterial; not within the issues in this case; no proper foundation laid.

The Court: He can testify as to what the records show.

A. For the oil circuit breakers, $15,821.40. For the line Wishek to Bowdle, $111,823.01. Total $127,694.45.

Q. From what records did you get those figures?

A. From the work orders.

Q. Part of Exhibit 82? A. Yes.

Q. Did you examine the records to ascertain, if possible, the cost of the interconnection expense under the contract of October 7, 1936, of the interconnection facilities?

A. You mean cost of the Northwestern Public Service Co. investment?

Q. Yes, the Northwestern Public Service Co. investment.

A. Yes.

Q. And Exhibit B of the complaint is, is it not, the interconnection contract of October 7, 1936? A. Yes.

Q. That is the contract I am referring to. Did you find among the records, items from which you made a computation of the cost of construction of those facilities under that contract?

A. From the records of Northwestern Public Service Co.

Q. From the defendant's records which are in here as Exhibit 55? A. Yes.

Q. And from what portion of their records did you find these records?

A. From the property ledgers, the work order ledgers, the work orders themselves, and inspection of some of the vouchers.

Q. Were you able from those records to make and establish a computation of the cost of those interconnection facilities?

A. Yes, with the assistance of an exhibit that was introduced by the defendant several days ago.

Mr. Royhl: Referring to what exhibit?

Mr. Benson: The witness indicated he wanted to refer to one of the exhibits.

The Witness: I am talking about the exhibit that had the tabulation, the one produced by Mr. Sickel after Mr. Buckmier testified he didn't know the source of 65,000 some odd dollars.

Q. You are referring to the exhibit where they had a total of $303,349.00?

A. This particular item referred to $60,000 for the Aberdeen station.

Q. It is the exhibit that had the total of those items of $303,000.00? A. Yes.

Q. When did you make your investigation or audit to ascertain the cost of these interconnection facilities?

A. I made my original effort in October and November, 1946, and I completed it since this exhibit was introduced.

Q. Were you able to complete it until they produced Exhibit 216 here? A. No.

Q. State whether or not you went to Huron for the purpose of examining the items which now appear in Exhibit 216? A. Yes.

Q. When was that?

A. In October and November, 1946.

Q. Did you inquire at that time of some one in the defendant's office for the figures which now appear in Exhibit 216? A. Yes.

Q. And particularly for the breakdown of the Aberdeen substation figures? A. Yes.

Q. What person?

A. Mr. Mauck. He was assigned to give me such information as they wanted to give me.

Q. The assistant secretary that was here on the stand a day or two ago? A. Same fellow.

Q. Were you able to get this information from him?

A. No.

Q. What did he tell you?

A. He gave me a schedule—When I say "he" I want to qualify it because at times he had an alternate, but he was usually in charge. He gave me a schedule prepared by Mr. Bayles which shows nothing but the total cost of the Aberdeen substation and allocated portion, and told me that was all they had.

Q. Told you that was all they had? A. That is right.

Q. Did you make a compilation from these various sources and make an estimate of the cost of these interconnection facilities? A. Yes, I did.

Q. Will you let me have that tabulation?

A. This is the summary.

Plaintiff's Exhibit 88, which was marked for identification, is as follows:

Plaintiff's Exhibit 88.

Comparison of Values Assigned to Interconnection Facilities

	By Elvig As of 1/1/36	By Defendant's Exhibit 216	By Sandstedt's Letter to F. P. C. Dated 2/24/42
Aberdeen substation	$ 43,038.77	$ 52,547.49	$ 60,479.48
Aberdeen-Barnard line	28,545.36	32,800.34	47,824.90
Aberdeen-Ipswich line	58,833.92	64,370.97	60,038.68
Gettysburg substation	15,500.43	24,851.86	25,249.44
Gettysburg-Highmore line	109,781.06 (2)	109,781.06	109,856.76
Totals	$255,699.54	$284,351.72	$303,449.26 (1)

Note (1) This amount reflects additions and retirements to December 31, 1941, even though it is used as the basis for amortization, interest and operating expense beginning January 1, 1936. In a previous letter to the Federal Power Commission, dated March 15, 1939, Mr. Sandstedt quotes a value of $324,989.78.

(2) The accounting on Work Orders 397 and 420 is so hopelessly confused that no one can now state accurately the proper cost. In this column Mr. Strike's figure of $109,781.06 (Defendant's Exhibit 216) has been used even though it includes the 33 KV circuit from Ree Heights to Highmore, which is not included in the contract. The figure also includes excessive overheads.

Q. From what did you make your summary, from a tabulation?

A. From four other schedules. The fifth item is covered by a foot note on the summary.

Plaintiff's Exhibit 88-A, which was marked for identification, is as follows:

Plaintiff's Exhibit 88-A
(Pages 577, 579, 581, & 583)
is shown on Card 11.

Q. Are these figures taken entirely from Exhibit 55, which is material produced by the defendant, and from Exhibit 216, which was produced by the defendant?

A. That is right.

Q. Is Plaintiff's Exhibit 88-A the tabulation, consisting of four other schedules, which is the basis of your summary, which summary is Exhibit 88? A. Yes, it is.

Mr. Fellows: We offer in evidence Plaintiff's Exhibits 88 and 88-A.

Q. Do Exhibits 88 and 88-A show all of the evidence of cost which entered into the interconnection facilities that you could find in the records you have testified about?

A. Yes, they do. Such facilities as provided by the defendant in this case.

Mr. Royhl: Defendant objected to Exhibits 88 and 88-A each separately, as being self serving, hearsay; no proper foundation laid; incompetent, irrelevant and immaterial for any purpose; there being no proof of capacity on the part of the witness who has prepared these, and he not having identified the record from which the claimed computations were made, and it appearing that the said computations are wholly the opinions and conclusions of the witness and not a tabulation from accounts, but wholly the opinion and conclusion of this person, who is not qualified to determine what, if anything, should be included within the classification shown by the exhibit, and the exhibits are argumentative, particularly the notes appended to Exhibit 88, as being wholly self serving, and the opinion and conclusion of the person making them, there being no foundation laid therefor.

The Court: This is an expert witness, and an expert witness' testimony is usually opinion and conclusion. He is qualified as an expert. Objection overruled.

Mr. Royhl: To the extent of engineering, or just an accounting expert?

The Court: He has qualified as an expert on going over these accounts. There isn't any question about that in my mind. Objection overruled.

Q. Does this tabulation and this summary include an item of the cost of the Gettysburg substation?

A. Yes, it does.

Q. In what amount?

Mr. Royhl: May we have the same general objection to all of this line of testimony?

The Court: Yes, the record may show you have the same objection and same ruling of the Court to all evidence of the same character.

A. This shows the ledger balance to be $23,782.62 as of the date the interconnection contract went into effect, January 1, 1936.

Q. Is that the Gettysburg substation which you testified the northern companies paid for?

A. The northern companies paid for a part of this substation.

A. This substation has two banks of transformers, and one of them, while inserted in this work order and this ledger sheet at a value, actually belonged to the plaintiff in this case.

Q. Why do you say it belongs to the plaintiff in this case?

A. From observation of the work order, language of the work order, which is part of Exhibit 55.

Q. Were there any other items which belonged to the plaintiff in this case which were included by the defendant in its records of the cost of these interconnection facilities?

A. There are no other items that belong to the plaintiff in these work orders.

Q. When I refer to the plaintiff you know I mean its predecessor companies? A. Yes, I understand that.

Q. What did you determine from the books and records and by your tabulation and summary, was the cost of the interconnection facilities?

A. You are speaking of the group of them now?

Q. Yes.

A. I determined the value, $255,699.54, as of January 1, 1936, as compared to the contract figures of $303.449.26.

Q. Is Exhibit 82-6, consisting of four pages, letters which you found in the correspondence file or section of Exhibit 82? A. Yes, it is.

Plaintiff's Exhibit 82-6 was received in evidence, and reads as follows:

Plaintiff's Exhibit 82-6.

Middle West Utilities Company

Chicago

Date 1-11-35.

For/Company Business Only

Subject Management: UPU Properties

Location Northwestern Public Service Company

to C. J. Strike

From Geo. A. Mills

cc FEK

This is to thank you for your letter of the 10th sending detailed analysis of expenses allocated to the UPU companies. On the strength of our telephone conversation of Wednesday, I prepared for Mr. Green a memorandum, copy of which is attached. While the totals stated in the memorandum do not quite correspond with your detailed exhibit, I believe they are close enough for present discussion.

GEO. A. MILLS

GAM:KG

Services Rendered U. P. U. Group in Dakotas

Northwestern Public Service Company

Memorandum

North Dakota Power & Light Company, Northern Power & Light Company and the Knife River Coal Mining Company last year paid the Northwestern Public Service Company for general expense $44,400. This is divided as follows: Payroll $33,600, and other miscellaneous expenses $10,800. If these properties are separated from the Huron management, certain traveling expenses and personnel would be eliminated. It is Mr. Strike's estimate that the saving in payroll would be about $11,400 and other expenses would be cut $5,400, or a total saving of $16,800 per year; that is, the general expenses of the Northwestern Public Service Company would increase $27,600 if the management of the UPU Dakota properties were taken away.

Also please note that the UPU properties would have available $44,400 to provide an executive staff, including their traveling expenses and additional office people and miscellaneous supplies to make up a general office.

There is one important inter-company transaction which should be considered in the above. At the present time the Northwestern Public Service Company is purchasing power from the Northern Power & Light Company, who in turn is purchasing power from the North Dakota Power and Light Company. The Beulah plant of the North Dakota Power & Light Company is located at the mouth of the Knife River Coal Mining Company's mine. With this arrangement a profit is made by each company concerned, however, at the delivery point near Aberdeen, S. D., the Northwestern Public Service Company is paying a price equal to its own fuel cost, therefore, in buying power from the UPU Company it is making possible a profit to the UPU Company without harm to itself.

On the other hand the Northwestern Public Service Company has invested in substation equipment and transmission line to make this interconnection $327,000.

The UPU companies do not pay fixed charges or any other charges on this investment. This transmission line and substation provides a two-way service for the UPU properties and is of no particular value to the service of the Northwestern Public Service Company.

If there should be a change in management a new contract should be arranged whereby the UPU properties would help carry this $327,000 investment on account of the profits they are making on energy sold and the service they receive by having standby power on the south end of their system.

During the year 1934, 2,500,000 kilowatt-hours were purchased by the Northwestern Public Service Company at a cost of $12,627, however, in 1933, the Northwestern Public Service Company purchased five million kilowatt-hours at a cost of about $25,000.

General Office Payroll and Expenses
Allocation

January 10, 5

Geo. A. Mills.

In reply to your telephone call I am attaching hereto breakdown of expenses which are allocated between the four companies and showing the basis of allocation. This basis is revised annually and is on a basis of gross revenues, excluding inter-company transactions.

There are many expenses which are not allocated but which are absorbed directly by Northwestern Public Service Company. The expenses as detailed in the attached statement are what we believe, properly chargeable to all companies. There are no direct charges made to the U. P. U. Companies.

You will note that the allocation includes all General Office Supervision and Operation including the actual billing for all of the customers as we have centralized billing in the General Office. We have very carefully reviewed these items on a monthly basis and are convinced that each

are defensible as being chargeable to the various companies, and in the aggregate, the expenses to the U. P. U. groups is a very nominal charge.

While the attached is for the month of November, it is my opinion that for the year these charges will average approximately $3600.00 per month. As I advised you yesterday there is no charge made for the interconnection between Northwestern and Northern Power and Light Company, Northwestern having an investment of approximately one-third of a million dollars of transmission lines and substations.

Particularly, at the present time, Beulah has no surplus power except on the after midnight or off-peak periods and consequently, Northwestern gets no benefit from the U. P. U. system. If you will check the map on the lines owned by Northwestern you will note the 33,000 line from Highmore to Gettysburg; the 33,000 line from Aberdeen to Ipswich; and the 33,000 volt line from Aberdeen to Barnard including the stepdown substation. Likewise, that portion of the [aberdeen] substation which is chargeable to the interconnection.

Yours very truly,

CJS-B

C. C. to Mr. Kruesi

Encl.

By Mr. Fellows:

Q. Did you find anything in the records, which are Exhibit 82, which showed whether the energy was metered at Aberdeen? A. Yes.

Q. What document in Exhibit 82 disclosed that?

A. Each month a voucher covering interchange of power between Northwestern Public Service Co., and Northern Power & Light Co., and later Dakota Public Service Co. One voucher each month.

Q. Examine Exhibits 82-7 and 82-8 and state whether or

not they are respectively those vouchers for 1939 and 1941?

A. These are the vouchers for the month of January in each of the year, 1939 and 1941, covering interchange of power. The 1939 voucher would be Northern Power & Light. The 1941 would be Dakota Public Service Co.

Q. Do those vouchers show the allowance of line loss during the period which each of them cover?

A. One of them does, yes.

Q. For what year? A. For January, 1939.

Q. Is there any other line loss recognized for any other period of time during that period?

A. It continues for a period of 24 consecutive months, including December, 1940.

Q. Thereafter what does the record disclose as to line loss?

A. The second voucher which I spoke of, which is identified as Exhibit 82-7, makes no allowance for line loss, and carries notation giving the reason for discontinuing it.

Plaintiff's Exhibits 82-7 and 82-8 were received in evidence.

Q. Does the voucher, Exhibit 82-8 contain a statement of the reason for discontinuance of an allowance for line loss? A. No.

Q. Does Exhibit 82-7 contain the reason? A. Yes it does.

Q. Was that statement on the voucher when it came into your hands? A. Yes, it was.

Q. What is the statement?

A. "Note—New interpretation has been placed on interchange contract at January 1st, 1941, by Mr. Sanborn and Mr. Sandstedt. This interpretation of contract implies that all KWH interchange would be transferred as of FOB metering points and all KWH losses have eliminated from billings starting with January 1, 1941." It would appear the word "been" has been inadvertently left out. It is signed with some initials I can't decipher, and dated February 14, 1941.

Q. Did you examine the records of the defendant from Exhibit 55 to ascertain if possible the amount charged

to operation and maintenance and taxes for the interconnection facilities? A. Yes, I did.

Q. In order to determine the fair per cent of charge on the original investment? A. Yes.

Q. What records do you find which gives you information on those items?

A. The operating reports, financial statements and operating reports, published in 1936, and Federal Power Commission reports from that date up to 1945. And the tax records produced by Mr. Buckmier.

Q. You mean their reports to the Federal Power Commission? A. Those on FPC No. 1.

Q. And on their tax reports? A. Property tax records.

Q. Are they available in Exhibit 55, those records which you obtained the figures from? A. Yes, they are all here.

Q. Did you make a computation and summarize such amount in dollars and cents?

A. No. I reduced my figures to per centages.

Q. What per centage did you reduce your figures to?

A. Slightly under 1% on taxes. Around 1%, or little over on operation and maintenance. A total of 2-1/4% at the outside. It would vary somewhat from year to year.

Q. Did you make figures for your own use?

A. I made figures for my own use, yes.

Q. Were these figures based on a cost of $303,349.26?

A. When I stated my per centages I used them in connection with that figure.

Q. Referring again to the expenditures by plaintiff, did you find an item in the records whereby the wiring or voltage from Frederick to state line was increased?

A. I think I testified to that.

Q. Do you know what year that was in?

A. I don't recall offhand.

Q. From what record did you find that item?

A. I don't believe I can state right now.

Q. Haven't you the same record there?

A. I don't believe it was done under construction work order.

Q. Do you know what the increased voltage was, from the records? A. Yes.

Q. What was it?

By Mr. Royhl:

Q. Are you testifying to a figure that appears in some records now? A. No, sir.

Mr. Royhl: We object to this as incompetent, irrelevant and immaterial; no proper foundation; wholly opinion and conclusion of the witness; speculative, indefinite and uncertain.

The Court: He has testified that he knows. There isn't anything in your examination of him to indicate that he doesn't know. If he knows he can answer. Objection overruled.

A. The voltage was increased from 22,000 to 38,000.
Q. Do you know whether that was in December, 1940?
A. That is approximately the right date.
Q. State whether or not you also found an increase in voltage from state line to Ellendale?
A. Yes, that was a part of the same transaction.
Q. Were you able to find whether or not there was an increase in voltage across the state line to Ellendale?

Mr. Royhl: Same objection.

The Court: Answer yes or no.

A. Yes.
Q. What was the increase as shown by the record?

Mr. Royhl: Same objection heretofore made to this line of questioning.

The Court: The witness has testified he is able to state from the record. The objection is overruled.

A. Increased from 22,000 volts to 38,000 volts.
Q. Was that also in December, 1940? A. Yes.
Q. Upon an examination and audit of these records were you able to find figures from which you made a schedule showing power received from the defendant corporation,

and its average cost per Kilowatt hour by years, from 1930 to October, 1945, inclusive?

The Court: Answer yes or no.

A. Yes.

Q. Will you find that schedule? Was the schedule you just mentioned compiled or tabulated from the records which are included within Exhibit 82? A. Yes.

Plaintiff's Exhibit 82-9 was received in evidence and reads as follows:

Plaintiff's Exhibit 82-9.

Dakota Public Service Company and Predecessor

Schedule Showing Total and Average Cost of Gross Energy Received from Northwestern Public Service Co.

Year	Charges: Rental	Charges: Reserve Capacity	Charges: Energy (Gross)	Charges: Total	KWH Received	Average Cost per KWH (in Mills)
1930	.....	.....	$ 2,509.11	$ 2,509.11	231,449.	10.84
1931	.....	.....	8,094.45	8,094.45	1,051,060.	7.70
1932	.....	.....	11,384.21	11,384.21	1,724,880.	6.60
1933	.....	.....	7,874.20	7,874.20	1,574,840.	5.00
1934	.....	.....	9,465.60	9,465.60	1,893,120.	5.00
1935	.....	.....	10,904.80	10,904.80	2,180,960.	5.00
1936	$20,000.00	.....	17,958.30	37,958.30	3,591,660.	10.57
1937	20,000.00	.....	12,951.30	32,951.30	2,590,260.	12.72
1938	20,000.00	$22,440.00	10,712.70	53,152.70	2,142,540.	24.81
1939	20,000.00	18,136.80	12,109.40	50,246.20	2,421,880.	20.67
1940	20,000.00	12,685.20	9,911.70	42,596.90	1,982,340.	21.49
1941	20,000.00	4,276.80	6,903.42	31,180.22	1,380,684.	22.58
1942	20,000.00	17,199.60	5,032.30	42,231.90	1,006,460.	41.96
1943	20,000.00	8,514.00	6,599.70	35,113.70	1,319,940.	26.60
1944	20,000.00	9,992.40	7,144.50	37,136.90	1,428,900.	25.99
1945	20,000.00	22,994.40	9,685.60	52,680.00	1,937,120.	27.20

Schedule Showing Sales to Northwestern Public Service Co.

	Energy Sales	Total Sales	KWH Sold	Average Price (in Mills)
1930	$ 9,554.30	$ 9,554.30	1,227,395.	7.5
1931	26,296.06	26,296.06	3,506,141.	7.5
1932	29,640.60	29,640.60	4,491,000.	6.6

All energy sales subsequent to 1932 were at 5 mills per KWH.

Q. You took your figures which are in Exhibit 82-9 from the records which go to make up Exhibit 82? A. Yes.

Q. And are the figures which appear on 82-9 accurate as shown on the records which make up Exhibit 82?

A. Yes, they are.

Mr. Fellows: Offer in evidence Exhibit 82-9.

Q. Does Exhibit 82-9 also show the power and the average cost of it which was sold by us to the defendant?

A. Yes, for three years, while the price was very low.

Q. Are those figures also taken from the records, Exhibit 82? A. Yes, they are.

Mr. Fellows: We offer in evidence Exhibit 82-9.

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial; argumentative; not an audit or statement of what is shown by the books; no proper foundation laid; the witness not qualified.

The Court: Overruled.

Plaintiff's Exhibit 82-10 was received in evidence and reads as follows:

Schedule showing sou
Dakota Public Servic
January

Year	NET GENERATION					
	Beulah Steam Plant	Bismarck Steam Plant	Mandan Steam Plant	Dickinson Steam Plant	Dickinson Diesel Plant	Mott Diesel Plant
1929	14,305,196	3,141,892	24,681	140,144	-	655
1930	18,875,940	3,304,324	117,970	124,667	-	348
1931	24,043,300	2,949,678	19,460	86,298	125,546	3,865
1932	24,243,316	3,025,400	58,049	275,040	554,438	10,641
1933	26,473,435	3,020,700	85,113	2,800	214,719	3,639
1934	26,090,200	3,763,230	33,625	-	644,999	10,108
1935	29,971,120	4,199,540	111,168	-	473,659	16,542
1936	29,107,638	4,331,870	139,852	-	1,131,306	53,837
1937	35,202,352	3,768,370	26,774	103,800	454,105	37,290
1938	37,412,751	3,773,310	43,303	1,000	287,285	19,837
1939	39,722,389	5,348,070	48,380	15,700	434,000	13,036
1940	39,711,328	8,675,704	54,774	7,740	508,528	9,997
1941	38,569,145	18,753,243	51,423	10,540	204,267	23,277
1942	38,314,752	21,072,877	54,776	4,700	283,365	6,427
1943	41,246,800	18,485,060	64,628	5,530	133,566	3,300
1944	39,789,600	20,113,068	65,944	12,900	468,236	3,996
1945	44,668,440	20,944,808	56,694	25,540	719,017	20,785
to Oct.19	33,925,220	16,598,000	56,014	5,000	434,370	6,217

Year	Purchases from others	Total 'Dakota' Group	INTERCHANGE			Balance
			To Northwestern	From Northwestern	Net to Northwestern	
1929	6,437	21,550,665	-	-	-	21,550,665
1930	31,331	25,736,843	1,227,375	231,449	995,926	24,740,917
1931	-	29,577,925	2,569,149	84,600	2,484,549	27,093,366
1932	-	29,633,559	4,491,000	1,724,880	2,766,120	26,867,539
1933	-	30,856,573	5,781,400	1,574,840	4,206,560	26,650,013
1934	-	32,680,474	4,826,100	1,893,120	2,932,980	29,747,494
1935	-	38,497,367	5,854,200	2,180,960	3,673,240	34,824,127
1936	-	39,456,447	5,091,200	3,591,660	1,499,540	37,956,907
1937	-	44,174,749	6,239,169	2,590,260	3,648,909	40,525,840
1938	-	45,481,465	6,251,670	2,142,540	4,109,130	41,372,335
1939	-	48,477,898	6,688,515	2,433,920	4,254,595	44,223,303
1940	-	52,192,597	7,044,662	1,992,340	5,052,322	47,140,275
1941	-	60,893,511	11,314,400	1,380,684	9,933,716	50,959,795
1942	-	63,082,150	12,102,000	1,006,460	11,095,540	51,986,610
1943	-	63,355,560	11,621,100	1,319,940	10,301,160	53,054,700
1944	-	65,193,653	10,883,300	1,428,900	9,454,400	55,739,253
1945 to Oct. 19		54,915,021	8,847,500	1,265,300	7,582,200	47,332,821
1945		69,995,271	14,695,800	1,937,120	12,758,680	64,736,591

edule showing source of electric energy in Kilowatt hours fr-
kota Public Service Company and its predecessors from
January 1, 1929 to October 19, 1945

GENERATION

Mott Diesel Plant	Mobridge Steam Plant	Ellendale Steam Plant	Lemmon Diesel Plant	Gettysburg Diesel Plant	All Other Diesel Plants	Balance
655	3,242,086	302,970	46,880	2,641	[illegible]	21,550,665
348	2,837,077	275,222	24,821	1,331	144,508	24,740,917
3,865	2,258,200	47,186	6,303	75	38,154	27,093,366
10,641	1,525,600	23,272	43,925	2,497	[illegible]	26,867,539
3,639	1,215,400	21,908	6,940	2,227	[illegible]	26,650,013
10,108	2,222,700	29,223	8,812	3,273	-	29,747,494
16,542	3,727,900	31,065	24,254	4,249		34,824,127
53,837	4,674,200	35,225	45,486	7,483		37,956,907
37,290	4,637,300	32,020	17,768	12,558		40,525,840
19,837	4,046,900	37,865	19,556	1,994	-	41,372,335
13,036	2,997,600	47,793	41,344	1,932	-	44,223,303
9,997	3,347,900	42,927	27,869	1,232	-	47,130,275
23,277	3,407,700	42,215	13,411	5,566	-	50,959,795
6,427	3,446,700	33,085	35,491	6,299	-	51,986,610
3,300	3,584,200	42,990	3,196	1,826	-	53,054,700
3,996	4,905,400	45,080	9,237	2,240		55,739,253
20,755	5,120,900	47,455	29,921	7,660		47,332,822
6,217	4,024,700	40,250	23,387	4,395	-	64,784,842

Q. Does it correctly and accurately reflect the entries in various records in Exhibit 82, from which it was compiled and taken? A. It does.

Q. What records were used in the preparation of this schedule? A. The records identified as operating reports.

Q. Will you take Exhibit 82-10 and explain the various figures that appear in the different columns?

A. The first column shows the years for which the figures are submitted. The next eleven columns show the net kilowatt hour generation in each of the power plants of the system, the combined system, Northern, North Dakota, and later Dakota Public Service Co. Where there are red figures it indicated the output of the plant was negative. That is, where the consumption of a station was more than the amount generated. The ink figures opposite 1945, and other figures beneath them, are the figures for the year Montana Dakota acquired. The figures in the lower tabulation are reversed because these figures were inserted after the tabulation was prepared and there was no space available. In the lower section the first column after the year shows purchased power from outside sources, not including Northwestern Public Service Co. I should qualify that. I am not sure but it might, but the amount is trivial. It might include Northwestern Public Service Co. And the title "Dakota Group" indicates the same. The next three groups are covered by the title "Interchange". The first shows the energy delivered to Northwestern Public Service Co. The second from Northwestern Public Service Co., and the third, the net amount delivered to Northwestern Public Service Co. The last column is the balance after deliveries to Northwestern Public Service Co. and this last column would be energy for [Dakots] company's own use, including its own line loss and line loss on energy delivered to Northwestern Public Service Co.

Q. Did you prepare from your examination and audit of the records which go to make up Exhibit 82, a [shcedule] showing the production costs per kilowatt hour of net generation of the principal plants or of the total plants for Dakota Public Service Co. and its predecessor from 1930 to 1945? A. I did.

Q. From what records did you prepare that schedule?

A. From the operating reports.

Plaintiff's Exhibit 82-11 was received in evidence. It reads as follows:

Plaintiff's Exhibit 82-11.

Schedule Showing Production Cost per KWH of Net Generation of Principal Plants and Total Plants for Dakota Public Service Company and Its Predecessor from 1930 to 1945

Production Cost (In Mills)

Year	Beulah	Bismarck	All Power Plants
1930	4.80	16.65	10.05
1931	3.82	16.07	7.93
1932	3.75	(not available)	7.40
1933	3.84	15.29	7.04
1934	4.41	13.67	7.32
1935	4.07	11.62	6.59
1936	4.45	13.02	7.14
1937	3.65	13.60	5.96
1938	3.72	12.63	5.85
1939	3.53	8.90	5.51
1940	3.21	7.49	5.23
1941	3.45	5.14	5.14
1942	3.83	5.21	5.43
1943	3.75	5.93	5.62
1944	3.97	6.10	5.94
1945 (to Oct. 19)	3.97	6.10	5.88

Q. Is Exhibit 82-11 the schedule you have just testified about? A. Yes, it is.

Q. Does it correctly show the entries as they appear in the record from which it was made up?

A. Yes, except the last column is a computation, I believe.

Q. Was the production cost which you took from the books and placed on the Schedule, 82-11, figured in mills?

A. Yes.

Q. Did you prepare from the records which go to make up Exhibit 82 a schedule showing energy received by Dakota Public Service Co. and its predecessor from Northwestern Public Service Co. from January 1, 1936 to October 19, 1945? A. I did.

Plaintiff's Exhibit 82-12 was received in evidence. It reads as follows:

KWH

Schedule showing energy received by Dakota Public Service Company and its predecessor, from Northwestern Public Service Company from January 1, 1936 to October 19, 1945

	(1) Delivered to Northwestern at Aberdeen	(2) Received from Northwestern At Aberdeen	(3) Total Interchange at Aberdeen	(a) Percent received to total	(b) Delivered to Northwestern at Barnard and Gridley	(c) Portion of energy for Barnard and Gridley supplied From Aberdeen	(d) Net energy received from Northwestern at Aberdeen	(e) Energy received from Northwestern at Gettysburg
1936	4,000,300	2,551,000	6,554,100	38.93	841,010	327,417	2,224,383	792,000
1937	5,395,200	1,536,300	6,932,500	22.74	630,909	143,469	1,432,831	762,900
1938	4,981,200	1,650,000	6,631,100	27.08	754,130	204,218	1,645,782	27,400
1939	5,485,200	1,975,300	7,460,300	26.47	817,780	216,451	1,758,649	156,800
1940	5,744,300	1,541,400	7,285,500	21.16	835,160	180,952	1,360,448	100,200
1941	5,696,700	267,300	5,963,800	2.48	834,125	20,687	226,413	765,120
1942	6,708,400	393,500	7,358,300	5.08	797,040	64,401	529,499	70,200
1943	5,886,400	898,200	6,784,600	13.48	820,060	109,888	788,312	53,100
1944	4,873,300	1,022,300	5,894,900	17.33	970,700	168,222	853,578	28,200
1945 (to Oct. 19)	4,339,980	7167,300	5,327,200	14.40	939,800	135,331	631,969	182,100

(a) Column 2 divided by column 3.

(b) Energy metered to Northwestern at Gridley and Barnard less energy metered to Dakota Public Service Company and predecessor at Barnard.

(c) Computed energy supplied to Barnard and Gridley by Northwestern. (a x b)

(d) Computed energy supplied to Dakota Public Service Company and predecessor by Northwestern (2-c)

(e) As metered.

Plaintiff's Exhibit 82-12.

Filed Feb 19. 1948
Roy D Marker
Clerk

P# 82-12

Q. Is Exhibit 82-12 the schedule you have just referred to? A. Yes, it is.

Q. From what records is that schedule made up?

A. From the operating reports.

Q. In Exhibit 82? A. Yes.

Q. Does that correctly show the entries as they appear in Exhibit 82?

A. Part of it which is an abstract, that is accurate, and part of it is computation.

Q. Which part of it is computation?

A. Beginning with "A".

Q. A, B, C, D and E.? A. A, B, C, and D.

Q. A, B, C and D are computation, and the columns headed 1, 2 and 3, are figures taken from the books?

A. Figures 1 and 2 are from the books. #3 is the total of the first two.

Q. 1 and 2 are the figures taken from the book and totalled under Column 3? A. That is right.

Q. Column A is a computation of what?

A. Computation of the figures under the respective years in Column 2, divided by the figure in the same year in Column 3.

Q. What does that purport to represent?

A. It shows the ratio of energy received from Northwestern Public Service Co., at Aberdeen and to the total movement both ways.

Q. What does Column B purport to show?

A. That shows the amount of energy delivered to Northwestern at Barnard, less the amount which they in turn delivered to Dakota at Barnard.

Q. That is the net energy? A. That is right.

Q. And Column C?

A. Column C is a computation to determine what part of the energy in the preceding column came from Dakota and what part of it came from Northwestern.

Q. How could you ascertain that, or from what records could you ascertain that figure?

A. That is arrived at by applying the per centage which appears in column A to the figure in column B.

Q. What does column D show?

A. Column D is addition of the figures in Column 2 and column C.

Q. What net energy does that exhibit show?

A. This does not show what portion of the energy metered to Dakota at Aberdeen actually went to Dakota. It has to be on a computation basis because the record was not kept and the meter was not kept at the plant to show true interchange.

Q. That is the only method of computing that, is it, in the absence of metering?

A. In the absence of proper meter allocation and records one has to resort to some computation. To my mind this is the fairest yardstick to apply.

Q. What does column E purport to show?

A. That is the energy delivered to Dakota and its predecessor at Gettysburg by Northwestern Public Service Co., for the respective years.

Plaintiff's Exhibit 82-13 was received in evidence. It reads as follows:

Bismarck, Bismarck and Mobridge Plant Statistics

Year	Net Kwh Generated	Net Fuel Cost	Average Fuel cost per Kwh (Mills)	Total Cost of Power Generated	Average Cost per Kwh (Mills)
1930	23,017,941	$116,462.26	5.06	$204,693.38	8.89
1931	29,251,178	113,633.98	3.88	188,630.88	6.45
1932	30,720,555	116,002.88	3.81	181,582.13	5.91
1933	42,076,180	120,339.86	2.73	201,774.23	4.79
1934	37,894,960	134,165.06	3.54	216,960.04	5.72
1935	36,111,704	137,849.41	3.61	235,183.28	6.17
1936	45,602,022	122,668.95	2.69	224,264.78	5.18
1937	46,066,099	124,081.66	2.98	229,413.88	4.77
1938	42,744,952	131,979.76	2.98	231,347.73	4.99
1939	50,788,088	157,160.57	2.99	278,160.61	4.51
1940	62,831,729	180,185.51	2.87	302,842.96	4.82
1941	63,116,060	188,831.83	2.98	315,772.96	4.99
1942	64,806,068	202,276.82	3.12	342,252.28	5.28
1943	54,987,920	178,766.89	3.24	266,776.78	5.29
1944	47,726,925	144,343.30	3.31	263,539.56	5.52

Columns are after deducting steam heat credits.

Filed Feb. 17, 1948.
Doy D. Thurber
Deputy
Dakota

Q. Is Exhibit 82-13 a schedule prepared by you?
A. This schedule was prepared under my direction.
Q. From what records? A. From the operating reports.
Q. In what? A. Exhibit 82.
Q. Did you check it with the entries in Exhibit 82?
A. Yes, I have.
Q. Does it correctly reflect the entries in Exhibit 82?
A. Yes, it does.
Q. What does it purport to show?
A. This schedule is a summary of the statistics for [Buelah], Bismarck and Mobridge plants by years from 1930 to 1945, and it shows for the three plants combined the net kilowatt hours generated, the total cost of generation, the average cost per kilowatt hour generated in mills, and the net fuel cost for generation of the three plants combined, and the average fuel cost per kilowatt hour, the cost in each case per kilowatt hour, in mills.

Plaintiff's Exhibit 82-14 was received in evidence. It consists of engineering survey by Lucas & Luick, engineers, Chicago, Illinois, of the combined properties of Hughes Electric Company, Bismarck, North Dakota, and Northern Power and Light Company, Mobridge, South Dakota, dated March 1928, comprising 149 pages, inclusive of diagrams, blue prints, graphs and similar exhibits, and a two-page index, title page and a two-page transmittal letter dated April 14, 1928 addressed to United Public Service Company. Portions thereof are as follows:

"Summary of Conclusions and Recommendations.

Pages 1-4.

"The purpose of the investigation reported herewith was to determine the economic requirements and probable economic results attending the consolidation of the Hughes Electric Company and the Northern Power and Light Company properties."

The Summary further states:

"The general results of the study may be summarized as follows:

"(1) A pronounced economy will result from producing the maximum amount of energy at the Beulah Station.

"(2) A certain amount of energy will be produced at other steam plants in order to furnish exhaust steam for the heating systems and also at times of peak demand. These plants being under operation can relieve the system at peak periods so as to obtain good voltage regulation, thus obviating an otherwise essential investment in transmission copper.

"(3) Additional transmission capacity is required between Beulah and Bismarck, and the new line between these stations should take a route different than the present line, preferably such a route as will approach the Ottertail Power Company system at some point, looking to a future interconnection.

"(4) The oil engine plants should be shut down, but held as standby reserve in case of break-down emergency.

"(5) The first and shortest interconnecting line between the Hughes Electric Company and the Northern Power & Light Company systems can be run from Bismarck to Driscoll.

"(6) A transmission line connection between Elgin and Thunderhawk will be of economic value in permitting closing down the Lemmon oil engine plant.

"(7) Eventually a tie-in between McIntosh and Mobridge via McLaughlin will be required to enable the shutting down of the latter station and to permit a reduction in Mobridge station operation in favor of energy from Beulah. Tie lines between Wetonka and Ipswich, and between Mobridge and Herreid will result in increased transmission capacity and improved voltage regulation.

"(8) A 3500 K. W., 14-stage turbine unit seems to be the most economical to install at Beulah.

"(9) The prospective growth of business and resulting revenue appears to be such as to support the construction program outlined.

"(10) An analysis of Knife River Coal Mining Company costs indicated that the excess cost of mining their coal would warrant its use in all of the steam stations, with a resulting economic gain.

"(11) Due to the relatively low saturation of the territory, it may be said in general that it becomes necessary to obtain the maximum revenue possible. This requires that the territory be well covered with lines, but such lines must be built at a minimum cost, consistent with reasonable reliability and carrying capacity. Furthermore, in order to raise the sales to a maximum, the measures that suggest themselves are a survey of the territory to ascertain prospective sales, a vigorous new business policy, and a study of rate structures to see that they are such as to result in maximum revenue.

"Due to the newness of the Beulah plant, there was but little background offered for compiling operating results. However, an estimate of future costs was built up based on known results of similar equipment, and it is believed that the figures arrived at are conservative enough to be safely used in the study. Fuel has been taken at $.95 per ton at the tipple, this representing the excess cost of mining coal for the electric stations. An analysis of mining costs was made which shows an excess cost figure somewhat below this, but in order to be conservative, a few cents were added for contingencies, and the amount $.95 arrived at. It appears that with $.95 lignite the production cost at Beulah should approximate $.004 per KWH, generated. The corresponding efficiency would be 26,000 to 28,000 BTU. per KWH. output which should be reasonably attainable in a station of the type contemplated. In making comparisons between station generating costs, excess cost figures were used. The excess cost of making 6,000,000 KWH. at Beulah—that is, increasing output from 8,000,000 to 14,000,000 KWH.—figures $14,300, or $.0024 per KWH. The excess cost of making 6,000,000 KWH. at Bismarck—that is, increasing the output from the 2,000,000 KWH. required to produce heating steam to 8,000,000 KWH.—figures $31,400, or $.0053 per KWH. The comparison with the other stations is, of course, still more favor-

able to Beulah operation. The conclusion is that even with considerable line loss, it would be most economical to generate the maximum quantity of energy at Beulah.

In the chapter "Forecast of Revenues" there is presented a detailed program of proposed capital expenditures for the ensuing four years. During the first year the expenditures in round numbers consist of $250,000 for plant extension, $430,000 for transmission additions, and $150,000 for distribution and other lesser improvements. During subsequent years the aggregate amount per year will become less. These expenditures will be essential to insure continuity of service and to care for the additional load which it is anticipated will accrue to the system in the near future.

The economical justification for the outlined improvements is to be found in the saving resulting from producing the greatest amount of energy in the plants of lowest operating costs, the closing down of high cost oil engine plants, the acquisition of new consumers along the lines, and the revenue from the natural growth of business.

Pages 5 and 6:

An inspection of the foregoing table and of the tabulation on a subsequent page outlining the construction program, will show that a plant at any location other than near Beulah would not be as economical a project as the development of the Beulah station. A plant at any other location would have to save its own cost in transmission lines, plus the coal freight on its fuel. The latter could hardly be accomplished by a superior efficiency, and consequently such freight cost would have to be compensated also by transmission line reduction. It can be seen that this would be impractical.

Pages 18 and 19:

Capacities, Conditions and Requirements.

The Beulah station as at present constituted contains one 750 H. P. boiler and one 2500 K. W. 80% power factor

machine, with a duplicate boiler installation on order and an additional generating unit contemplated.

The steaming capacity of the Beulah boiler room, after completion of the installation of the second 750 H. P. boiler, on a basis of 200% rating is 88,400 lb., on a rating of 225% is 99,500 lb. and on 250% is 110,000 lb. Assuming that these boilers can be carried at 225% of rating for periods of two or three hours and for shorter periods at 250% of rating, the total generating capacity becomes 6,350 kilowatts and 7,050 kilowatts respectively. On this basis the limitation with an additional 2500 kilowatt unit is the generating capacity, which, under high load factor, would approximate 6300 kilowatts. This capacity could not be carried continuously for any length of time, inasmuch as operating troubles could be expected in one of the boilers which would necessitate taking it out of service, in which event the capacity becomes 3,150 and 3,500 kilowatts respectively. From the standpoint of reliable operation, it will be necessary, within the next year, to install one additional 750 H. P. boiler so that the full generating capacity of the station can be relied upon constantly. With this third boiler installed, peak load operation may be contemplated from the standpoint of all boilers in operation which would produce a total steam capacity of 131,500 lb. at 200% of rating, equivalent to approximately 8,500 kilowatts of generating capacity. If the size of the second unit is increased to 3,500 kilowatts the maximum demand which can be placed upon the station under the good power factor conditions which should obtain, is slightly in excess of 7,700 kilowatts, requiring the operating of three boilers at 175% of rating and which undoubtedly is the rate of maximum efficiency for these boilers. In addition thereto, the 3,500 kilowatt unit will be able to handle peak loads of approximately 4,400 kilowatts, producing a reserve capacity in this unit when in operation, sufficient to carry the normal daily maximum during the next two years. It also places the station in a position so that this proposed unit and the existing unit can be offset by a future unit of either 3,500 kilowatts or 6,000 kilowatts, depending on which appears to be economic at that time.

Pages 29 and 30:

Transmission Requirements.

Having determined tentatively the probable outputs and loads to be demanded from the plants, the next part of the study was devoted to determining the transmission line construction necessary to convey the loads to be added.

The combined system will contain 13.2 K. V. lines, 22 K. V., delta-connected lines of single-arm, flat construction, and 40 K.-V., Y-connected lines of triangular construction. There are also a number of lower voltage branches. The last named and also the 13.2 K. V. lines need not be considered in this part of the discussion, in which it is expected to work out the main lines only. Several combinations of tie lines were considered speculatively, but the ones appearing worthy of further study reduced to two layouts which are illustrated diagrammatically. In any event, the following factors appear paramount:

1. The 22 K. V. lines should be remodeled to 40 K. V. Y-connection. The main lines should be not less than #1 to #00 conductor. Since 3-strand #6 equivalent to about #1.3, has been used extensively in the Hughes Electric Company's system, this size has been assumed in most of the calculations.

2. Not less than two parallel lines, preferably on independent routes, inter-connecting sections of the system, are essential to insurance of continuity of service. Necessary switching stations will be required at certain junction points.

3. Economies will be introduced thru the shutting down of isolated plants, and some revenue obtained, thru securing new consumers, but the principal value of the new lines is to be obtained thru transmitting power from Beulah where it can be produced at a low fuel cost.

4. Because of the relative locations of plants and loads, voltage drop becomes an important factor. During the peak demand periods the plants which are steamed up for supplying heating business will be required to take over

considerable portions of the demand in lieu of building lines heavy enough to handle such peak demands which occur but rarely, and are of short duration.

5. In order to obviate the necessity of changing the entire 22 K. V. portion to 40 K. V. at one time, which would be difficult and expensive, it has been planned to use auto transformers to transfer from one to the other until the change is completed.

The combined system mileage of lines is about as shown below:

	Present	To Be Built or Acquired Plan 1	Plan 2
Branches less than 13.2 K. V.....	55		12
13.2 K. V. branches	137	36	36
22.0 K. V. delta lines	485		
40.0 K. V.-Y lines	143	340	358

Of the 22 K. V. lines, about 190 miles are part of the main lines and should eventually be changed to 40 K. V.-Y connection and the copper increased to about #1. The branch lines can be changed in construction and reinsulated and the copper left as it is, mainly 3-strand #8. In general, it is planned that this work will be distributed over several years.

Pages 74 and 75:

Construction Estimates.

An estimate was prepared covering the cost of installing a new generating unit at Beulah with boiler and accessory equipment. Calculations were made assuming the installation of a 2500 KW. set, the same as the present one, also a 3500 KW. unit of similar type, and also a 3500 KW. unit, 14-stage construction. The boiler room additions are to be nearly a duplicate of the present. An itemization of the principal apparatus is presented to indicate what is included, and details are recited subsequently. It would appear that the spray pond addition could be deferred, and that less than a proportionate addition will be necessary. It also appears that the 14-stage unit will be economically of greater value than the 8-stage machine.

Beulah Plant Extension Estimate Covering 8-Stage, 2500 KW. Unit, 8-Stage, 3500 KW. Unit, 14-Stage, 3500 KW. Unit, Boiler Plant Equipment and Accessories

8-stage 2500 KW. unit with air cooler	$ 45,400.
Exciter and wiring	2,200.
Erection and freight, turbine and condenser	2,500.
Condenser, pumps and line to spray pond	19,500.
Panel and wiring	2,500.
Foundations, including building foundations	5,000.
Building extension	4,300.
750 HP. boiler and superheater, including superintendence	20,300.
Boiler erection and piping	5,500.
Stoker, furnace, air preheater, fans, steelwork, boiler accessories, (contract)	61,000.
Extra for larger feed heater	2,400.
Extra for concrete or account ash tunnel	4,000.
Fan motors, 40 H. P. and 75 H. P.	2,000.
	176,600.
Plus 20%	211,900.
8-stage, 3500 KW. unit with air cooler	$ 54,900.
Exciter and wiring	2,300.
Erection and freight, turbine and condenser	2,800.
Condenser, pumps and line to spray pond	26,500.
Remaining items same as first list	107,000.
	193,500.
Plus 20%	$232,200.
14-stage, 3500 KW. unit with air cooler	62,900.
Exciter and wiring	2,300.
Erection and freight, turbine and condenser	3,000.
Condenser pumps and line to spray pond	26,500.
Remaining items same as first list	107,000.
Plus 20%	$242,200.

Q. Is 82-14 one of the documents which was received in the mass of records which constitutes Exhibit 82?

A. Yes, it is.

Q. Was it taken by you from Exhibit 82 and produced here? A. Yes.

Q. Is it in the same condition it was received along with the rest of the material that constitutes Exhibit 82?

A. Yes.

Plaintiff's Exhibits 82-15 and 82-16 were marked for identification and received in evidence.

Plaintiff's Exhibit 82-15 is the minutes of a special meeting of the directors of North Dakota Power & Light Company held at Chicago, Illinois, on August 6, 1929, which meeting was held for the purpose of accepting resignations of officers and directors and appointing successors to fill the vacancies thus created.

Plaintiff's Exhibit 82-16 is the minutes of a special meeting of the directors of Northern Power and Light Company held at Chicago, Illinois, on August 6, 1929, for the same purposes.

The following table shows the directors and officers of each company whose resignations were accepted and also the persons who were appointed to fill the respective vacancies, such resignations and successor appointments being identical except that Frost succeeded Huffman as vice president of North Dakota Power & Light Company whereas Strike succeeded Huffman as vice president of Northern Power and Light Company.

Office	Resignation	Appointments
Director	Parkinson	L. B. Breedlove
"	Jacobson	T. T. Parker
"	Huffman	C. L. Sandstedt
"	Wilder	C. J. Strike
"	Ross	W. H. Frost
President	Jacobson	T. T. Parker
Treasurer	Morrison	C. L. Sandstedt
Asst. Treasurer	Brennan	J. F. Buckmier
Secretary	Horn	C. L. Sandstedt
Asst. Secretary	Dibelka	
Vice President	Lucas	
Vice President	Huffman	Frost
		Strike

Q. Is Exhibit 82-15, contained in the bound volume marked Hughes Electric Co., an exhibit which was taken by you from Exhibit 82? A. Yes.

Q. State whether or not it purports to show the directors' meeting of the North Dakota Power & Light Co. held in Chicago on August 8, 1929? A. It is. August 6th.

Q. And the election of the directors at that meeting?

A. Yes.

Q. Is Exhibit 82-16 contained in the bound volume marked Northern Power & Light Co., a minute [books] consisting of nine pages, one of the records which you took from Exhibit 82? A. Yes.

Q. Does that show the meeting of the board of directors of the Northern Power & Light Co. held at Chicago, Ill., on August 6, 1929, including the election of directors?

A. That is right.

Mr. Fellows: We offer in evidence Exhibit 82-15 and 82-16.

Mr. Royhl: We object to this as incompetent, irrelevant and immaterial, and being too remote, being minutes of August, 1929, a time prior to the issues in this litigation, and for the further reason that they have no bearing upon any issue in this case, and make the same objections separately to each Exhibit 82-15 and 82-16.

Mr. Benson: This is the time the record shows the officers and directors of the prior administration moved out and the new people moved in.

The Court: Objection overruled.

Mr. Fellows: Your Honor, I call your attention to the fact that in these exhibits it is disclosed that at the meeting of the board of directors, held at 3:55 P. M. on that date, and ten minutes later a meeting of Northern Power & Light Co. was held at the same place, same room, and identical directors of each corporation and identical officers of each corporation were elected for each corporation at this particular meeting.

Mr. Royhl: Is there something about that that is against the law?

Mr. Fellows: Yes. It is presumptively fraudulent.

The Court: There is no use counsel arguing the matter. It is evident you are unable to agree.

By Mr. Fellows: Q. Were you able to state from your examination of the records what the original voltage capacity of the Ellendale, Wetonka, Leola line was?

A. Yes.

Q. From what records can you determine that?

A. From the work order and the work order ledger.

Q. And they are part of what exhibit here? A. 82.

Q. Will you state what that voltage originally was.

Mr. Royhl: Objected to as not the best evidence; no proper foundation laid.

The Court: He testified he gained his information from these records. This is to save time. Objection overruled.

A. The record shows the line was designed to be 40,000 volts and to be immediately energized at 22,000.

Q. Can you state the date of the Lucas & Luick report?

A. The report is dated on the cover March, 1928. The transmittal letter is dated April 14, 1928.

Q. Can you state from your examination of these records what stations were eliminated after the date of the Lucas & Luick report? A. Yes, I think I can do that.

Q. That is from the Northern Light & Power property?

A. Yes.

Q. And from what records can you ascertain that fact?

A. From the financial statement of Northern Light & Power Co. primarily, and from the early reports that was kept by the Huron office.

Q. They are part of Exhibit what? A. 82.

Q. Will you state what stations were eliminated after the date of the Lucas & Luick report?

Mr. Royhl: That is objected to as self serving; hearsay; no proper foundation laid; not being shown that this witness has any knowledge of the fact, and it appearing that he is merely testifying from some entry within a book, and testifying therefrom to the fact of actual removal; not binding upon this defendant and not within the issues in this case.

The Court: The objection technically probably is well taken like a good many of the others, but in the interest of saving time here I am going to take the answers. Overruled.

A. Eureka, South Dakota; Hazleton, North Dakota; Ipswich, South Dakota; Lemmon was changed to standby basis; Leola was eliminated; McLaughlin was eliminated; Steele, North Dakota, Dawson, Pollock, Selfridge, North Dakota.

Q. In your audit and examination of the various records of these corporations were you able to find any corporate proceedings authorizing A. B. Sanborn, as president, to file certificate of concurrence, with the Federal Power Commission, which was filed December 28, 1939, purporting to concur in Northwestern Public Service Co. FPC Schedule No. 3, which is the interconnection agreement of October 7, 1936?

Mr. Royhl: We object to this as not the best evidence; calling for the opinion and conclusion of the witness; hearsay.

The Court: The question can be answered yes or [not]. Were you able to find such a record? Overruled.

A. No.

Q. State whether or not you were able to find any amended certificate of succession authorized by the corporate records of Dakota Public Service Co.?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. No.

Q. Were you able to find from any of the records any corporate action shown by any of the minute books, authorizing A. B. Sanborn to sign any certificates of concurrence on any of the contracts that are attached to the complaint, or to file any such contracts with the Federal Power Commission?

Mr. Royhl: Same objection.

The Court; Same ruling.

A. No.

Plaintiff's Exhibit 82-17 was received in evidence. It consists of a number of vouchers attached to a letter dated May 19, 1938, said letter and vouchers being taken from the mass Exhibit 82. The letter reads as follows:

United Public Utilities Corporation
20 North Wacker Drive
Chicago, Illinois

May 19, 1938

Mr. J. F. Buckmier,
North Dakota Power & Light Company,
Huron, South Dakota.

Dear Mr. Buckmier:

The April Financial Reports of North Dakota Power & Light Company and Northern Power & Light Company indicate that you are considering all of the purchased power and sales of power as interchange power. I have discussed this subject with Mr. Packman and Mr. Buell and we believe that this is correct in regard to the transactions between Northern Power & Light Company and Northwestern Public Service Company. The capacity charge, however, should also be included in the interchange power account. In the case of North Dakota Power and Light Company and Northern Power and Light Company, however, I do not believe that this is interchange power but instead should be recorded on a revenue and expense basis through accounts 2105 and 190.

As the 1937 figures of North Dakota Power and Light Company and Northern Power and Light Company have been published in the United Public Utilities Corporation and subsidiary consolidation, I do not think it advisable that the comparative figures should be adjusted. This will result in twelve months figures to date of Northern Power

and Light Company being on a different basis, but this is justifiable as the capacity charge was made effective January 1, 1988.

Please send us revised April income account and supporting schedules thereto, in accordance with the above.

Yours very truly,

R. McCLANAHAN

The vouchers read as follows:

Part of Plaintiff's Exhibit 82-17.

Form 305-616-5-37

JOURNAL VOUCHER NO. 4-59

Northern Power & Light Co.

(Stamp Name of Company Here)

MONTH OF APR 1938

Control	G.L. ✓	S.L. ✓	DEBIT	CREDIT

Record Miscellaneous Journal Entries.

82-17

Filed Feb 8, 1945
Roy B. Harker,
Clerk,
By C. C. Schwarz
Deputy.

38 1r

Prepared by	Date	Audited	Approved

328

Part of Plaintiff's Exhibit 82-17.

Form 205—625-5-37

JOURNAL VOUCHER NO. 4-59

Northern Power & Light Co.

(Exact Name of Company Here)

MONTH OF APR 1938

	Control	G.L.	S.L.	DEBIT	CREDIT
Line Stores	31.11	✓	*	33451 70	
Appliance Stores	31.31	✓	*	10217 36	
Jobbing Stores	31.33	✓	*	7102 42	
Unassigned Lamp Stock	31.35	✓	*	1774 89	
Fuel Stores	31.5	✓	✓	271 40	
Prepaid Insurance	32.4	✓	*	2083 40	
St of N.D. wh. tax. Elec. Dept	325	✓	*	785 57	
Store Expense Clearing	31	✓	*		06
Electric Distribution Expense	250	✓	✓	32 13	
Interchange Power	191	✓	✓	13694 98	
Electric Operating Revenue	2100	✓	✓	7463 20	
Delaware Franchise Tax Expense	956.4	✓	*	75 00	
Power Purchased	190	✓	✓	1651 68	
Interchange Power	191	✓	✓	7480 00	

*538c

Prepared by | Date | Audited | Approved

325

Part of Plaintiff's Exhibit 82-17.

Form 305—SM-6-37

JOURNAL VOUCHER NO. 4-59

Northern Power & Light Co.

(Stamp Name of Company Here)

Pg 2

MONTH OF APR 1938

	Control	G.L. ✓	S.L. ✓	DEBIT	CREDIT
Line Stores	31.12	—	*		33451 70
Appliance Stores	32.1	/	*		10217 36
Jobbing Stores	32.2	/	*		7102 42
Consigned Lamp Stock	32.3	/	*		1774 89
Fuel Stores	33	/			2714 10
Prepaid Insurance	36.3	/	*		2083 40
St by N.O. Wh. Lamp. Adv. Deferred	36.31	/	*		785 57
Jobbing Stores	31.33	/	*		06
Contrl Wh in Cryogen Perm Elec WO	3.11	/			32 12
Purchased Power	190	/			13694 98
Interchange Power	191	/			7463 20
Taxes Accrued	78	/			75 00
Interchange Power	191	/			16511 69
Power Purchased	190	/			7480 00

5382

Prepared by | Date 4-28-38 | Approved

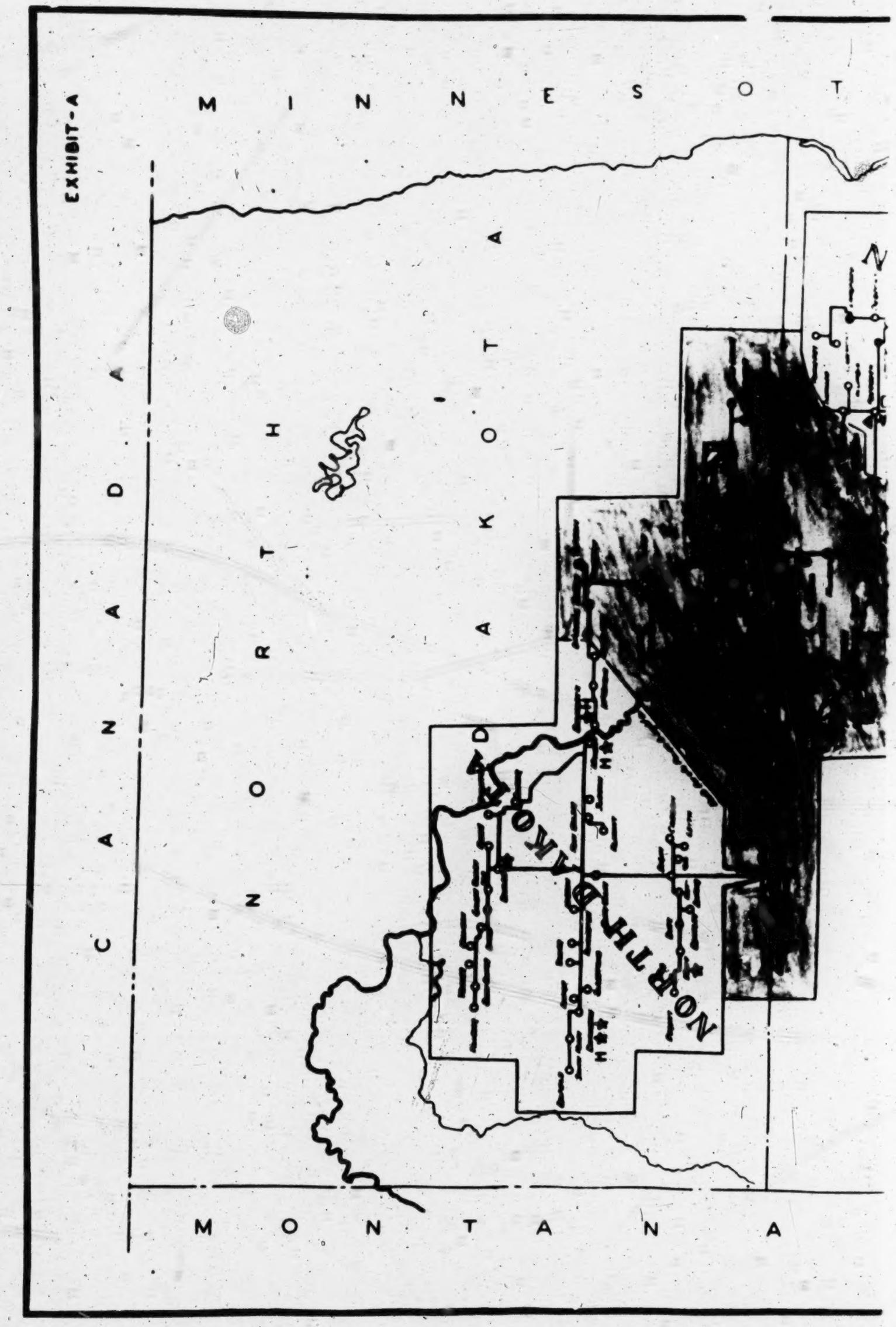
SAVINGS BY REASON OF OPERATING THE SYSTEMS OF NORTHWESTERN PUBLIC SERVICE COMPANY - NORTH DAKOTA POWER & LIGHT COMPANY AND NORTHERN POWER & LIGHT COMPANY AS AN INTERCONNECTED SYSTEM

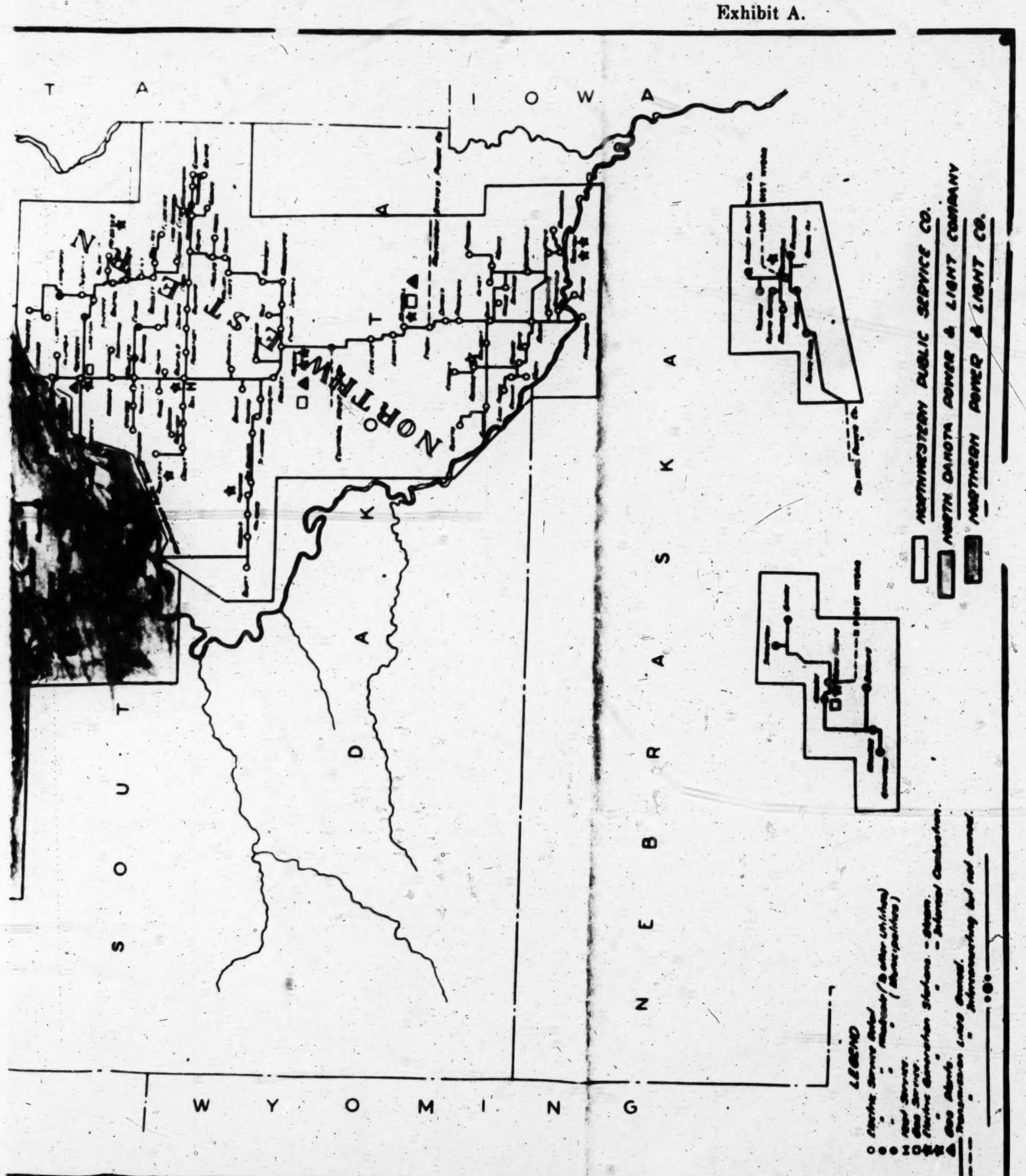
	Northwestern Public Serv. Company	No. Dakota Power & Lt. Company	Northern Power & Lt. Company	Total
PRESENT COSTS				
KWH Generated	47,868,585	34,772,029	3,725,338	86,365,952
" Purchased Outside	7,410,800	--	--	7,410,800
" " Inter Co.	3,673,240	--	12,639,756	--
Total Output	58,952,625	34,772,029	16,365,094	
COST OF POWER				
Generation	443,433.50	198,183.08	55,372.65	696,989.23
Purchased Outside	47,095.00	--	--	47,095.00
" Inter Co.	18,366.20	--	44,239.16	62,605.36
Total Cost of Power	508,894.70	198,183.08	99,611.81	806,689.59
COST PER KILOWATT-HOUR -Mills				
Generation	9.26	5.7	14.86	
Purchased Outside	6.35	--	--	
" Inter Co.	5.	--	3.5	
Total	8.63	5.7	6.08	
ACCOUNTED FOR				
Sales	46,535,241	30,303,487	11,324,120	
Company Use	1,091,832	152,314	132,949	
Total Accounted For	47,627,073	30,455,801	11,457,069	
Unaccounted For	11,325,552	4,316,228	4,908,025	
% Losses	19.21%	12.41%	30. %	
COSTS OF GENERATION WITHOUT INTERCONNECTION				
Additional KWH to be generated	3,673,240	3,673,240		
Losses Estimated 20%		734,648		
	3,673,240	4,407,888		
NORTHWESTERN PUBLIC SERVICE COMPANY				
Aberdeen - 2,754,930 KWH @ 5.6 mills	15,427.61			
Other Stations 918,310 KWH @ 7.1 mills	6,520.00			
Total 3,673,240	21,947.61			
Savings in cost of Inter Co. purchased	18,366.20			
Net additional cost	3,581.41			3,581.41
NORTH DAKOTA POWER & LIGHT CO.				
Beulah Savings 4,407,888 KWH @ 2.86 mills		12,606.56		
Loss in revenue KWH sold to N.P.S.L. Co. 4,407,888 KWH @ 3½ mills		15,427.61		
Net additional cost		2,821.05		2,821.05
NORTHERN POWER & LIGHT CO.				
Loss in KWH sold to N.W.P.S. Co. 3,673,240 @ 5 mills			18,366.20	
Savings in Purchased from N.D.P.S.L. Co. 4,407,888 @ 3½ mills			15,427.61	
Net additional cost			2,938.59	2,938.59
Total costs without Interconnection	512,476.11	201,004.13	102,550.40	816,030.64
Savings by reason of Interconnection	3,581.41	2,821.05	2,938.59	9,341.05

Plaintiff's Exhibit 216-A.

Exhibit A.

EXHIBIT-A





85

CANADA

NORTH DAKOTA

SOUTH DAKOTA

NEBRASKA

LEGEND

- Electric Service Retail
- " " Wholesale (To other Utilities)
- " " " (Municipalities)
- H Heat Service
- Gas Service
- Electric Generation Stations - Steam
- " " " - Internal Combustion
- Gas Plants
- Transmission Lines Owned - (22 K.V., 33 K.V. & 38 K.V. Lines)
- " " " - (Lines Under 22 K.V.)
- Interconnections

Scale 1 in = 20 mi.

Drawn By O.M.B. Sept. 13, 1939

Exhibit A

NORTHWESTERN PUBLIC SERVICE CO.

DAKOTA PUBLIC SERVICE CO.

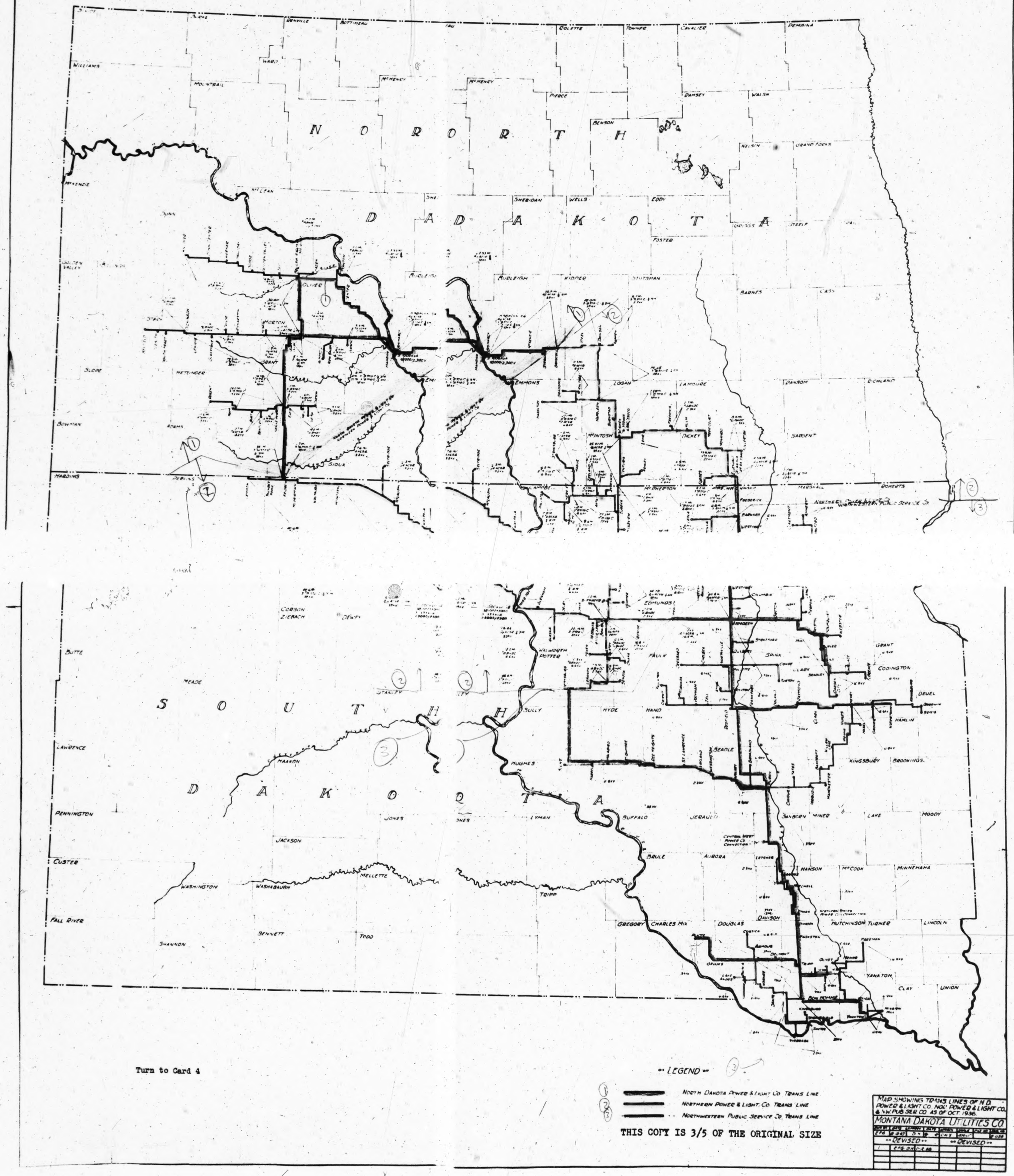
-85-

Turn to Card 2

Exhibit A.

Turn to Card 2

Plaintiff's Exhibit 15.



Turn to Card 4

Turn to C

Turn to Card 8

.449

449

ANNUAL PRODUCTION COSTS & KWH GENERATED PER
NORTH DAKOTA POWER & LIGHT CO.

MILLS P.R.L.L. KWH GENERATED

45,000,000
40,000,000
35,000,000
30,000,000
5
4
3
2
1

KWH GENERATED

TOTAL PRODUCTION COSTS

FUEL COST

OPERATING LABOR

MAINTENANCE

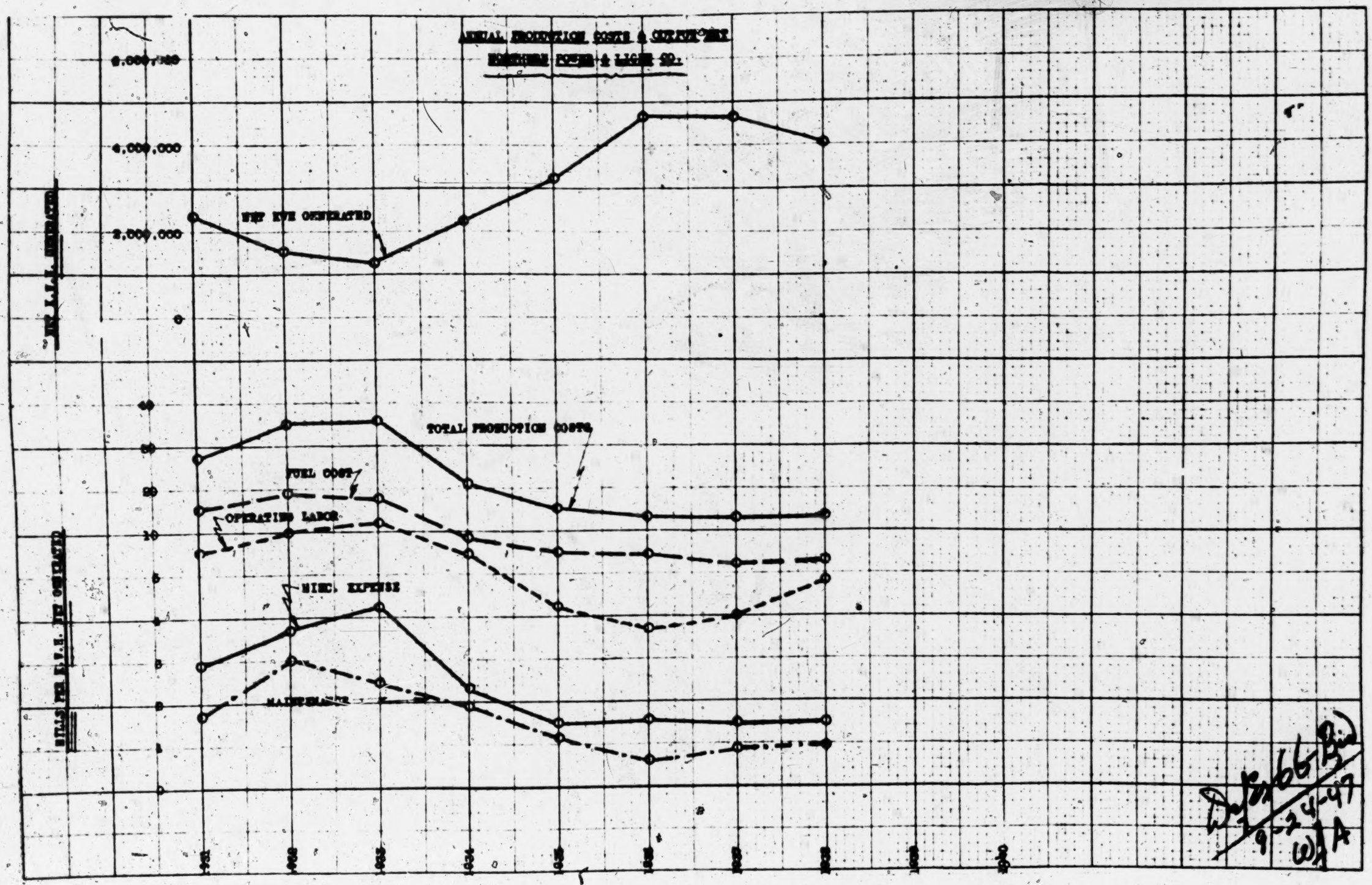
MISC. EXPENSE

1931 1932 1933 1934 1935 1936 1937 1938 1939 1940

Def Exhibit A-w
9-24-47
WJA

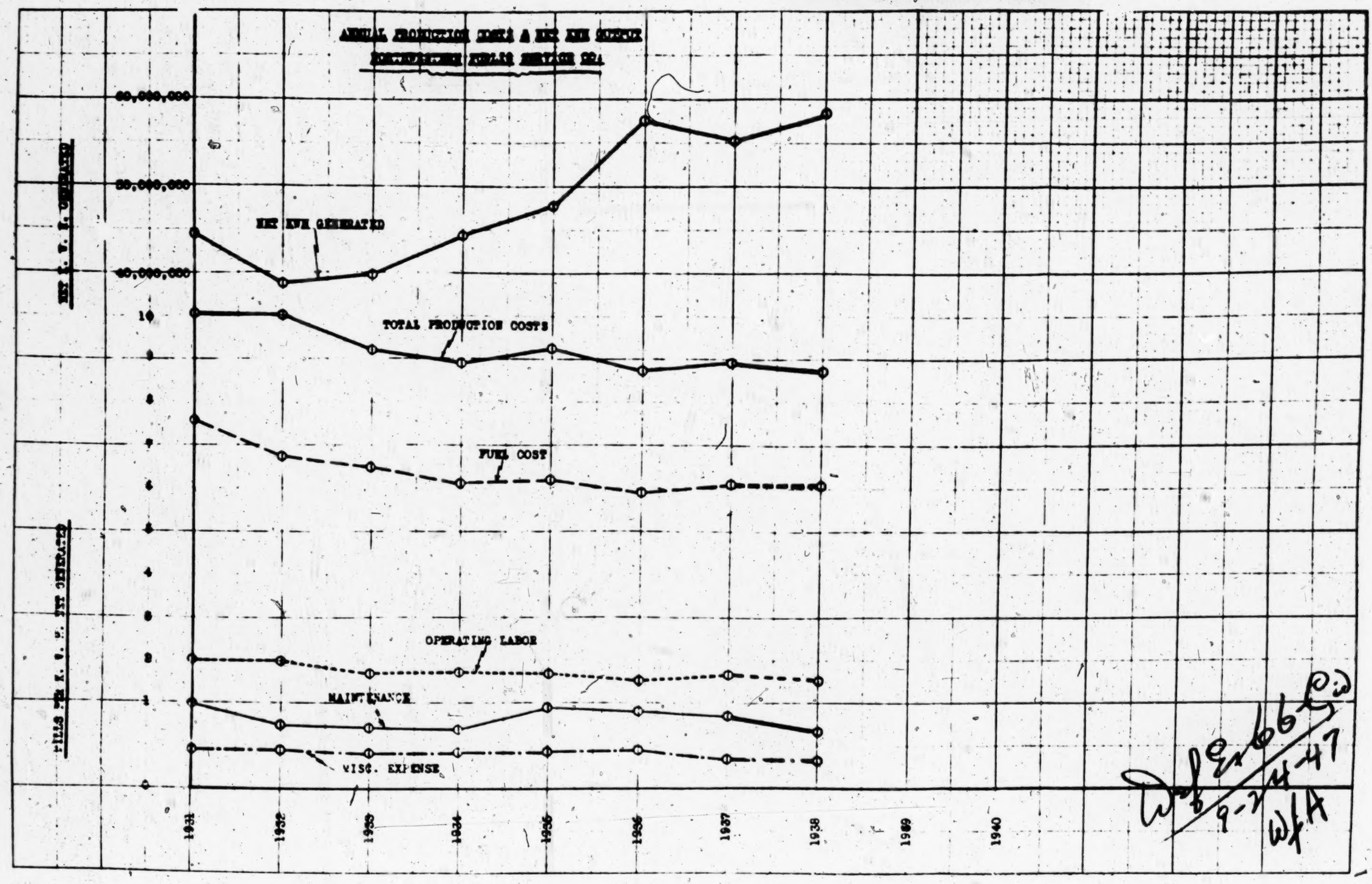
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451



453

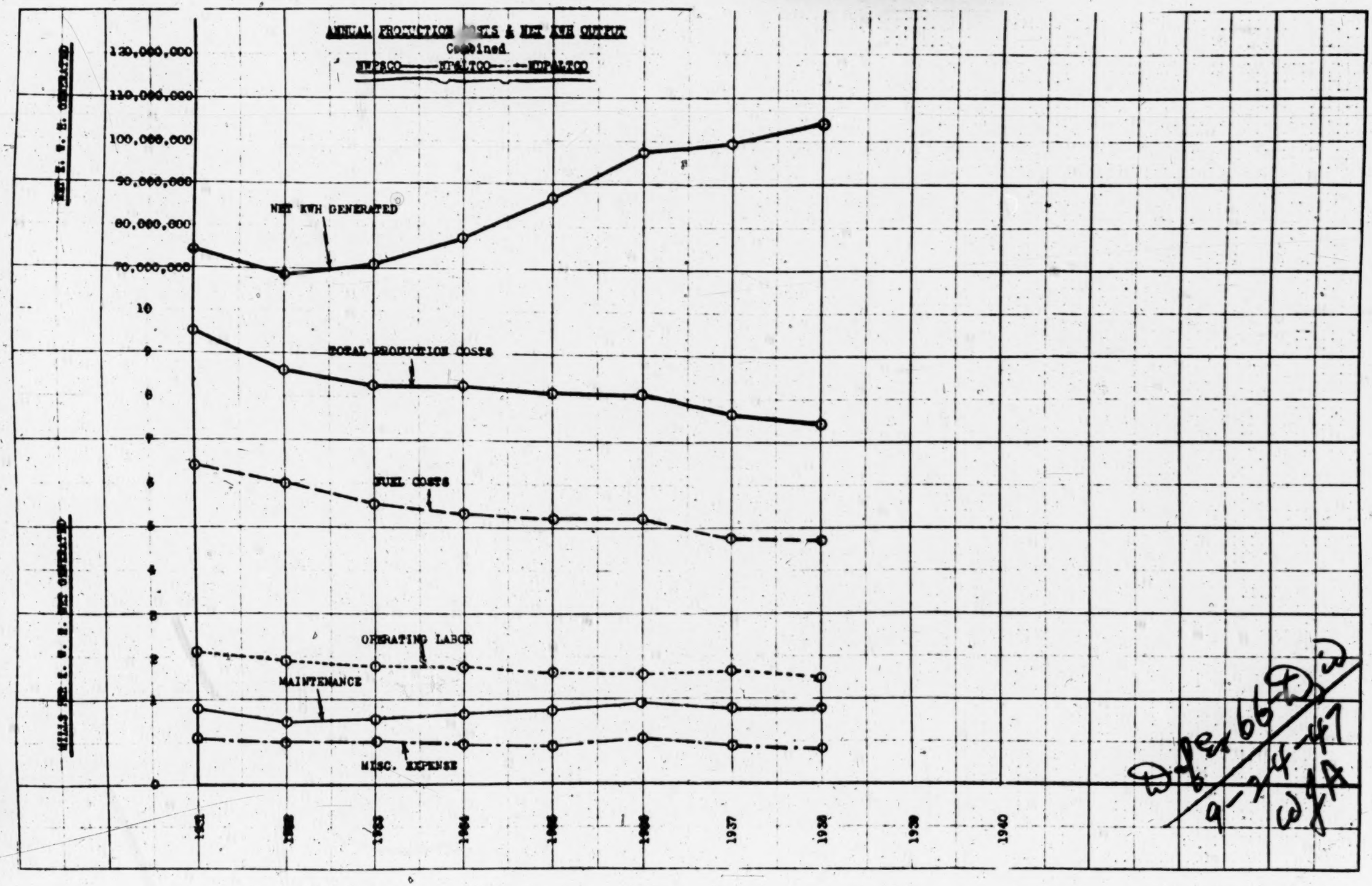
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455

Turn to Card 8

455



[redacted]

553

Turn to Card 9

Sales of energy by North Dakota Power and Light Company

1930
1931

1930	%	KWH metered		Rate	Amount	
June	77%	2[illegible]70	25[illegible]70	2½¢	2[illegible]93	
July	77%	[illegible]	279600	2½¢	2[illegible]70	
Aug	77%	[illegible]	95[illegible]30	2½¢	7[illegible]32	[illegible]
Sept	77%	[illegible]	57[illegible]75	2½¢	1[illegible]67	
Oct	77%	[illegible]	7[illegible]35	2½¢	1[illegible]50	
Nov	77%	[illegible]	7[illegible]80	2½¢	1[illegible]95	
Dec	77%	[illegible]	76[illegible]	2½¢	1[illegible]11	
			[illegible]10		[illegible]98	
[illegible]	[illegible]	[illegible]	[illegible]62	[illegible]	[illegible]76	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	

Plaintiff's Exhibit 85.

[redacted] Public Service Company, COMPANY

Schedule [illegible]

WORK ORDER

W.O. No. 347
Acct. No.

GENERAL DESCRIPTION Extending our 33KV line 18 miles from Ree Heights to Highmore and moving sub to Highmore and building 13 miles of new line from Harrold to Blunt.

ADDITIONAL DETAIL DESCRIPTION

This will enable us to shut down the present direct current plant at Blunt. The line from Harrold to Blunt will be 2/0 aluminum and built for 33 KV. The circuit from Ree Heights to Highmore will be 2/0 aluminum. This will enable us to carry the desired load over these lines when we tie in with the Norther Power and Light at Gettysburg in the future. Moving the sub from Ree Heights to Highmore will materially improve service as the regulation at Highmore is bad at present.

M. W. U. CO. ENG. DEPT. Approved [illegible] Date 11-23-29

OPERATING DEPT. M.W.U. CO. RECEIVED NOV 22 1929 APPROVED 11/23

ADDITIONAL INVESTMENT NECESSARY AND WHICH IS TO BE CHARGED TO THE PERMANENT WORK ORDERS

TRANSFORMERS $

METERS

BUDGET SCHEDULE NO. [illegible]

BUDGET SECTION $ [illegible]

WORK ORDER NO. $

ESTIMATED LENGTH OF TIME REQUIRED TO COMPLETE WORK AFTER APPROVAL 3 months

DATE COMPLETED Total Actual Amt., $

SUBMITTED BY Title

CHECKED 8/26/29 By E. K. Albert

APPROVED 11-20-29 By C. L. Sandstedt Vice President

APPROVED 9/11/29 By M. F. Low Vice President

APPROVED 11-19-29 By T. J. Rasch President

Filed Feb 12 1948 Rose B. Markey Clerk (OVER)

GROSS EXPENDITURE $43,801.84

OFFICE OF ORIGIN Huron, So. Dak.

DATE August 20, 1929

EXPENDITURE

NEW WORK

MATERIAL & EXP. $34,073.61

LABOR 4,620.00

TOTAL $38,693.61

LABOR REMOVING OLD WORK

MAINTENANCE

STORES DEPT. CHGS. 10%

GEN. OFFICE SUPERVISION $3,849.36

INT. ON IDLE INVESTMENT 838.45

GROSS EXPENDITURE 43,801.84

LESS CONTRIBUTIONS [illegible]

NET COST TO COMPANY $43,801.84

PROPERTY TO BE RETIRED

ORIGINAL COST

RETURN TO STOCK AT ORIG. COST

SALVAGE VALUE

DEPRECIATION

BENEFITS ACCRUING

INCREASED NET REV. PER YEAR $3000.00

% INCR. REV. TO COMPANY COST 6.8%

DECREASED EXP. PER YEAR $3600.00

% DECR. EXP. TO COMPANY COST 8.1%

MATERIAL

VALUE ON HAND

TO BE PURCHASED $34,073.61

TOTAL MATERIAL $34,073.61

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Turn to Card 9

Part of Plaintiff's Exhibit 55-6.

Form No. 78—4-27

Final Return Sheet — Auth. W.O. 397

Bureau Division — Description: Extending our 33 KV line 13 miles from Rae Heights to Highmore and moving substation to Highmore and 13 miles

Est. Cost 43,201.64 — Date Started June 1930 — Acct. Chgd. — $

Act. Cost 39,676.04 — Date Completed Sept. 1930 — Acct. Chgd. 1100 — $43.24

Under 8.16 — Acct. Chgd. 1119 — $4,121.00

Date Cleared Oct. 1930 — Journal Entry J 10-66 — Acct. Chgd. 1122.1 — $13,090.37

Acct. Chgd. 1123.1 — 22,421.43

Item No.	ITEM	QUANTITY Est.	QUANTITY Act.	AMOUNT Estimate	AMOUNT Actual	DIFFERENCE	ACCT CHG'D
1	35' poles	373	330	5,303 30	4,237 50		1122.1
2	40' poles	13	27	195 00	417 00		1122.1
3	30' poles	13	14	79 30	108 40		1122.1
4	10' cross arms	434	730	434 00	1,352 78		1122.1
5	72" angle braces	434	434	434 00	556 71		1122.1
6	8" carriage bolts	1342	1003	37 44	72 09		1122.1
7	10" machine bolts	600	442	60 00	48 15		1122.1
8	14" machine bolts	572	122	62 92	10 98		1122.1
9	16" D.A. bolts	156	48	25 40	7 20		1122.1
10	3/8" Galvanized guy strand	2000'	7250'	58 50	180 46		1122.1
11	Anchors	60	54	120 60	108 95		1122.1
12	Strain plates	120	124	9 60	10 88		1122.1
13	Guy hooks	120	188	9 60	15 17		1122.1
14	Guy clamps	120	119	24 00	25 04		1122.1
15	Steel pins and spur washers	1872	1875	1,216 80	3,[illegible] 84		1122.1
16	45 K.V. insulators	1872	669	4,118 40	[illegible] 20		1122.1
17	4/0 A.C.S.R.	[illegible]	[illegible]	2,500 00	13,[illegible] 53		1122.1
18	#6 alumi tie wire	500 #	887	150 00	70 89		1123.1
19	Alumi Armour wire	500 #		150 00			1123.1
20	Strain insulators	36	42	288 00	336 86		1122.1
21	Dead end clamps	36	18	72 00	22 41		1122.1
22	3 pole 6600 V switch	1		75 00	10 97		1119
23	Substation structure	1		1,200 00	4,253 47		1119
24	Lot for substation	1		50 00	34 10		1100
25	Substation foundation	1		200 00	168 00		1119
26	Substation fences	1		200 00	255 00		1119
27	Labor on Trans. structures			1,200 00	2,257 71		1122.1
28	Labor on Trans. conductors			2,400 00	2,648 85		1123.1
29	Labor on substation			500 00	570 71		1119
31	Incidentals			1,242 55	1,472 34		Overheads
32	Supervision			2,260 32	2,302 70		Overheads
33	Interest			638 45	629 53		Overhead
				43,201 64	39,676 04	(3,525 60)	

Summary

	Expenditure	Percent of Total	Overheads	Total		
Acct 1100	34.10	.11	9.14	43.24		
Acct 1122.1	10,250.60	26 .26	2,739.68	13,090.37	13090.37	
Acct 1123.1	17,728.53	56 .57	4,692.90	22,421.43	22421.43	
Acct 1119	3,662.15	10 .09	958.85	4,121.00	3551.10	
					17285.90	
	[illegible]	100 .03	[illegible]	[illegible]		

26.4 to 4

To

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Turn to Card 9

Part of Plaintiff's Exhibit 55-6

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Turn to Card 10

Plaintiff's Exhibit 88-A

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Division of Cost of Aberdeen Substations
as determined by H.R. Ehrig, using basic figures from
Defendants Exhibit 216

Sheet 1 of 2

Items	Labor	Incidentals	Overheads	Structure	33000-volt substation	Interconnecting facilities	Excessive overheads	Balance
Depreciable			476 81		1068 41			
					1819 18			
			476 91		2988 59			2859 10
allocate overheads (3%)			(476 81)		74 00		404 51	
Totals			—		2454 59		404 51	2859 10
Work Order N194	748 14		155000		14749			
					11367			
					1068 41			
					477953			
					5931 4			
					9943 6			
	748 14		155000		799450			1029964
allocate labor	(748 14)				748 14			
	—		155000		874264			1029964
allocate overheads (3%)			(155000)		26400		128800	
Totals			—		900464		128800	1029964
Work Order 278	90427	98027	149785		1176812			1515031
allocate labor and incidentals	(90427)	(98027)			185434			
	—	—	149785		1365246			1515031
allocate overheads (3%)			(149785)		41000		108785	
Totals			—		1406246		108785	1515031
Work Order 404	5348 79		1117923	1701385	157797	258 58		
				301652	87553	307874		
				49399		3169244		
						477029		
						273991		
						247023		
						131579		
						265317		
	5348 79		1117923	2054936	245350	1995595		5946683
allocate labor	(5348)			254779	30668	249432		
			1117923	2309715	276018	2245027		5946683
allocate overheads (3%)			(1113923)	61300	8300	67400	972923	
Totals			—	2371015	284318	2312427	972923	5946683

Sheet 2 of 2

Division of Cost of Aberdeen Substation
as determined by H. N. Ebbig, using basic figures from
Defendants Exhibit 216

Items	Labor	Incidentals	Overheads	Structures	33000-volt Substations	Interconnection Facilities	Executive Overheads	Balance
Work Order 1081	10041	11600	83598			527100		632339
Allocate labor and Incidentals	(10041)	(11600)				21641		
	—	—	83598			548741		632339
Allocate overheads (3%)			(83598)			16500	67098	
Totals			—			565241	67098	632339
Totals of Work Orders and Appraisal				2377015	2896487	2877668	1318057	9409227
Allocate structure - 40% - 60%				(2377015)	950806	1426409		
Allocated values				—	3847293	4303877	1318057	9409227

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Turn to Card 10

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Turn to Card 10

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Plaintiff's Exhibit 88-A.

Statement Exhibit showing Gross Abstracts to Expense and Operating Accounts & H.N. Wing

	Work orders 404	Credit - Unabsorbed materials, &c. 405	Balance	Operations Operating lines 2/9/425	Operations Expense lines 2/9/425	Total - 3 Columns and unabsorbed excess	Balance for General Note	To reduce overhead + 3%	Net Operating lines	To reduce expense lines subject 3%	Net Expense lines
Materials -											
Poles	1554117		1554117	901994	652123	(218489)	437634	-	437634	-	901994
Other distribution items	1020929	(188418)	832511	473469	358762	(114639)	247623	-	247623	-	473469
Total	2575046	(188418)	2386628	1375463	1010885	(333128)	677757		677757		1375463
Conductors	4816092	(776457)	4039635	2721612	1317823	(463613)	1354210		1354210		2721612
Total materials	7391158	(964875)	7026263	4097075	2928708	(796741)	2031967		2031967		4097075
Labor -											
Pole labor	1168242	(85843)	1082399	626601	455798	(151781)	304017	-	304017	-	626601
Conductor labor	502915	(8122)	494793	286436	208357	(69383)	138974	-	138974	-	286436
Total labor	1671157	(93965)	1577192	913037	664155	(221164)	442991		442991		913037
Other costs -											
Line poles	383209	(28167)	355042	205534	149508	(49786)	99722	-	99722	-	205534
Underground conduit	545549	(8808)	536741	310719	226022	(75465)	150757	-	150757	-	310719
Underground, inside buildings	942758	(36975)	905783	524253	381530	(127051)	254479		254479		524253
Total direct costs -											
Poles	4115516	(302468)	3813089	2207398	1605691	(534695)	1070996	-	1070996	-	2207398
Conductors	5858556	(945777)	5763779	3336767	2427012	(808461)	1618551	-	1618551	-	3336767
Total direct costs	9974073	(397005)	9577068	5544165	4032703	(1343156)	2689547		2689547		5544165
Depreciation -											
Poles	394962	(29039)	365923	211836	154087	(51313)	102774	(7050)	32130	(14561a)	117569
Conductors	562282	(9079)	553203	320249	232954	(77574)	155380	(10681)	45699	(24046)	176034
Total depreciation	957244	(38118)	919126	532085	387041	(128887)	258160	(17731)	80699	(38607)	293603
Interest -											
Poles	128375	(9436)	118939	68836	50103	(16674)	33429	-	33429	-	68836
Conductors	187716	(9951)	177765	102866	74899	(24948)	49951	-	49951	-	102866
Total interest	316091	(19387)	296704	171702	125002	(41622)	83380		83380		171702
Total Maintenance -											
Poles	4638853	(340943)	4297910	2488070	1810157	(602682)	1207475	(7050)	1134525	(145614)	2348070
Conductors	6608354	(964807)	5643547	3268882	2334865	(777108)	1557757	(10681)	1547076	(240146)	3268882
	11247378	(1305750)	10791457	6256952	4534534	(1379790)	3031987	(17731)	2854536	(385760)	5616952

Net charged to Expense Account

48567

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Turn to Card 10

Plaintiff's Exhibit 88-A. -583-

Gettysburg Substation Costs
as determined by H.N. Craig

		Equipment	Labor (allocated)	Social taxes, supervision, interest (allocated)	Excessive Overheads	Northern Power & Light Co. Property	Totals
Work Order 420 charges –							
Switches	③	12847.0	2446.00	562.50		⑤ 3968.66	(3 2400-volt transformers from Work to 420)
Switch houses	④	3328.74	636.00	1456.22		⑤ 1685.16	(" " " " ")
Regulators	⑥	2319.93	443.00	1016.00			
33 KV arrestors		114.34	21.86	49.68			
22 KV arrestors	③	1000.00	191.31	437.32			
Foundations		314.70	62.00	138.20			
Fence (from Wiley)		214.17		49.83			
3 33000-volt transformers		3126.50		357.00			
1 3 KVA transformer		97.30					
		12826.88	1796.17	4505.75		4653.82	
Labor transferred		1796.17	(1796.17)				
		14623.05	–	4805.75		4653.82	
overheads & accretals transferred (L-4)		-377.38		(4505.75)	3628.37		
Totals January 1, 1936		15500.43		–	3628.37	4653.82	23782.62
Changes since January 1, 1936 –							
1936 – voucher 3-9	①	39.24	(meters)				
" 3-9		1030.00	(meters, eqt.)				
1938 – voucher 8-27		261.82	(meters, etc.)				
" 8-31	①	(39.24)	(meters)				② (4653.82) (3 2200 volt transformers retired, 1942 general vouchers 4-30)
1943 – voucher 11-28		2210.00	(regulators)				
" 9-31	③	(1267.79)			(365.84)		
1944 – vouchers 4-31	④	(2101.05)			(669.18)		
" 10-31	⑤	(88.08)			(25.51)		
Totals of changes		49.90			(1000.53)	(4653.82)	(5604.45)
Balances		15550.33			2627.84	–	18178.17
Not in service, but not retired	⑥	(2928.71)			(850.44)		(3778.93)
Current balance December 31, 1943		12621.62			1777.40		14399.24

Notes –
Items ③, ④ and ⑤ should have been retired in December, 1941. Item ⑥ should have been retired in November, 1943

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Q. And is it in an unchanged condition now from the time you took it out? A. Yes.

Mr. Fellows: We offer in evidence Exhibit 82-17, the letter and the vouchers.

Mr. Royhl: Objected to as immaterial; not within the issues in this case; no proper foundation laid.

The Court: Overruled.

Mr. Fellows: Your Honor, this exhibit which was just received shows a letter from Mr. McLanahan directing book entries should be changed from purchased power to interchanged power.

(Plaintiff's Exhibit 82-18 marked for identification).

Q. Are the six ledger sheets bound together and marked Exhibit 82-18 taken by you from Exhibit 82?

A. Yes, they were.

Q. Are they in the same condition now as they were when delivered to you?

A. Except being bound together, yes.

Q. State whether or not, from your examination of the records, they refer to the McLanahan letter and vouchers that were offered in evidence as Exhibit 82-17?

A. They show that the instructions in the letter were carried out.

Mr. Royhl: You can answer that yes or no.

The Court: The question should be answered yes or no.

Mr. Fellows: We offer in evidence Exhibit 82-18.

Mr. Royhl: May we have the answer of the witness stricken from the record as not responsive.

Mr. Benson: I would like to ask the witness whether the Exhibit 82-18 contains entries changing the account of the item referred to in McLanahan's letter from purchased power to interchanged power?

The Witness: It does.

Mr. Royhl: Objected to as calling for the opinion and conclusion of the witness; not the best evidence; and for all of the reasons urged heretofore to this testimony.

The Court: There is an answer in the record. We will let it stand.

Mr. Royhl: We make the same objection to 82-18 that was made heretofore to 82-17.

The Court: Overruled.

Plaintiff's Exhibit 82-18 was received in evidence and shows that the charges under the interchange capacity contract (Exhibit C to Plaintiff's Complaint) for the first four months of 1938 were changed from the account "power purchased" to the account "interchange power".

Q. Did you, from the books and records of these various companies, prepare a statement or tabulation of the matters shown by the books or contained in the books and records which would show by years the installation by the northern companies of generating capacity from 1936 to 1945?

A. I have the record. I didn't make a tabulation.

Q. You found that in records. In what records did you find that material?

A. Work orders contained in Exhibit 82.

Q. Do those work orders in Exhibit 82 likewise show the installation by the defendant company during that same period of time? A. No, they don't.

Q. In 55, do they show that?

A. From 55 you can determine it, yes.

Q. Have you determined it from 55? A. Yes.

Q. Have you made a compilation of the entries in Exhibit 82 which show by years the installation by us or our predecessors, for each of those years so that you can testify to it?

A. I made a compilation for the years involved.

Q. Will you state what it is for those various years?

A. The generating units installed by Dakota Public Service Co. at Bismarck, 4000 kilowatt unit, which has usually been rated 3000 in these contracts. In addition to the generating unit there was two boilers installed. The generating unit installed in 1940. In addition there was two

boilers installed at Bismarck in 1938. Also a large boiler installed at Beulah in 1937.

Q. During that period of time, what do the records show were the installations for increase in generating capacity installed by the defendant corporation?

A. Since 1936 the defendant installed one unit, Diesel unit, of 980, sometimes listed 981, kilowatt capacity. I believe at Yankton.

Q. Do the records show the cost of the installation you have just testified to at both Bismarck and Beulah?

A. Yes.

Q. Will you state what those respective costs are as shown by the records?

A. The boiler at Beulah cost $172,226.02, according to the final return sheet in the work order on the records kept.

Q. As shown by the records of what Exhibit?

The Court: I understand it is shown by the records?

Mr. Woods: It is part of the records of the joint management.

The Court: It is the records of the companies involved in this law suit.

Q. Is it 82 you refer to?

A. Yes. The boilers at Bismarck which were installed in 1938, cost $142,541.12. The turbine installed in 1940 cost $349,979.74. When I state boilers and turbines I mean installation complete.

Q. Were you able to find from these records the cost of the generating facilities put in by the defendant company during that period of time? A. Yes.

Q. From what records? A. From Exhibit 55.

Q. Does that consist of the Yankton installation you have just testified to? A. Yes.

Q. Is there any record of any installation by the defendant company, or anything which increased their generating capacity, during that period, except the Yankton installation?

A. I find no increase until they installed the large turbine, which was not in service on October 19, 1945.

Q. Will you state now from the records you have taken from Exhibit 55, the cost of additional generating capacity installed during this period of time by the defendant corporation, and also the date of its installation?

A. I am sorry. I will have to qualify that answer. I don't believe those records are here. I got my information from an examination of the Huron office.

Q. Will you state from your examination of the Huron office what that was? A. Approximately $107,000.00.

Q. When you refer to the Huron office, you refer to the defendant's records in their Huron office, do you not?

A. Yes.

Q. Were you able to determine from your examination of these records whether or not there was a price drop in sales of energy by the northern companies to defendant corporation? A. Yes.

Q. From what records were you able to determine that?

A. From records included in Exhibit 82.

Q. When did the first price drop occur?

A. Did you say between Northern and Northwestern?

Q. Yes.

A. I don't think I can explain that just by date.

Q. Will you explain it so it will answer the question?

A. To begin with, Northwestern and Northern were interchanging power in a small way. Then Northwestern began to buy power direct from North Dakota Power & Light, as appears in the record here, between June, 1930 and February 1931, inclusive. At that time the price was three fourths of a cent. On March 1, 1931, the transactions were directly between Northern Power & Light Co. and Northwestern Public Service Co. and at that time the price was continued at three fourths cent per kilowatt hour. On February 1, 1932, the price was changed so that the first 225,000 kilowatt hours per month were at 7.5 mills, or three fourths of a cent, and the excess .45¢.

Mr. Royhl: Do you mean 4-1/2 mills?

A. Yes. Then on January 1, 1933 the price was changed to 5 mills, and it has continued at that price during the life of the contract. That is, until after the date the Montana Dakota acquired the stock of the company.

By Mr. Royhl:

Q. You were not talking about anything but energy rates?

A. I would say there was if you bring it right up to date.

Q. You are talking about a provision made in August, 1937, aren't you, 1947?

A. That was the purpose of my limitation.

Q. Excluding your arrangement of August, 1947 with the defendant company, the five mill rate was never changed after January 1, 1933, was it? A. No.

By Mr. Fellows:

Q. Were you able to determine and can you now state from your examination of the records when the [Buelah] turbine was installed? A. Yes.

Q. From what records can you ascertain that fact? From Exhibit 82? A. Yes.

Q. Will you give that date?

A. It was installed in 1928. That is, the second turbine at [Buelah].

Q. And at what cost?

A. I didn't tabulate those costs. We have the ledger sheets here.

Q. Were you able to determine from your examination of the records, the ages of the property in the interconnection facilities as of January 1, 1936? A. Yes.

Q. By ages of the property, I mean the dates they were installed? A. Yes.

Q. What was the age at that time of the pole line to Harrold?

Mr. Royhl: We object to this as no proper foundation laid; it not being shown that this witness has any knowledge concerning it; wholly opinion and conclusion, and not within the issues in this case.

The Court: He is merely testifying as to what the records show. Overruled.

A. I observed from a part of the records in Exhibit 55 that the pole line, but not including conductors and 33 KV line, was installed in 1936 from Harrold to Highmore.

Q. When was the rest of the interconnection facilities built?

Mr. Royhl: May we have the same objection to this line of testimony?

The Court: The record may show the same objection and the same ruling of the Court.

A. From the fall of 1929 to sometime in September, 1930.

Q. Is that all information you got from Exhibit 55?

A. Yes. I want to qualify that just a little bit. There were alterations throughout the period, the principal ones being in the Gettysburg substation and Aberdeen substation.

Q. Do the records show what the alterations consisted of? A. Yes.

Q. And when they were made? A. Yes.

Q. Can you state now from the examination of those records the date of such alterations, and their nature?

A. Yes, I can.

Q. Will you do so?

A. The changes in the line from Highmore to Gettysburg, they were minor matters. I didn't tabulate them in any way. The changes on the other line, that is from Aberdeen to Barnard and Aberdeen to Ipswich, were all of minor importance except when Dakota Public Service Co. rebuilt its line from Bowdle to Ipswich, the Ipswich to Aberdeen line was shortened and there were other minor changes. I have shown on the schedule covering those two lines some alterations at the bottom.

Q. That is in Exhibit 88-A? A. Yes.

Q. It appears there?

A. Yes. I wanted to state there is a minor error in that figure of a couple of hundred dollars, covering the numbering of poles.

Mr. Benson: Do you want to clear up that error and state where it is in the exhibit?

A. Yes. Where I say, "net additions to Barnard line, $485.67", it should read—I believe that was corrected before the exhibit was drawn. Anyway, the item I had in mind was numbering of poles in 1931. The aggregate

amount involved is $193.00. The other changes were on the two substations. On the schedule covering Gettysburg substation we show continuity down to the time of my examination, and the correction I thought should be made, which I note now has been made on the record.

Mr. Robinson: Which exhibit?

A. Gettysburg substation, in Exhibit 88-A. You will note I included in Exhibit 88, $15,540.43, and that figure appears about the middle of the page in the first column containing figures. Below that I have shown the number of increases or decreases. The decreases are in parentheses. Opposite some of those figures are code numbers, which refer to code numbers on the upper portion. Now, the item encircled, 5, 4, 3, represent values or recorded costs or equipment which became of no value to this substation at the time the [Buelah] transformer was put in.

Mr. Royhl: We move to strike out this statement as to value or no value as not responsive to the question, the question merely asking for changes; and the further reason this witness is now shown qualified to determine value of operative equipment.

The Court: I am not clear. One of those questions called for costs of installation.

Q. Are the charges self explanatory, on Exhibit 88-A?

A. On the Gettysburg section of Exhibit 88-A.

Q. What was the other substation?

A. On the Aberdeen substation.

Q. Are the charges self explanatory in the exhibit?

A. No. I didn't record anything beyond the opening date of the contract.

Q. There have been changes in the Aberdeen station since the date shown on Exhibit 88-A? A. Yes.

Q. When did those changes take place?

A. They took place at various dates, the principal item being in 1941.

Q. What was that?

A. That was the installation of 5000 KVA transformer.

Q. Do the records in 55 show the cost of the transformer?

A. Yes.

Q. How much? A. $13,761.04.

Cross Examination, by Mr. Royhl.

Q. How old are you, Mr. Elvig? A. 50.

Q. You say you have been employed by the plaintiff for approximately twenty-three or twenty-four years?

A. About twenty-three and a half, yes.

Q. What did you do before you were employed by the plaintiff?

A. Do you mean you want continuous history up to that date?

Q. What did you do before you were employed by the plaintiff?

A. I started high school. In high school I took a commercial course.

Q. Commercial course in what?

A. In accounting, shorthand, typewriting, commercial arithmetic, commercial law, and at the same time my manual training teacher interested me in the hobby of electricity, which I followed under his direction throughout my high school years.

Q. Where was that?

A. Little Falls, Minnesota. I went to business college in Little Falls for about three months. That takes us through 1917. The next summer I worked in a saw mill there, but most of my duties consisted in helping the millwright, and blacksmith and saw filer. Then I got into the army and I was sent to Dunwoody Trade School, where I took the army's course as electrician. I had just completed it when the war ended. The next year I worked in railroad shops where I swung a sledge hammer. The next year I installed burglar alarms in banks throughout western and northern Minnesota. In 1930, I guess, I went out to large logging camps in northern Minnesota where I built camps, built roads, railroads, and conducted all of the operations of getting out time and load them on cars. I was camp clerk where I was responsible for the time keeping, and keeping supplies for men and horses, and all equipment necessary. Generally camp accountant. I did that for two seasons with a short lay-off in the summer of 1921. I came home in May and I was invited to go to work for Little Falls Water Co. My first job was cashier. It lasted about a month. I was transferred out of the city. At the end of the three months

the accountant was transferred to another number. I inherited the records and learned them the hard way. I was there until the property was sold to Electric Bond & Share Co. I decided I didn't want to go back to keeping routine records so I went out to the west coast where I worked for Puget Sound Power & Light Co.

Q. In the clerical department?

A. The first four or five months I was at Port Dawson where I did everything from selling electric ranges and collecting accounts and issuing materials for men taking out, Prepared work authorizations. Everything that has to be done in an accounting way. The division manager was a very old man. Then I was transferred into the general office in Seattle, where I worked on construction records primarily, and along late in the Spring I decided to come back in Minnesota, which was just about the time the Minnesota Northern was incorporated, which is the present Montana Dakota. Mr. Stephens, whom I had worked under in Little Falls had taken a job as assistant treasurer and wrote and invited me to join his organization.

Q. You went in the clerical department, did you? What year was that?

A. I didn't go into the clerical department. In 1924, July 14, I kept general records of the parent company.

Q. Is that when you started work, in 1924?

A. That is when I started to work for this company.

Q. That is what I am talking about. A. That is right.

Q. You were then working for the assistant secretary, were you, under his direction? A. Yes.

Q. And that was in the accounting department? A. Yes.

Q. What are your duties now?

A. Well, to begin with, I am responsible for the operation of the division offices.

Q. At what point?

A. About fifteen of them. About 210 employees. I also—

Q. That is a matter of books and records and auditing, etc.? A. That is right.

Q. What do you do now?

A. In addition to what I have narrated, I am responsible for the operation of the auditing and statistical department in Minneapolis and fixed capital records. I look after all of

the mechanics of paying taxes on the property now totalling fifty million dollars. I appear annually before the South Dakota Division of Taxation for the company. I have done so for fifteen years, in regard to these South Dakota taxes. I prepare the company's federal income taxes; state income taxes. I am responsible for the preparation of all of the government reports, both federal and state, both regulatory and in the way of taxation. I make all rate studies for the revision of electric and gas rates in our company. I made the original cost study of both gas and electric properties for our companies for Federal Power Commission. I have had an important part in preparation of registration system for practically all of the financing since FPC originated. I am generally assigned to help and assist federal and state regulatory auditors, including the Federal Power Commission, and bankers and insurance men and outsiders who need information from the records. I have personally investigated several properties we have bought since 1935, and a number that we haven't. I have followed through and picked up the records in any offices organized to our system of accounting. I have opened most of the division offices on the property and taken over the existing records way back to 1928. I have been on all of the major construction projects, and most of them I have been on for a considerable period during the active construction. There are many other duties. I think that pretty well summarizes them.

Q. You have a president, do you? A. Yes.

Q. And you have a vice president? A. That is right.

Q. How many vice presidents? A. Two.

Q. Do you have a secretary? A. Yes.

Q. Who is your secretary?

A. Mr. Aytch Woodson.

Q. Do you have an assistant secretary? A. Yes.

Q. And assistant to the president? A. No.

Q. Do you have a treasurer? A. Yes.

Q. Do they have any duties with regard to the operation of the corporation? A. Certainly.

Q. Do you have an engineering department? A. Yes.

Q. Who is at the head of your engineering department?

A. Mr. Smith.

Q. He is a vice president, isn't he? A. That is right.

Q. He works at his duties, does he? A. Certainly.

Q. Do you have engineers in the field? A. Yes.

Q. Do you have other engineers than Mr. Smith in your head office? A. Yes.

Q. Mr. McDonald? A. Yes.

Q. Any others?

A. Mr. Frederickson, cost engineer, and Mr. Pearson.

Q. How many men do you have in the field who are engineers? A. I would not know.

Q. A large corps of them?

A. I don't know their professional standing. There are a number of men who work on technical subjects.

Q. That is on production and operation?

A. That staff is quite limited.

Q. Transmission and distribution?

A. Primarily, Mr. McDonald. I am talking about the time prior to the inclusion of Dakota Public Service.

Q. Has that been changed any since?

A. We naturally inherited the staff at Dakota Public Service Co., and Mr. Bayles.

Q. You spoke of Mr. Bayles concerning a schedule or tabulation. What Bayles is that? A. He is Mr. Ed Bayles.

Q. Was he formerly with the interconnected companies, here in Huron operation, as a part of that joint plan of operation?

A. I understood he worked for Northwestern Public Service.

Q. From whom did you understand that?

A. It was just an impression.

Q. You can tell by referring to the records in 55 and 82 that he was a part of the joint staff of the interconnected operations, couldn't you?

A. From the payroll records I would say he worked for Northwestern.

Q. (Read) You can tell by referring to the records in 55 and 82 that he was a part of the joint staff of the interconnected operations, couldn't you?

A. I didn't draw that conclusion.

Q. You did not? A. No.

Q. You would not say that was not a fact, would you?

A. I don't like to characterize that joint staff. He worked on three properties.

Q. And the Dakota Public Service Co., and the Northern Power & Light Co. and the North Dakota Power & Light Co., paid a portion, a regular portion of his salary, didn't they?

A. They paid Northwestern Public Service Co. a portion of his salary.

Q. The account was cleared through Northwestern Public Service Co. books. That is what you mean, don't you?

A. Yes.

Q. Under this joint management agreement?

A. I think my statement is correct.

Q. You know Mr. Bayles worked on these interconnected corporations since about 1930?

A. I don't have a recollection of the exact date.

Q. He is now working for the plaintiff, isn't he?

A. That is right.

Q. And he is a technical electrical engineer, isn't he?

A. Yes, I believe so.

Q. Is he stationed now out on the Dakota properties?

A. He is at Bismarck.

Q. That is where his headquarters is. Do you know what position he held when he was paid by these interconnected companies?

A. I believe I have heard he was transmission and distribution superintendent.

Q. Do you know how many engineers he has under him, if any? A. No, I haven't any idea.

Q. That is the same man you say you used a Bayles tabulation that Mr. Mauch or someone showed you?

A. I presume so.

Q. Some tabulation that he had made? A. Yes.

Q. And that was 303 tabulation, was it not?

A. My testimony on that should have read Bayles and Gazin.

Q. It is the same Bayles? A. I assume so.

Q. You don't mean to infer, do you, that you represented the company on engineering matters, referring to the plaintiff? A. Well, I would not exclude it in some ways.

Q. I mean outside of this law suit?

A. No. I won't make that statement either.

Q. When the plaintiff purchased the Dakota Public Service Co., did you go up in the capacity of an engineer to make an appraisal of the property?

A. I went out in company with Mr. Heskett and examined key points on both Dakota and Northwestern company.

Q. Did the plaintiff in addition to your examination get a firm of engineers to make an appraisal?

A. We employed a firm of engineers in order to secure the necessary certificates.

Q. At any rate, you employed a firm of engineers?

A. That is right.

Q. They were Day & Zimmerman of Philadelphia?

A. Yes.

Q. People of national scope? A. Yes.

Q. And they made a very exhaustive study and report of their study, didn't they?

A. I would not say the report was exhaustive. It was made for a particular purpose.

Q. They made a report then? A. Yes.

Q. They also made an integration report, didn't they?

A. Yes.

Q. You are familiar with the report? A. I have seen it.

Q. Now, you say you went out on the property with Mr. Heskett. At the time the plaintiff purchased the Dakota Public Service Co. property the plaintiff employed Arthur Young & Co. to audit the property?

A. Yes. That was also for a special purpose.

Q. You have reviewed this audit and this survey by these auditors and these engineers?

A. Yes, I have examined them.

Q. And you are familiar with them?

A. I was at the time.

Q. Had these engineers and these auditors represented you prior to this time in 1945? A. Yes.

Q. Do I understand that you can state positively when the Gettysburg transmission line, when construction on that was instituted, actually, physically, practically started to be built?

A. I can do so from your records, I think. From an examination of them.

Q. Did you testify as to when it was started, when construction was started? A. Yes.

Q. When was that?

A. I believe I said in the fall of 1929.

Q. Will you show the entry from which you made that conclusion?

A. This work order 404. It covers facilities in the Aberdeen area. The Aberdeen substation, Aberdeen to Barnard line, Aberdeen to Ipswich line. It states on the authorization, "Work started October, 1929, and completed October, 1930."

Q. That is the Aberdeen end? A. Yes.

Q. I am speaking about the Gettysburg transmission line.

A. Work order 420. This covers part of the Gettysburg Highmore line. These two jobs were intermingled so they could not be sorted out. This states "Began November 1929, completed October, 1930." The reason I went around the other one, it doesn't seem to be in the files.

Q. Would this be the one?

A. Yes. That is what I am looking for.

Q. That is an exhibit?

A. This one says—This is work order 397, Plaintiff's Exhibit 55-6. First started in December, 1929 and completed in September, 1930. I want to qualify my answer. There is a part of this line covered by another authorization here, No. N-138, which seems to be of a different type or form. It is part of April 24, 1926. But it has written in ink on it, "Work completed August 1, 1926." As I understand, that covers the pole line from Highmore to Harrold.

Q. Now, then, you produced Exhibit 55-6 and 55-7, and you observed, did you not, that the work order 55-6 and the duplicate 55-7, were signed by Mr. Albert as of August 26, 1929? A. I see it now. I probably saw it before.

Q. You also observed, did you not, in Plaintiff's Exhibit 86, that the Pierre election was held on September 3, 1929? A. Yes, I was aware of that.

Q. Now, will you refer again to Plaintiff's Exhibit 55-6 and 55-7 and observe that the further approval of this work order was made by C. L. Sandstedt, as of November 20, 1929?

A. It seems evident his name signed by somebody else.

Q. You also notice that Frost signed as of September 11, 1929? A. Yes.

Q. And that T. P. Parker, the president, signed as of November 19, 1929? A. Yes.

Q. And it was cleared through the engineering department of the Middle West Utility Co., on November 22, 1929? A. It has an approval stamp of that date, yes.

Q. And with a further operating department approval stamp of Middle West Utility Co., as of November 22, 1929?

A. Yes, and pencilled date of November 23.

Q. Pencilled date of November 23. That does not show 1929 does it? A. No.

Q. If Mr. Albert had signed before the Pierre election, and the balance of these men had signed after the Pierre election, wouldn't it be natural, in the course of the business of a power company to have erased the words "and Pierre" from this work order?

A. I don't think anybody would ever have bothered with it.

Defendant's Exhibit 219 was received in evidence. It consists of the minutes of the annual meeting of stockholders of Northern Power and Light Company held on April 21, 1936 at 2:00 P.M. at the office of the corporation, 100 West Tenth Street. Wilmington, Delaware, pursuant to notice duly mailed. Said minutes include, among other things, the notice of the meeting subscribed by C. L. Sandstedt as Secretary, together with his affidavit of mailing, the certificate of the inspectors of election, the proxy vote cast for the election of directors, the certified list of common stockholders as of April 1, 1936, and the proxy executed April 4, 1936, by Provident Trust Company of Philadelphia, Trustee under Trust Indenture of United Public Utilities Corporation dated January 1st, 1935, covering all of the stock standing in the name of said Provident Trust Company of Philadelphia, as trustee as aforesaid, and authorizing the proxies therein named, among other things, to vote for the election of a Board of Directors of said Northern Power and Light Company consisting of M. C. Blackstun, F. E. Kruesi, C. L. Sandstedt, C. J. Strike and S. W. White. Said minutes show, among other things, that at said meeting the Provident Trust Com-

pany of Philadelphia, as trustee as aforesaid, as owner of the 5,388 shares of common stock outstanding as of April 1, 1936, was represented at the meeting by Alfred Jervis, one of the individuals named in the aforesaid proxy, executed by said stockholder; that John E. Barber and O. B. Dendtler were chosen as Chairman and Secretary, respectively, of the meeting; that said Dendtler and P. A. Linskey acted as inspectors of election and filed their certificate showing that the 5,388 votes were cast in favor of the election as directors of Northern Power and Light Company of M. C. Blackstun, F. E. Kruesi, C. L. Sandstedt, C. J. Strike and Samuel W. White, which votes were cast by said Alfred Jervis as proxy as aforesaid; that the annual report submitted by the directors for the preceding calendar year was presented and read and was duly approved and ordered filed; and that the records and minutes of all meetings of the directors of Northern Power and Light Company held since the last preceding meeting of the stockholders were presented to the meeting for inspection and examination by any stockholder desiring to make same.

Q. With respect to Exhibit 85, which is a tabulation of sales of energy during the year 1930 and part of 1931, you stated, I think, that you got that information from this Exhibit 82, which includes all of the records? A. Yes.

Q. Will you produce the part thereof that you used on arriving at these computations?

A. It is in the record now.

Q. Do you refer to Exhibit 82-1? A. Yes.

Q. And your first column heading, what does that refer to?

A. That is supposed to represent the delivery of power—

Q. I am talking about the heading? A. Elgin.

Q. Is that a town in North Dakota?

A. Yes. It is a metering point on the line south from Beulah to Aberdeen.

Q. Does Exhibit 82-1 show all of the records from which you took all of the figures in Exhibit 85?

A. I believe so. I made that for my own use about eighteen months ago. I didn't know it was going to be an exhibit.

Q. And this study, Exhibit 85, was your preparation?

A. Yes, for my own use.

Q. Is there any part of Exhibit 82-2 which you used in the preparation of Exhibit 85?

A. I believe I used 82-2 to find the vouchers from which to select information.

Q. There would be no computation here, then, that would be used by you?

A. No, but when vouchers are in numerical file I have to have some means of locating the proper vouchers and I used this record to get them.

Q. It was a matter of locating vouchers only?

A. That is what I used it for at the time, but it records the history.

Q. You are a stockholder in the plaintiff company?

A. Yes.

Q. In quite a substantial amount? A. Yes.

Q. Does it represent a good portion of your personal fortune? A. Yes, I guess so.

Q. You know it does, don't you?

A. I was just wondering about what your interpretation was.

Q. During your examination you listed increased generating units installed between and including the year 1936 and 1945, did you not?

A. I specifically excluded 1936, I believe.

Q. You did not include 1936?

A. That is my recollection of it.

Q. If I understand you correctly you claim the only new generation provided by the defendant during that period of time was at Yankton? A. Yes.

Q. What is the source upon which you base your statement of what generation was created during that period of time?

A. Primarily Federal Power Commission reports.

Q. Will you produce the document that shows the various plants that you claim were constructed after 1936. Do you have them? A. Yes, I have.

Defendant's Exhibit 55-9 was received in evidence. It is a copy of the verified Annual Report filed by defendant with the Federal Power Commission for the year ended

December 31, 1945, and, in part, sets forth the following information:

Item 101—the officers of defendant and their addresses.

Item 102—the directors of defendant and their addresses and terms.

Item 103—the corporate control over defendant, showing such control to be sole, complete and direct through common stock ownership by North West Utilities Company.

Item 104—shows security holders and voting powers and lists the persons holding securities with their respective addresses, the total number of votes, and the type of stock or other securities with voting power owned, together with the total number of votes entitled to be cast and the number cast at the last general meeting for the election of directors.

Item 200—sets forth the comparative balance sheet showing figures for both the beginning of the year and the end of the year.

Item 274—shows accrued and prepaid taxes including ad valorem taxes.

Item 300—shows the income and earned surplus account together with increase or decrease from the preceding year.

Item 420—shows taxes charged during the year including ad valorem taxes.

Item 427—shows service contract charges by associated companies and sets forth that Middle West Service Company rendered such services in connection with engineeering, purchasing, commercial, accounting, rate, merchandising, income tax and other matters, that it charged for such services on a cost basis under a contract dated February 16, 1937, running for an indefinite period, that such contract had not been approved by the Commission, and the aggregate paid for such services and expenses during the preceding year broken down between electric, gas and heating divisions.

Item 428—shows management and engineering contracts with non-associated companies including the same kind of information as that included under Item 427.

Item 500—shows the original cost of electric plant in service at the beginning of the year together with additions and retirements during the year broken down into the subdivisions of intangible plant, production plant (steam, hydraulic and internal combustion), transmission plant, distribution plant and general plant.

Item 530—shows sales to other electric utilities (but did not set forth any sales of power by defendant to Dakota Public Service Company).

Item 536—shows rents received during the year for the use by others of electric property owned by defendant (and shows receipt by defendant from Dakota Public Service Company for "lines and substations for interconnection" in the sum of $20,000.00).

Item 551—shows purchased power (but does not set forth any power purchased by defendant from Dakota Public Service Company).

Item 552—shows interchange power and, in detail, all kilowatt-hours received and delivered during the year and the net charge or credit under interchange power agreements. Subdivision A shows a summary of interchanges according to companies and points of interchange, including the designation of the other companies as either associated or nonassociated utilities, associated or nonassociated nonutilities, or municipalities; whether the interchange was intrastate or interstate; the voltage at which energy is interchanged; and the kilowatt-hours received, delivered and the net difference; and the amount of settlement in dollars. The report sets forth, among other things, the interchange between defendant and Dakota Public Service Company, the latter being classified as a nonassociated utility and the interchange as intrastate; the points of interchange as being Aberdeen and Gettysburg, South Dakota; the voltage as being 33,000/38,000; 10,625,500 KWH received; 1,937,120 KWH delivered; the net difference of 8,688,380 KWH; and the amount of settle-

ment as being $20,447.50. Subdivision C shows the details of settlement for interchange power including names of the companies with which defendant interchanged power, remarks, demand charges, energy charges, other charges and total settlement. The report sets forth as to defendant and Dakota Public Service Company energy charges due from defendant to Dakota Public Service Company of $43,441.90 with an offset for "other charges" which, as stated, "represents reserve capacity charge", resulting in a total settlement from defendant to Dakota Public Service Company of $20,447.50.

Item 579—shows generating station statistics including among other things the location and kind of plant, the year originally constructed, the year the last unit was installed, the total installed generating capacity (name plate ratings), the peak demand on each plant in kilowatts (60 minutes), the net generation and the production expenses including the fuel cost.

Item 581—shows changes made or scheduled in generating station capacities, including stations or units scheduled for or undergoing alterations or additions, and also new stations or units scheduled for or under construction.

Item 583—shows statistical information as to steam generating stations including boilers, prime movers and generators, showing as to each, among other things, the location, type or description, and the year of installation.

Item 585—shows statistical information as to internal combustion engine generating stations including both prime movers and generators, showing as to each, among other things, the location, description and year of installation.

Q. I show you book marked Defendant's Exhibit 55-9, and ask you if that document was a part of the group designated and offered in evidence as Exhibit 55?

A. Yes, it was, and it is the source from which I determined the new generating capacity on the Northwestern Public Service Co. system.

Q. In determining new capacity placed upon the system of the defendant company during the years 1937 to 1945, inclusive, you need nothing except Exhibit 55-9, do you?

A. I would not be sure about that. There might have been material added or removed in the intervening time.

Q. Where would you find anything that was removed from the defendant's system, other than in this, or what else? A. There is a number of them.

Q. Will you indicate what other records are necessary for you to determine and testify as to increased capacity on the defendant's system from 1937 to 1945, both inclusive?

A. To make an exhaustive study of it, we ought to have all of them.

Q. Get them. You are the man that testified to this stuff. I am asking you what you testified from.

Mr. Benson: How many books do you have there?

The Witness: Seven in addition to the two I previously brought out.

Defendant's Exhibits 55-10 to 55-17, both inclusive, were received in evidence and are copies of the verified Annual Reports filed by defendant with the Federal Power Commission for the years 1938, 1939, 1940, 1941, 1942, 1943, 1944 and 1937, respectively. They contain the same type of information for the respective years covered by each of the reports as that contained in Defendant's Exhibit 55-9 (R. p. 643, supra). Three of said reports also contain some correspondence between defendant and the Federal Power Commission, none of which pertains to any of the rates, charges or contracts involved in this case.

Q. I show you documents marked Defendant's Exhibits 55-10 to 55-17, both inclusive, and ask you if they in each instance are a part of the general exhibit, No. 55, heretofore offered and received in evidence? A. Yes, they are.

Q. And do each of these documents refer to Northwestern Public Service Co.? A. Yes.

Q. And are these all of the files that you used in de-

termining the increase of generation on the defendant system for the years 1937 to 1945, both inclusive?

A. Yes, I believe so.

Q. Now, will you indicate when the Redfield generation was increased as shown by those documents?

A. The book shows 1937.

Q. You didn't mention that, did you, in your examination? A. No, I didn't. I overlooked that. I am sorry.

Q. Did you mention on the system of the defendant the boiler at Aberdeen?

A. I understood the question referred to capacity.

Q. If that affected capacity should it have been mentioned?

A. My understanding of the term capacity, in the question, was as used in these contract.

Q. You did mention, didn't you, two boilers at Bismarck for the plaintiff company and its predecessor?

A. That is correct.

Q. And you mentioned the boiler at [Buelah] for the plaintiff and its predecessor? A. That is right.

Q. But you didn't mention the boiler at Aberdeen in 1943, did you? A. No, I didn't.

Q. Will you look at those exhibits, 55-10 to 55-17, and indicate whether or not boilers were placed in the Aberdeen property or plant of the defendant company in the years 1943 to 1945?

A. The books shows 1943, commissioned in 1945. My understanding was the 1945 boiler was not in operation at the time.

Q. Your understanding does not account for anything you are reading in that book, though, does it? A. No.

Q. Also in 1945 they installed 7500 KW's in Aberdeen, didn't they? A. That is correct, and that was in operation.

Q. There is nothing in that book that shows it was not in operation is there? A. I don't know.

Q. And you said that was what you were testifying from, didn't you? A. That is right.

Q. Can you tell from any record that you have in Exhibit 55, whether or not a thousand kilowatt of capacity was installed at Armour in the season of 1935, on the defendant's system.

A. I think that is correct. Slightly short of a thousand.

Q. Mr. Elvig, are you testifying largely from records and files of the interconnected companies, or have you an independent knowledge of transmission and power plant generation, etc.? A. A little of both, I would say.

Q. Do you know where Bowdle is? A. Yes.

Q. Ever been there?

A. Been through there on the train, I guess.

Q. What train? A. Milwaukee.

Q. Stop there? A. No.

Q. Ever been to Wishek? A. I don't believe so.

Q. Ever been at Ipswich?

A. I have gone through Ipswich.

Q. The train didn't stop there, did it?

A. No. I have driven there also.

Q. Did you ever examine the power plant and the transmission and that sort of thing? A. At Ipswich, no.

Q. You have testified concerning the transmission line from Bowdle to Ipswich? A. Yes.

Q. Can you find the documents upon which you based your testimony concerning the Bowdle to Ipswich line?

A. Yes.

Q. Will you produce them, please?

Mr. Benson: What have you just handed counsel?

The Witness: Work order files covering construction of 38,000 volt transmission line between Bowdle and Ipswich. I don't remember the number of it.

Q. And the records you just handed me concerning work orders and the work order file, they are a part of the general Exhibit 82, are they? A. Yes.

Defendant's Exhibit 82-19 was received in evidence. It consists of a folder containing miscellaneous documents, including carbon copies, detailed field reports and correspondence, pertaining to Work Order 653 and Work Order 654-R of Dakota Public Service Company. Defendant's Exhibits 82-20 and 82-21 were extracted from Defendant's Exhibit 82-19 and are hereinafter reproduced in part.

Q. I show you Defendant's Exhibit 82-19 consisting of numerous records and files and ask you if they are a part of the record, Exhibit 82, which has been offered and received in evidence? A. They are.

Defendant's Exhibit 82-20 was received in evidence and is Work Order No. 653 and final return sheet in connection therewith, and is in part as follows:

WORK ORDER

Dakota Public Service Co. Aberdeen, S.D. Company
Date [illegible] Station Bonilla-Ipswich Utility Electric

W. O. No. [illegible]
Budget Sched. No. [illegible]
Acct. No. [illegible]
Franchise Exp. Date [illegible]

Description To build a 33000 volt transmission line from a point 1 mile east of the Bonilla substation to Ipswich, South Dakota, distance of 28 miles. Normal pole 35' - 3 pole structures @ every mile; 3 pole structures at 1/2 mile; two transposition 2 pole structures; a 4 pole switch structure at Bonilla and Ipswich, S.D. Conductor to be 2/0 aluminum, with ACSR reds; 45 KV insulators; [illegible] conductor 4' below crossarms.

APR 15 1940
BUDGET & ANALYSIS DEPT.

Date Work To Be Started June 1, 1940
Date Work To Be Finished Aug. 31, 1940

Retirement
Sec [illegible] Work Order No. Gen 2
Inv [illegible]

Proposed Expenditures—Budget Schedule No. [illegible]
Previous Authorizations $ -
This Authorization $59,[illegible]

ESTIMATE OF COST OF WORK TO BE APPROVED	AMOUNT
1. [illegible] Purchased	37,[illegible].04
2. [illegible] To Be Used From Stock	2,827.71
3. [illegible] Material To Be Used	
4. [illegible] Equipment Cost of right of way	780.00
5. Labor	11,200.00
6. [illegible] expenses	2,600.00
7. [illegible]	55,[illegible].75
8. [illegible] Department Charge 7 %	2,[illegible].80
9. [illegible] Office Supervision 3 %	1,744.76
10. [illegible] On Idle Investment %	
11. [illegible] Cost of Work To Be Approved	58,[illegible].41
[illegible] WORK ORDERS	AMOUNT
[illegible] Transformers and Installation	
[illegible] Meters and Installation	
[illegible] Services	
[illegible] Short Extensions	
16. [illegible]	
17. [illegible]	
18. [illegible] Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	58,503.41
22. Less: Salvage To Be Used	—
23. Transferred Equipment	—
24. Contributions	—
25. Refundable Deposits	—
26. Permanent Work Orders	—
27.	—
28. Total	—
29. Total Cash Required for New Work to be Authorized	58,503.41

BENEFITS ACCRUING FROM NEW WORK	
Increased Gross Revenue Per Year	[illegible]
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	[illegible]
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	[illegible]
% Decreased Expense To Cost of New Work	[illegible]

ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	
(How Computed and Date Installed)	
Less: Transferred Equipment	
Original Cost of Property Retired	
Cost of Removing Property Retired	
TOTAL	
Salvage Mat.—Junk Value	—
Salvage Mat.—Ret. to Stock	—
	—
TOTAL SALVAGE MATERIAL	—
NET RETIREMENT CHARGE	

		DATE
Submitted By	[illegible]	DATES 4-10
Checked By	[illegible]	4-8-40
Checked By	E. L. Bayless	4-9-40
Checked By		
Approved	[illegible]	4-9-40
Approved	[illegible]	4-11-40
Approved	[illegible]	4/12/40
Approved		
Approved		
Approved		
Approved		
Approved MIDDLE WEST SERVICE CO.		
Authorized By	[illegible]	4/22/40

*Investment-Retirement-Maintenance-Operating-Suspense

(OVER) DFC Smf 4/23

3

8351

Part of Defendant's Exhibit 82-20.

653

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

ACCOUNT NUMBER	ITEMS	SIZE	QUANTITY	COST PER UNIT	AMOUNT
1146	1. Head braces sets of 2 ea. 60" sp. 30" drop		579	1.72	995.88
	2. Crossarms 4"x5"x10'		579	1.95	1129.05
	3. Pins 1 3/8" LHx3/4 x 7" x 9" top		1536	.97	1489.92
	4. Pins 1 3/8" LH x 3/4 x 2x9" top		572	.73	417.56
	5. Poles Class 4 - 30' WRC BT	30'	51	7.60	387.60
	6. " " 3 - 35' WRC BT	35'	572	10.72	6131.84
	7. " " 2 - 40' WRC BT	40'	83	13.39	1111.37
	8. " " 2 - 45' " BT	45'	21	16.18	339.78
	9. " " 2 - 50' " BT	50'	5	20.16	100.80
	9A. " " 2 - 55' " BT	55'	4	22.58	90.32
	10. Ridge irons #1144 or equiv.		572	1.64	938.08
	11. Structures 2 pole "F" Hughes or equiv.	#A301	37	20.00	740.00
	12. " 3 pole "P" " " "	#A302	26	53.00	1378.00
	13. " 2 pole "F" " " "	#A303	2	33.00	66.00
	14. " 4 pole sgs 10'x14" " "	#B323	2	225.00	450.00
	15. Conductor ACSR sl. with armor rods - tie wire	#2/0	87500#	.21	18375.00
	16. " neutral 1/4" Siemens-Martin steel	1/4"	157833#	.0153	2414.84
	17. Insulators 46 KV 1 3/8"		1979	1.09	2157.11
	17A. " 46 KV 1 3/8" silentype		129	1.40	180.60
	18. Suspension insulators 10" strings of 4 each	#601	24	10.50	252.00
	19. #6 copper strand - grounds		3500#	.14	490.00
	20. Lightning protection arc gaps		128	2.50	320.00
	21. Air break switches [illegible] 3 pole 45 KV		2	400.00	800.00
	Total Material				40755.75
	ENG 7%				2852.90
	23. Purchase cost of right of way easements				750.00
	Total				44358.65
	Labor PCE				6000.00
	Labor ACE				4500.00
	Miscellaneous expenses				700.00
	24. Contingencies Total Labor				11200.00
	Transportation expenses				750.00
	Engineering and estimating				750.00
	Legal services other than Co. (surveying)				750.00
	Purchasing easements				350.00
	25. Administrative and general expenses 3%				1744.76
	Total Cost				59903.41

TOTAL CASH REQUIRED — BY WORK — BY MONTHS		
MONTH		ESTIMATE
January	19	
February	19	
March	19	
April	19	
May	19	
June	19 30	20,000.00
July	19 [illegible]	20,000.00
August	19 [illegible]	19,903.41
September	19	
October	19	
November	19	
December	19	
TOTAL		59,903.41

Reason Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

4

Part of Defendant's Exhibit 82-20.

653

Defendant's Exhibit 82-21 was received in evidence and is Work Order No. 654-R and final return sheet in connection therewith and related miscellaneous papers, and is in part as follows:

WORK ORDER

Retirement

W. O. No. 653 R
Budget Sched. No. 4
Acct. No. 1365 - 1146
Franchise Exp. Date

Dakota Public Service Co. Mobridge, S.D. Company
Date 3-26-40 Location Bowdle to Ipswich Utility Electric

Description

To retire the present 23000V 3 phase transmission line beginning 1 mile east of Bowdle substation and extending east to Ipswich South Dakota a distance of approximately 30 miles. Line #419. 29.5 miles actually retired. .5 mile remains in service becoming the Roscoe feeder distribution line due to the location of the new line.

RECORDED
APR 15 1940
BUDGET & ACCOUNTS DEPT.

Dftfy 82-21 Filed Feb 28 1945 Reg. U.S. Thurlow Deputy

Date Work To Be Started

Date Work To Be Finished

Retirement
See Work Order No. 653
Investment

Proposed Expenditures—Budget Schedule $
Previous Authorizations $
This Authorization $

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	
2. Material To Be Used From Stock	
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	
6.	
7. Total	
8. Stores Department Charge %	
9. General Office Supervision %	
10. Interest On Idle Investment %	
11. Total Cost of Work To Be Approved	
PERMANENT WORK ORDERS	AMOUNT
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	
22. Less: Salvage To Be Used	
23. Transferred Equipment	
24. Contributions	
25. Refundable Deposits	
26. Permanent Work Orders	
27.	
28. Total	
29. Total Cash Required for New Work to be Authorized	

Submitted By [signature] DATE 3-40
Checked By [signature] 3-8-40
Checked By [signature] 4-9-40
Checked By

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	
% Decreased Expense To Cost of New Work	
ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	[redacted]
(How Computed and Date Installed)	
I.P.Sy. Conn. Instr. -Page 9)	
Less: Transferred Equipment	
Original Cost of Property Retired	[redacted]
Cost of Removing Property Retired	[redacted]
TOTAL	[redacted]
Salvage Mat.—Junk Value	
Salvage Mat.—Ret. to Stock	12,667.59
TOTAL SALVAGE MATERIAL	[redacted]
NET RETIREMENT CHARGE	[redacted]
Approved [signature]	4-9-40
Approved [signature]	4-10-40
Approved [signature]	4/10/40
Approved	
Approved	
Approved	
Approved	
Approved MIDDLE WEST SERVICE CO.	
Authorized BY [signature]	478.40

*Investment-Retirement-Maintenance-Operating-Suspense

(over) OK Ernst 4/10

5

Part of Defendant's Exhibit 82-21.

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below) Original Cost

ACCOUNT NUMBER	ITEMS	Dis-position	Quantity	Size-Unit Cost	Amount	COST PER UNIT	AMOUNT
1144	1. Crossarms 3½x4½x8' offset	OK	519	.50	259.50	2.35	1219.65
	1A. " " " " "	NG	100	mc	-	2.35	235.00
	2. Timbers 6"x6"x12'	OK	2	1.48	2.96	19.69	39.38
	3. Down guys single DM	OK	3	.94	2.82	4.56	13.68
	4. Down guys " PA	OK	85	.94	79.90	4.46	379.10
	5. " " double DM	OK	1	1.88	1.88	7.50	7.50
	6. OH Guys	OK	10	2.75	27.50	3.45	34.50
	7. Clamp on steel pins 1 3/8" LH	NG	1842	mc	-	1.05	1934.10
	8. Pins steel LH 1 3/8"	OK	21	.87	18.27	1.03	21.63
	9. Poles 30' BT	OK	360	7.60	2736.00	11.33	4078.80
	10. Poles 30' BT	NG	175	.25	43.75	11.33	1982.75
	11. Poles 35' BT	OK	60	10.72	643.20	16.25	975.00
	12. Poles 35' BT	NG	22	.25	5.50	16.25	357.50
	13. Poles 40' BT	OK	10	13.39	133.90	19.81	198.10
	14. Poles 40' BT	NG	5	.50	2.50	19.81	99.05
1145	15. Insulators 35KV 1 3/8"	OK	1863	.25	465.75	1.71	3185.73
	16. Suspension insulators 10" #601	OK	99	1.65	163.35	2.899	287.00
	17. Conductor copper 3#8 stranded	OK	647464	.113	7316.30	.2202	14257.07
	17A. " " " "	NG	71944	.05	359.70	.2202	1584.12
	18. Copper DH shoes 3#8	OK	6	mc	-	Included with wire	
	19. Copper running corner shoes 3#8	NG	24	.28	6.72	"	"
	Total cost of material				12269.80		30,889.66
	Add 10.3% Appraisal Overheads						3,181.63
							34,071.29

Note: N.D.P.R.Comm. appraisals lists 671 = crossarms whereas our actual inventory shows 629 crossarms total in this line. We believe our figure to be correct. The difference between the arms retired and 629 is accounted for on the portion of line not actually retired.

Retirement Cost - $3500.00

TOTAL CASH REQUIRED FOR NEW WORK — BY MONTHS	
MONTH	ESTIMATE
January 19	
February 19	
March 19	
April 19	
May 19	
June 19	
July 19	
August 19	
September 19	
October 19	
November 19	
December 19	
TOTAL	

Reason Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

This transmission line is in bad condition. Some of the poles are becoming rotted. The grading and ground clearance is poor. The line is under insulated for use as a 35000 V line. The conductor is 3#8 copper stranded and is badly worn at the insulator ties.

657

Part of Defendant's Exhibit 82-21.

Q. As I understand it, you have sent your assistant to the hotel for the property subsidiary sheet which covers this project? A. Covers the transmission line.

Q. Will that be something you will have to have in order to further discuss this matter? A. I don't believe so.

Q. I show you Exhibit 82-20, and ask you if that shows the amount or the cost of the construction, Bowdle to Ipswich?

A. Are you speaking about a specific figure? There are a number of figures here.

Q. I asked you if that is the document from which you got the figure you gave as to cost of that work?

A. I think I qualified my reply to this particular question by giving two figures.

Q. What figures did you give?

A. One of approximately $55,000.00, and another something over $50,000.00, to cover the changes because there seemed to be accounting adjustments between the completion of the construction and shortly thereafter.

Q. Was there any retirement in connection with this work order No. 653, which has been marked Defendant's Exhibit 82-20?

A. I believe there was another line stricken out, yes.

Q. You know there was, don't you? A. From the record.

Q. Yes. That is all you know about this law suit, is from the records, isn't it? Now, you have handed me as part of this record from which you say you testified, a retirement voucher, 82-21. I want you to look at that. That is one of the papers you handed me, isn't it? A. Yes.

Q. Did you consider that when you told the Court this cost between $50,000.00 and $55,000.00?

A. My testimony was adequate.

Q. Did you mention this paper, Defendant's Exhibit 82-21? A. No sir.

Q. Now, isn't it a fact, that as shown by Exhibit 82-21, there was retired some $25,000.00 on this project, incident to the construction shown by Exhibit 82-20?

A. When the new line was built the old one was taken out, which is the custom.

Q. And the retirement was $25,601.79, wasn't it?

A. That is the estimated charge, I believe, when the authorization was approved.

Q. Your ledger will show, won't it, when it comes?

A. Usually it would, but this particular accounting is a little involved. My figure is not far wrong.

Q. You say it is not too far wrong? A. That is right.

Q. Can you tell us, as a matter of fact, whether or not when the transmission line runs down to Ipswich from Bowdle, that that is the end of the plaintiff's system at that point? A. Yes, I can tell that.

Q. It is the end of your line there, isn't it?

A. Yes, last of our line.

Q. It is the line by which the plaintiff company serves Ipswich, isn't it? A. Yes.

Q. In other words, you would have to have that line there if you were going to keep lights in Ipswich, wouldn't you? A. Either a transmission line or a power plant.

Q. Going back to Exhibits 82-19, 82-20, and 82-21, particularly 82-20 and 82-21, I observe that they have approval as work orders by a number of persons. Are you familiar with the signatures or initials?

A. I know Mr. Harrison's, Mr. Bayles', Mr. Buckmier's signatures, from long standing. I think I recognize Mr. Sandstedt's. I recognize Mr. Corbin's from examination of the files.

Q. Can you identify the initials of White?

A. I learned in Chicago that was Mr. White's initials.

Q. You would say then, from that knowledge, that is Mr. White's initials on that instrument?

A. I believe so, yes.

Q. Is that the signature of A. B. Sanborn? Does that strike any recognition? A. That is familiar also.

Q. In both of these instruments? A. Yes.

Q. We are now talking about the Wishek Bowdle line. I think you identified that as new construction sometime between 1936 and 1945, and gave the cost of that.

Q. Will you produce the records from which you got the information concerning that testimony?

Mr. Benson: What are you handing counsel?

The Witness: This contains work order 366, 367-R, and work order 370.

Q. You have reviewed that transmission line?

A. What do you mean by "reviewed"?
Q. Seen it? A. No, I don't believe I have.
Q. Then your testimony is a matter of records and based upon records? A. Yes.

Defendant's Exhibit 82-22 was received in evidence, consisting of Work Order 365 of Northern Power and Light Company and related papers. It is in part as follows:

[redacted] VE

JUN 12 1935

WORK ORDER

INVESTMENT

W.O. No. 366
Budget Sched. No. 23
Acct. No. 1122.1, 1123.1

[redacted] POWER & LIGHT Company
Date 5/13/35 Location BOWDLE Utility ELECTRIC

Description Build new 38 KV line from Bowdle to Wishek, using 2/0 ACSR and 35', class 3 poles with 240 foot spacing and storm guyed at each half mile.

Retirement
See Investment Work Order No. 367-R

Date Work To Be Started Augl 1, 1935
Date Work To Be Finished Nov. 1, 1935

ESTIMATED COST OF WORK TO BE APPROVED	Amount
Material To Be Purchased	62588.78
Material To Be Used From Stock	4000.00
[redacted] Right of Way	3000.00
[redacted] Incidentals	3379.44
Labor	14860.00
Total	88818.22
Stores Department Charge 10%	8061.16
General Office Supervision 1% 784.11	[redacted]
Interest On Idle Investment	978.79
Total Cost of Work To Be [redacted]	[redacted]
PERMANENT WORK ORDERS	Amount
Transformers and Installation	
Meters and Installation	
Services	
Short Extensions	
Total Permanent Work Orders	101 304 55
TOTAL COST OF NEW WORK	[redacted]
Less: Salvage To Be Used	
Transferred Equipment	
Contributions	
Refundable Deposits	
Permanent Work Orders	
Material in stock 4000.00	
TOTAL	4000.00
[redacted]	[redacted]
Submitted By [redacted]	5-13-35
Checked By [redacted]	5/17/35
Checked By [redacted]	5-18-35
Checked By [redacted]	5-16-35

RECEIVED
MAY 23 1935
BUDGET DEPT.

BENEFITS ACCRUING FROM NEW WORK	Amount
Increased Gross Revenue Per Year	
% Increased Gross Revenue To Company Cost	
Increased Net Revenue Per Year	
% Increased Net Revenue To Company Cost	
Decreased Expense Per Year	2000.00
% Decreased Expense To Company Cost	1.8%
ESTIMATED RETIREMENT CHARGE	Amount
Original Cost of Property Retired	
(How Computed)	
Cost of Removing Property Retired	
TOTAL	
Salvaged Mat.—Junk Value	——
Salvaged Mat.—Ret. to Stock	——
TOTAL SALVAGE MATERIAL ——	
NET RETIREMENT CHARGE	

		DATE
Approved	R. L. Walsh	5/18/35
Approved	[redacted]	5/18/35
Approved	[redacted]	5/23/35
Approved	[redacted]	MAY 27 35
Approved	[redacted]	JUN 8 1935
Approved	[redacted]	JUN 8 1935
Approved		
Approved		
Approved		
Approved		
Authorized	[redacted]	JUN 8 1935

*Investment Retirement Maintenance Summary

(Over) OK [redacted]

J

661

Defendant's Exhibit 82-22.

DETAILED ESTIMATE OF COST (Itemize Labor & Material Below)

Account Number	Items	Size	Quantity	Cost Per Unit	Amount
1183.1	1 [illegible] poles 1/2" penetration 35'	Class 3	1076	15.00	[illegible]
	2 " " " 40'	" 3	[illegible]	15.00	[illegible]
	3 " " " 45'	" 3	88	17.00	[illegible]
	4 " " " 50'	" 3	80	20.00	[illegible]
	5 " " " 55'	" 3	30	33.00	[illegible]
	6 10' Wash Pin arms	4x5	1154	1.85	[illegible]
	7 11' " " "	4x5	96	1.85	[illegible]
	8 12' " " "	4x5	288	1.85	[illegible]
	9 15' " " "	4x5	15	5.00	[illegible]
	10 60" Wood cross arm braces	60"	1154	1.20	[illegible]
	11 Pole bands	5"	18	1.00	[illegible]
	12 3/4x14" Thumbolts	14"	1154	.15	[illegible]
	13 5/8x10" "	10"	1744	.10	[illegible]
	14 1/2x8" Carriage bolts	1/2"	2308	.05	[illegible]
	15 1 3/8" Lead head steel pins	8"	2307	.60	[illegible]
	16 13/16" hole 3" washers	13/16"	3844	.015	[illegible]
	17 11/16" " 3" "	11/16"	844	.015	[illegible]
	18 5/8" Lockmits	5/8"	2344	.01	[illegible]
	19 3/4" "	3/4"	1154	.01	[illegible]
	20 1/2" "	1/2"	2848	.01	[illegible]
	21 Staple clamps	1/4"	1348	.30	[illegible]
	22 Copperweld staples	3"	30,000	.005	[illegible]
	23 3/8" Galv. guy strand.	3/8"	8000'	1.60 C	[illegible]
	24 Anchor rods 3/4x8'	3/4"	36	.75	[illegible]
	25 Anchor logs	8'	36	1.00	[illegible]
	26 Square washers 4"	13/16"	1036	12.00 C	[illegible]
	27 Thimbles	[illegible]	18	.05	[illegible]
	28 3 bolt heavy clamps	[illegible]	72	.35	[illegible]
	29 X Braces - sets	[illegible]	128	12.00	[illegible]
	30 X Braces	[illegible]	128	[illegible]	[illegible]
	31 3/4x16" Thumbolts	3/4	256	[illegible] C	[illegible]
	32 3/4x8" Eye bolts	3/4"	76	[illegible] C	[illegible]
	33 3/4" Eyelets	3/4"	56	.35	[illegible]
1183.1	34 3-Unit suspension strings complete	45 KV	37	7.00	[illegible]
	35 2/0 ACSR Staple clamps	2/0	155	2.25	[illegible]
	36 2/0 ACSR Conductor	2/0	[illegible] lb.	.14	[illegible]
	37 45 KV Insulators	5 3/8"	3307	2.25	[illegible]
	38 Sets of Anchor rods	2/0	4000	.35	[illegible]
	39 Anchor rod clamps	2/0	9150	.35	[illegible]
	40 3" .1368 Dia Wire	3"	37,000'	.005	[illegible]

TOTAL COST OF NEW WORK—BY MONTHS		
Month		Estimate
January	19	
February	19	
March	19	
April	19	
May	19	
June	19	
July	19	
August	19[illegible]	[illegible]
September	19[illegible]	[illegible]
October	19[illegible]	[illegible]
November	19	
December	19	
TOTAL		

Reason Why Work Should Be Done: The present line is on small 30' poles and is 3 number 8 copper strands. The lines served from this line have had much poor service during recent sleet storms that we will lose some of the farms if this line isnot rebuilt. The savings shown are estimated savings in maintenance

8

Defendant's Exhibit 82-22.

663

Defendant's Exhibit 82-23 was received in evidence, consisting of Work Order 367-R of Northern Power and Light Company and the final return sheet thereon.

S. W. Syst. 30 Rev.—6-31.

WORK ORDER

RETIREMENT

W.O. No. 367-R Sheet 1
Budget Sched. No. 23
Acct. No. 11281, 1128.1

[redacted] POWER & LIGHT Company
Date [redacted] Location BOWIE Utility ELECTRIC

Description: Retire 25 miles of line from Bowdle to Eureka, 28 miles from Mound City Junction to a point one mile west of Wishek and 2 miles of Stub line into the Venturia sub.

See Retirement / Investment Work Order No. 366

Date Work To Be Started Aug. 1, 1934
Date Work To Be Finished Sept. 1, 1934

ESTIMATED COST OF WORK TO BE APPROVED	Amount
Material To Be Purchased	
Material To Be Used From Stock	
Salvage Material To Be Used	
Transferred Equipment	
Labor	
Total	
Minor Investment Charge 10%	
General Office Supervision	
Interest On Life Investment	
Total Cost of Work To Be Approved	

RETIREMENT CREDITS	Amount
Transformers and Installation	
Meters and Installation	
Services	
Plant Extensions	
Total Retirement Work Orders	
TOTAL COST OF THIS WORK	
Less Salvage To Be Used	
Transferred Equipment	
Labor	
Material Disposals	
Retirement Work Orders	
Total	
Estimated by	E-B-B
Checked by	[illegible]
Checked by	[illegible]
Checked by	8-16-34

BENEFITS ACCRUING FROM NEW WORK	Amount
Increased Gross Revenue Per Year	
% Increased Gross Revenue To Company Cost	
Increased Net Revenue Per Year	
% Increased Net Revenue To Company Cost	
Decreased Expense Per Year	
% Decreased Expense To Company Cost	
ESTIMATED RETIREMENT CHARGE	Amount
Original Cost of Property Retired	15,780.05
(How Computed) Appraisal [illegible]	
Page 230 [illegible]	
Cost of Removing Property Retired	[illegible]
TOTAL	[illegible]
Salvaged Mat.—Junk Value	1,376.71
Salvaged Mat.—Ret. to Stock	—
TOTAL SALVAGE MATERIAL	[illegible]
NET RETIREMENT CHARGE	[illegible]
Approved R. E. Wabel	[illegible]
Approved [signature]	[illegible]
Approved [signature]	[illegible]
Approved [signature]	[illegible]
Approved [signature]	[illegible]
Approved [signature]	[illegible]
Approved [signature]	[illegible]
Approved	
Approved	
Approved	
Approved [signature]	

RECORDED
AUG 23 1934
BUDGET DEPT.

*Investment-Retirement-Maintenance-Suspense

(Over) [signature]

Defendant's Exhibit 82-23.

5

DETAILED ESTIMATE OF COST (Itemize Labor & Material Below)

Account Number	Items	Size	Quantity	Cost Per Unit	SALVAGE Amount
		REV.			
		DUE.			
		BAL.			
[illegible]	[illegible] Poles				
	[illegible]	1			
	[illegible]	2			
	[illegible]	3			
	[illegible]	4			
	[illegible]	5			
	[illegible]	6			
	[illegible]	7			
	[illegible]	8			
	[illegible] MA	9			
	[illegible]	10			
	[illegible]	11			
	[illegible]	12			
	[illegible]	13			
	[illegible]	14			
	[illegible]	15			
	[illegible] MA	16			
	[illegible]	17			
	[illegible]	18			
	[illegible]	19			
	[illegible]	20			
	[illegible]	21			
	[illegible]	22			
	[illegible]	23			
	[illegible]	24			
	[illegible]	25			
	[illegible]	26			
	[illegible]	27			
	[illegible]	28			
	[illegible]	29			
	[illegible]	30			
	[illegible]	31			
	[illegible]	32			
	[illegible]	33			
	[illegible]	34			
	[illegible]	35			
	[illegible]	36			

Reason Why Work Should Be Done:

1-AO
1-

10

Defendant's Exhibit 82-23.

DETAILED ESTIMATE OF COST (Itemize Labor & Material Below)

Account Number	Items	Size	Quantity	ORIGINAL Cost Per Unit	SALVAGE Amount
	Retire total amount of 23 miles from Bowdle to Eureka - Page 239 Appr.			28,300.16	
	Retire 30 miles of line on the Eureka to Wishek line Page 240 - Appr. @ 1189.44 per Mi.			35,683.20	
				63,983.36	
	20% - Appraisal Overhead			12,796.67	
36	1 Assmt. 4/0 x 5 x 12			76,780.03	23,376.71
37	- 3/8 x 4½ x 18 -				
38	Brace 28"				
39	Eyelets				
40	15 KV Insulators #601				
41	4 x 8 Steam plates				

TOTAL COST OF NEW WORK—BY MONTHS	
Month	Estimate
January 19	
February 19	
March 19	
April 19	
May 19	
June 19	
July 19	
August 19	
September 19	
October 19	
November 19	
December 19	
TOTAL	

Reason Why Work Should Be Done:

Defendant's Exhibit 82-23.

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Q. Will you produce the ledger sheets of the property accounts of these two transmissions?

Q. I show you Defendant's Exhibit 82-22 and 82-23. They are a part of general exhibit 82, are they not?

A. Yes, they are.

Q. Now, what do you say the cost of the Bowdle Wishek line was?

A. I don't recall. I had some notes when I testified.

Q. Will you refer to your notes? A. $111,873.01.

Q. And that is shown by Defendant's Exhibit 82-22, isn't it? A. Yes.

Q. Now, then, was there any retirement out of, or at the time of the construction of that transmission? A. Yes.

Q. And that is shown by Defendant's Exhibit 82-23, isn't it? A. Yes.

Q. And it shows a retirement of $55,071.56, in part, in addition thereto $75,517.00 plus. Isn't that right?

A. I would say this voucher indicated a retirement of $75,517.36 from the property account.

Q. And that is reflected in these ledger sheets. Your ledger sheets don't have this data back of the evidence of appraisal by the North Dakota Commission, following the installation of the transmission line?

A. I assume that is the reason, yes.

Q. Now, concerning the Bowdle to Ipswich line. Is the transaction concerning the Bowdle to Ipswich line reflected on ledger pages, Defendant's Exhibit 82-24?

A. Yes. This is the ledger sheet that I stated was confused. In and out. And it is not clear.

Q. It would appear then that prior to the construction of the new line, it was carried on the property ledger at $34,720.54? A. Yes.

Q. And after the completion of the construction and the retirement of the old line, it was carried on the property ledger as $50,851.11? A. Yes.

Q. Do you think you can identify the signatures of approval on the work order and the retirement, these exhibits 82-22 and 82-23? A. Yes, I can.

Q. Do you recognize them as being the signatures of the parties appearing there? A. Yes.

Q. Is that true also of the initials of S. W. White?

A. That looks like his initials.

Q. From your study of the system of the plaintiff, insofar as applied to Bowdle and Wishek, that is a part of the company transmission line, isn't it?

A. It is a part of the transmission system, yes.

Q. That line served for the Dakota Public Service Co., and now the plaintiff and the predecessor companies, the towns of Ashley, Ventura, Wetonka, Eureka, Hillsview, Hosmer, Greenway, Zeeland, Herreid, Mound City, Pollock, and Strandsburg, doesn't it? A. That is right.

Q. That system could hardly get along without that wire there, could they?

Mr. Benson: Do you mean the identical wire?

Q. Or another one like it?

A. A transmission line is required, yes.

Q. And it serves your towns, doesn't it?

A. Serves that market.

Q. You mentioned Bowdle substation. What did you say about that? Did you rebuild that?

A. Built a new one there, yes.

Q. You testified from certain records in your hands, a part of Exhibit 82. Will you produce them? Have you produced them? A. I have it here for you.

Q. Are you familiar with the line entering and leaving Bowdle? A. Just vaguely.

Q. There is a line runs into Bowdle from the north. That is this transmission line we are talking about?

A. The one we just referred to.

Q. There is a breaker on the north side of Bowdle, isn't there? A. Yes.

Q. That is to clear faults, isn't it?

A. That is the purpose of it, yes.

Q. Then there is a line going west from Bowdle? A. Yes.

Q. To Mobridge? A. That is right.

Q. And right out of or at Bowdle there is a breaker on the west line? A. That is right.

Q. That is true, east of Bowdle to Ipswich? There is a breaker on the east side of Bowdle?

A. These are all on the substation but they are on the lines going east and north and west.

Q. What do you understand by breaker?

A. A device for disconnecting transmission lines in case of trouble, or otherwise.

Q. It is one way you have of finding out where the trouble originates on the line?

A. I think it is primarily to protect the rest of the system.

Q. Eventually you corner whatever trouble is arising by confining it within the breakers?

A. As I understand it, they trace the trouble from there, yes.

Q. You had a breaker down south of Bowdle, too, didn't you? A. On the south line, yes.

Q. Where it goes down to Gettysburg? A. And beyond.

Q. I take it, to get energy to Gettysburg over the plaintiff's lines there, you have to go through Bowdle, don't they? A. Unless it comes from Huron.

Q. It doesn't come from Huron any more?

A. No, not now.

Q. Until October 19, 1945, Gettysburg was your own station, the plaintiff or its predecessor company?

A. That was our market.

Q. You served it? A. That is right.

Q. And you served it from the transformer, either at Gettysburg or from a little plant you had in Gettysburg. Is that right? A. That is right.

Q. That is, the defendant had no customers in Gettysburg? A. I don't think they had any.

Q. You had the franchise, didn't you? A. Yes.

Q. When I say "you" I mean the plaintiff and its predecessor. So that if energy was taken into Gettysburg from the north it would have to come through this Bowdle connection? A. That is correct.

Q. Important part of your system, wasn't it?

A. Important part only because of the interconnection. And these oil circuit breakers.

Q. I believe you served a number of towns between Bowdle and Gettysburg?

A. I believe there are four or five towns in there.

Q. Seneca, Lebanon, Hovey, Tolstoy, Wanetka? A. Yes.

Q. I show you Plaintiff's Exhibit 82-10, and ask you from what source you took those figures?

A. I think all of them came from the operating reports of the Northern Power & Light Co., North Dakota Power & Light Co., and Dakota Public Service Co., except we had

some trouble in 1932, when there was simplified accounting, at which time we went back to station sheets. I don't remember the title. Something that was included in the subpoena.

Q. Are those figures true and correct? A. Yes, they are.

Q. I am talking about 82-10. I call your attention to 82-9, Plaintiff's Exhibit, and ask you if those are true and correct? A. I believe they are, yes.

Q. I now call your attention to the fact that in 1931 you show an interchange from Northwestern Public Service Co. 84,600, in Exhibit 82-10, and in Exhibit 82-9 you show 1,051,060. What have you to say about that?

A. These two exhibits were prepared at different times. One of them considerably earlier than the other, and the first exhibit, that is Exhibit 82-10, shows a record as it was tabulated in the operating reports before I secured the individual vouchers. I believe at that time it was the practice to show on the operating reports the net transactions rather than the movement each way. This exhibit was made a long time ago for another purpose. I think they can be reconciled.

Q. Then one or the other of these isn't true and correct, is it?

A. I would say different method of presentation of the same information.

Q. What do you mean?

A. I stated before that the operating report showed the net transactions in some of the early periods rather than the movement both ways. When I made up the last mentioned exhibit I had the vouchers to follow through and got the gross movement both ways.

Q. On Exhibit 82-9 you have a column which says "Rental" from 1936 to 1945. There is a figure $20,000.00. Was that for the interconnection rental charge?

A. That is the item, yes.

Q. As a matter of fact it was not $20,000.00 for the year 1945, within the issues of this law suit, was it?

A. No, that is true.

Q. That includes the entire year of 1945? A. Yes.

Q. Is that true also of the reserve capacity charge?

A. May I see the figures? I believe it would be true of all of the figures.

Q. It is not cut off on October 19, 1945? A. No.

Q. It extends through the entire year of 1945? A. Yes.

Q. Now, you say here in the next column, which is the fourth column from the left of the sheet, "Energy Gross in Dollars." Is that the energy shown in the sixth column under the heading "N,W, received figured at 5 mills"?

A. Figured at 5 mills for the period the 5 mill price applied.

Q. Then from 1936 on, the kilowatt hours shown in Column 6, under the heading "Kilowatt Hours Received," multiplied by 5 mills equals the amount shown in the fourth column from the left headed, "Energy Gross in Dollars."

A. That is right.

Q. Do you have any exhibit here which shows what the plaintiff and its predecessors received from the defendant, in dollars?

A. I have made no such schedule that I can recall.

Q. You have no study showing what amount in dollars the plaintiff and its predecessor companies received from the defendant during the year 1936 to 1945, for energy?

A. I don't remember making one.

Q. Have you any study that has been presented to the Court here showing kilowatt hours that the plaintiff and its predecessors sold to the defendant?

A. I believe you have an exhibit in your possession.

Q. One of your exhibits? A. Yes.

Q. Referring to Exhibit 82-10, at the bottom gang of tabulations at the lower left hand corner of the page, under the column headed "Interchange to Northwestern", does that show the kilowatt hours that this plaintiff and its predecessors sold to Northwestern Public Service Co.?

A. Yes.

Q. And while the dollars are not figured out, do you know from the records that from and after 1936 to October 19, 1945, you collected 5 mills per kilowatt hour for each of those kilowatt hours? A. Yes.

Q. Did they?

A. The word "collected" is a little ambiguous, but we got credit for it, in off-sets, etc.

Q. It was paid? A. Yes.

Q. Then if I understand you correctly, in 1944, the plain-

tiff and its predecessors sold to the defendant, 10,883,300 kilowatt hours at 5 mills? A. Yes.

Q. And on the same line extended, Northwestern Public Service Co. sold to plaintiff and its predecessors, 1,428,900?

A. That was netted against the other in the transactions.

Q. That is right, isn't it? A. Yes.

Q. Now, the net was 9,454,400 kilowatt hours. Is that right? A. That is right, net to Northwestern.

Q. For which plaintiff and its predecessors collected 5 mills per kilowatt hour? A. That is right.

Q. Have you got a piece of paper? Will you compute what the plaintiff and its predecessors received at 5 mills for 9,454,400 kilowatt hours? A. $47,272.00.

Q. Now, if I understand you correctly, the plaintiff and its predecessors, as shown by your exhibit 82-9, that year paid $20,000.00 interconnection rentals? A. That is right.

Q. And $9,992.40 reserve capacity charge?

A. That is right.

Q. Making in all $29,992.40. Will you subtract that from the money you got for kilowatt hours? A. Yes.

Q. What is the difference? A. $17,279.60.

Q. That is, the plaintiff and its predecessors got that much more money out of the defendant company for that year's business. Is that right? On the energy?

A. The amount of $17,279.60, represents the excess of the interchange revenue over the rent charge and the demand charge. I believe that is right.

Q. It is the balance in the handling of the three rates and charges involved in this litigation for that period of time, isn't it? A. That is right.

Q. Now, in 1944, from your records and files, the plaintiff's predecessors owned Knife River Coal Mining Co., didn't they? A. No.

Q. Knife River Coal Mining Co.? A. No, they didn't.

Q. A common owner owned the Dakota Public Service Co. and the Knife River Coal Mining Co. didn't they?

A. Yes.

Q. And that was the Public Utilities Corporation?

A. United Public Utilities Corporation.

Q. In the year 1944, which was used as a test year here, and as shown by Exhibit 82-9, you have submitted to the

Court a study in which, as I understand, you contend that you paid 25.99 mills for 1,428,900 kilowatt hours, per kilowatt hour. Is that right?

A. That is the unit cost per kilowatt hour.

Q. And you arrived at that by adding the rental charge of $20,000.00, the reserve capacity charge of 9,992.40, and then dividing that amount of dollars by the kilowatt hours? A. You have left out one figure, I think.

Q. In addition to that you add up 5 mills for 1,428,900 kilowatt hours? A. I have three figures there.

Q. You add all of those dollars and you get a claimed investment of $37,136.90? Is that right? As shown by your exhibit? A. Claimed cost of power, yes.

Q. You add up all of those figures I spoke about and you get that total? A. That is right.

Q. Then you say we only got 1,428,900 kilowatt hours?

A. That is right.

Q. And because we spent $37,196.90, and only got that many kilowatt hours, that we paid 25.99 mills per kilowatt hour?

A. The kilowatt hours are divided into the dollars.

Q. Did you forget to tell the Court you had the use of these interconnecting facilities, too?

A. I didn't forget to tell the Court anything.

Q. Do you mean to tell the Court by this exhibit that you got no value of the reserve capacity charge?

A. I think that is probably correct.

Q. Do you know?

A. That is what we are litigating about.

Q. (Read) Do you mean to tell the Court by this exhibit that you got no value of the reserve capacity charge?

The Court: You can answer that question yes or no.

A. The way it is phrased I guess I better say no.

Q. What does it mean when you apply that all to the cost of your kilowatt hours? A. Now I don't understand.

Q. You can't answer that question?

A. I don't understand what you mean.

Q. Do you mean by this exhibit that you did get some value out of the reserve capacity agreement between the plaintiff's predecessor and the defendant?

...SERVICE COMPANY

Company

DEC 1944

SUMMARY OF ELECTRIC OPERATION

Line No.	all	CURRENT MONTH				12 MONTHS TO DATE			
		THIS YEAR		LAST YEAR		THIS YEAR		LAST YEAR	
1	K.W.H. Generated	1 [illegible]	9[illegible]6	4 [illegible]	8[illegible]0	72 [illegible]	9[illegible]	91 [illegible]	9[illegible]
2	K.W.H. Station Use	[illegible]	[illegible]	[illegible]	[illegible]	8 [illegible]	2[illegible]	2 [illegible]	1[illegible]
3	K.W.H. Net Generated	5 [illegible]	8[illegible]	5 [illegible]	[illegible]	65 [illegible]	6[illegible]	6 [illegible]	8[illegible]
4	K.W.H. Purchased and Interchanged	[illegible]	[illegible]	[illegible]	[illegible]	1 [illegible]	[illegible]	1 [illegible]	[illegible]
5	K.W.H. Total Output	4 [illegible]	[illegible]	5 [illegible]	[illegible]	66 [illegible]	[illegible]	6[illegible]	[illegible]
6	K.W.H. Supplied Gas Dept.								
7	K.W.H. Supplied Ice Dept.								
8	K.W.H. Supplied Water Dept.								
9	K.W.H. Supplied Railway Dept.								
10	K.W.H. Supplied Company Lighting								
11	K.W.H. Supplied Miscellaneous								
12	Total K.W.H. Supplied [illegible]	22 [illegible]		31 [illegible]		[illegible]		[illegible]	
13	K.W.H. Delivered to Transmission System	4 [illegible]	[illegible]	5 [illegible]	[illegible]	66 [illegible]	[illegible]	6[illegible]	[illegible]
14	K.W.H. Delivered to [illegible] K.W.H. [illegible]	3 [illegible]	[illegible]	3 [illegible]	[illegible]	40 [illegible]	[illegible]	3[illegible]	[illegible]
15	K.W.H. Delivered to [illegible] K.W.H. [illegible]	[illegible]	[illegible]	1 [illegible]	[illegible]	10 [illegible]	[illegible]	11 [illegible]	[illegible]
16	K.W.H. Delivered to Distribution System	4 [illegible]	[illegible]	4 [illegible]	[illegible]	5 [illegible]	[illegible]	4 [illegible]	[illegible]
17	K.W.H. Loss—Distribution	1 [illegible]	[illegible]	1 [illegible]	[illegible]	14 [illegible]	[illegible]	14 [illegible]	[illegible]
18	% Distribution Loss								
19	% Total Loss	17 [illegible] 13	24	88	24	96	22	14	22	72
20	EXPENSES								
21	Steam Generation Expenses—Labor								
22	—Fuel								
23	—Other Operation*								
24	—Maintenance								
25	—Rents								
26	—Steam Transf'd (Cr. or Dr.)								
27	Total Steam Generation Expenses								
28	Per K.W.H. Net Generated								
29	Hydro Generation Expenses—Labor								
30	—Water for Power								
31	—Other Operation*								
32	—Maintenance								
33	—Rents								
34	Total Hydro Generation Expenses								
35	Per K.W.H. Net Generated								
36	Int. Comb. Generation Expenses—Labor								
37	—Fuel								
38	—Other Operation*								
39	—Maintenance								
40	—Rents								
41	Total Internal Comb. Generation Expenses								
42	Per K.W.H. Net Generated								
43	Purchased Power Cost								
44	Per K.W.H. Purchased								
45	Interchange Power Cost or Credit								
46	Per K.W.H. Interchanged								
47	Total Production Charges								
48	Power Cost per K.W.H. Total Output								
49	Transmission Expenses—Operation								
50	—Maintenance								
51	Total Transmission Expenses								
52	Distribution Expenses—Operation								
53	—Maintenance								
54	Total Distribution Expenses								
55	Total All Other Expenses								
56	Total Cost of Electricity Supplied Other Depts.								
57	Gas								
58	Water								
59	Ice								
60									
61	Total								
62	Total Miscellaneous Expenses								
63	Cost Per K.W.H. Supplied Other Depts.					XXX		XXX	

*Include Amt. Expense—Dr.

Do not type

Part of Defendant's Exhibit 82-25.

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DAKOTA PUBLIC SERVICE COMPANY — DEC 1944

SUMMARY OF KWH GENERATED, STATION USE, NET OUTPUT

	KWH GENERATED	STATION USE	NET KWH — OUTPUT	KWH GENERATED	STATION USE	NET KWH — OUTPUT
	CURRENT MONTH THIS YEAR			CURRENT MONTH LAST YEAR		
STEAM GENERATION						
Beulah	4 141 200	441 400	3 734 800	4 448 300	389 000	3 459 300
Hazen	1 971 000	271 816	1 743 184	1 939 300	188 928	1 650 372
Stanton	-0-	6 450	6 450	-0-	6 982	6 982
Watrous	-0-	-0-	-0-	-0-	-0-	-0-
Glendale	-0-	4 280	4 280	-0-	4 405	4 405
Sheridan	366 400	25 200	341 200	423 600	24 600	399 000
Total Steam	6 618 600	757 146	5 861 454	6 911 600	664 015	5 647 585
INTERNAL COMBUSTION GENERATION						
Mott	-0-	-0-	-0-		90	10
Dickinson	47 860	13 691	34 169	12 460	10 698	1 762
Guttenberg	4 271	896	3 375	-0-	100	100
Lemmon	3 815	706	3 109	-0-	134	134
Total Int Comb	55 946	15 293	40 653	12 260	932	11 328
Total All Generation	6 674 546	772 439	5 902 107	6 923 860	664 947	5 658 913
	12 MONTHS TO DATE THIS YEAR			12 MONTHS TO DATE LAST YEAR		
STEAM GENERATION						
Beulah	44 852 700	4 463 400	39 389 300	45 542 300	4 295 900	41 246 400
Hazen	23 134 900	3 011 440	20 123 460	21 192 100	2 707 040	18 485 060
Stanton	-0-	6 944	6 944		65 928	64 628
Watrous	12 000	-0-	12 000	5 490	-0-	5 490
Glendale	2 [illegible]	46 [illegible]	45 [illegible]	1 360	44 350	43 990
Sheridan	5 [illegible]	[illegible]	[illegible]	4 434	8 700	3 725
Total Steam	[illegible]	[illegible]	65 [illegible]	71 127 290	7 963 318	63 219 972
INTERNAL COMBUSTION GENERATION						
Mott	4 495	496	3 996	5 900	2 600	3 300
Dickinson	502 850	104 284	398 566	397 730	104 204	293 526
Guttenberg	8 350	712	8 340	9 746	8 240	1 506
Lemmon	10 [illegible]	1 [illegible]	9 [illegible]	7 820	1 524	6 296
Total Int Comb	611 [illegible]	122 [illegible]	488 [illegible]	250 250	102 868	141 382
Total All Generation	[illegible]	[illegible]	45 [illegible]	71 421 040	8 072 110	63 355 860

Part of Defendant's Exhibit 82 25

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A. Oh, it is possible there was value both ways.

Q. How much?

A. I don't know. I don't know if there is any.

Q. Do you mean to tell the Court that plaintiff and its predecessor companies got no value out of the rental charge for interconnecting facilities, by this Exhibit 82-9?

A. The interconnection facilities are both an asset and liability, depending on conditions.

Q. Well, is it an asset to the defendant?

A. It can be either way.

Q. Have you got some data to show how much of an asset it is to the defendant?

A. I don't think it can be computed.

Q. At least you can't compute it. Is that right?

A. I would not attempt to.

Q. Is that true of the reserve capacity?

A. I would not try to compute it, no.

Q. I notice in the third column of Exhibit 82-9, the heading in there which is "Reserve Capacity." You made this exhibit, didn't you? A. Yes.

Q. What do you mean by reserve capacity?

A. I just took the common word that has been used in the contracts so it would be easily identified.

Q. (Read) What do you mean by reserve capacity?

A. In that column I have inserted the figures which were the amounts which the Dakota company and its predecessors have all of the time referred to in the contract as reserve capacity.

Q. That is a matter of bookkeeping then with you?

A. That is right.

Q. Don't I understand that you claim to be an electrical engineer and very skilled in that profession?

A. I made no such representation.

Q. Do you know what reserve capacity means?

A. I think I know how it has been used in connection with this contract.

Q. I am not asking you that. I am asking you if you know what reserve capacity means or is in the utility business?

A. My only experience with it is in connection with this contract.

Q. Then you don't know what you do mean. Is that right? A. I explained why I used that term before.

Q. Now, in one of your exhibits, 82-13—I show you Plaintiff's Exhibit 82-13. Do I understand that that first column to the left is entitled "year"? A. That is right.

Q. And the next column to the right is entitled "Net KWH generation"? A. Yes.

Q. Where do you get the figures in that column?

A. They are a combination of figures found in the operating reports.

Q. For those years. You would not have operating reports of course, for the year 1930 to 1936, inclusive, would you? A. Yes.

Q. You would not have the FPC reports?

A. I am not talking about FPC reports, I am talking about operating reports.

Q. You have those from 1930 to 1945, inclusive?

A. They are here.

Q. Do the figures in there represent all of the kilowatt hours generated by Bismarck, [Buelah] and Mobridge for the years shown?

A. The net kilowatt hours generated by those stations, I believe.

Q. What do you mean by net kilowatt hours?

A. After the station requirements have been deducted.

Q. That is just for station use? A. Yes.

Q. Is this exhibit intended to show what the fuel cost is per kilowatt hour, over those three stations?

A. The exhibit shows the information, yes.

Q. That is the purpose of the exhibit, is it, is to show fuel cost?

A. I didn't state the purpose of the exhibit.

Q. What do you mean up there in the right hand column that is filled with figures, headed "average fuel cost per KWH"? A. The exhibit shows that information, yes.

Q. That is what I am talking about. That is what you intended it to do, isn't it? A. Yes.

Q. Now, the defendant could not buy any energy from the plaintiff predecessors or from the plaintiff during the times that it was in control, except and unless it was out on a transmission line, could it?

A. I don't think that is a proper or intelligent question.

Q. You can't answer that one?

A. Do you mean you could not buy electricity unless it was on the line?

Q. On the transmission line?

A. Unless the energy was on the transmission line?

Q. Yes?

A. Maybe you ought to talk to Mr. Sickel. If you rephrase that for me.

Q. Alright. In Bismarck you have included in the [columan] "net kilowatt hours" generated, all of the generation of that Bismarck station, have you not?

A. That is right.

Q. Except what was used in the plant itself? A. Yes.

Q. Alright. Isn't it a fact, or do you know it is a fact, that most of the Bismarck generation is used in Bismarck?

A. I would not make any such statement.

Q. You don't know?

A. You are covering a long period of years here.

Q. I am talking about the years you show in this exhibit, 82-13. A. That is what I mean, too.

Q. Do you know whether or not at Bismarck, there is a meter where every kilowatt hour that goes on on the transmission line is metered?

A. I know of only one, on the east line, for a certainty.

Q. Would you say there wasn't any other meter there?

A. No. I don't know.

Q. You just don't know. Anyway, you have tried to restrict this study, Exhibit 82-13, to energy that actually got out on the transmission line, have you? A. No.

Q. Now, come back to my question. The defendant could not buy that energy up there [unles] it was energy that was on a transmission line, could they?

A. Now, I can't answer that question. There isn't any answer to the question.

Q. Where is the material from which you prepared Exhibit 82-13? What material did you use in preparing that exhibit? A. Operating reports.

Q. Is that all? A. I believe so.

Q. And for the years shown? A. Yes.

Q. Do they break down the fuel costs between the three plants mentioned, [Buelah], Bismarck and Mobridge?

A. Yes.

Q. From the information then, upon which you base this Exhibit 82-13, you can tell us what the fuel cost was at Buelah, can you? A. The book will show, yes.

Q. Have you any computation about that?

A. I don't have one with me, but I think I have one.

Q. Well, it is a low cost unit, isn't it?

A. When you say unit, you are speaking of the generating station?

Q. The station, yes? A. [Buelah] has the lowest cost, yes.

Q. Next comes Bismarck?

A. That depends on what year you are talking about.

Q. After 1940?

A. I think that is probably correct after 1940.

Q. And then comes Mobridge. Is that right?

A. After 1940, I am not just sure of those figures, but I believe that is correct.

Q. Have you anything that will show how much generation from Bismarck and Mobridge got out on the transmission lines?

A. No, I don't believe there is any such record.

Q. Well, if you have a fuel cost in 1944 of 3.12 mills for [Buelah], Bismarck and Mobridge combined, it would be less than that for [Buelah] alone, wouldn't it?

A. Probably was.

Q. Have you any way whereby you can determine what part of the net kilowatt hours generated on those three stations was placed on the transmission line by [Buelah] station? A. No, I don't believe so.

Q. Have you any records here from which that can be computed? A. No, I don't think so.

Mr. Benson: Do you mean by this witness?

Mr. Royhl: Yes.

The Witness: No, I can't compute it.

Q. Do you mean you don't know how?

A. I don't think there are records to show that.

Q. In making up this exhibit—Did you make any exhibit to show how much energy was put on the line by the [Buelah] station?

A. We have no separation from the [Buelah] market and transmission lines.

Q. I show you Plaintiff's Exhibit 82-12 which I believe you said you prepared. Is that correct? A. Yes.

Ms. 98, Stand 210—Rev. 1-41

DAKOTA PUBLIC SERVICE COMPANY — Company

DEC 1944 — Page No. 7

Plant — ELECTRIC GENERATION EXPENSES—STEAM

Line No.		CURRENT MONTH		12 MONTHS TO DATE	
		THIS YEAR	LAST YEAR	THIS YEAR	LAST YEAR
1	K.W.H. Generated	6,618,610	6,211,600	73,012,840	71,177,200
2	K.W.H. Station Use	751,806	606,015	8,346,896	7,958,918
3	K.W.H. Net Output	5,866,794	5,605,585	64,769,944	63,218,282
4	Max. K.W. Hour Generation				
5	Max. K.W. 30 Min. Peak				
6	Power Factor thru Maximum Hour				
7	Hours Operated				
8	Station Load Factor—Capacity Factor				
9	Station Serviceability Factor				
10	Steam Pressure Main Unit				
11	Superheat Main Unit				
12	Feed Water Temperature to Boilers				
13	Absolute Exhaust Pressure Main Unit				
14	Total Water Evaporated				
15	Make Up Water (Total)				
16	Average Number Plant Employees				
17	Coal Used in Tons	15,870	15,229	156,988	157,285
18	Gas Used in M. Cu. Ft.				
19	Oil Used in Pounds				
20	Cost per Ton Coal in Boilers	1.90	1.81	1.83	1.72
21	Cost per M. Cu. Ft. Gas				
22	Cost per Gal. Oil in Tanks				
23	Total Equivalent Principal Fuel				
24	B.T.U. per Unit as Fired				
25	Boiler Efficiency				
26	Steam per K.W.H. Output				
27	Fuel per K.W.H. Output				
28	B.T.U. per K.W.H. Output				
29	OPERATING EXPENSES				
30	Supervision and Engineering	477.09	752.51	9,465.49	8,504.65
31	Boiler Labor	4,580.98	4,215.53	51,766.21	47,815.27
32	Prime Mover and Generator Labor	1,556.90	1,216.38	15,207.53	14,488.42
33	Electrical Labor	1,097.70	952.13	12,466.47	11,396.22
34	Miscellaneous Station Labor	637.65	621.22	5,841.60	6,566.59
35	Fuel	28,951.98	27,660.33	386,641.60	374,674.38
36	Water	1,711.13	1,609.47	16,939.51	15,804.87
37	Lubricants	40.23	45.58	916.15	692.96
38	Station Supplies	536.24	459.06	4,691.80	4,948.24
39	Station Expense	367.61	526.10	4,344.76	4,912.65
40	TOTAL OPERATING EXPENSES	39,959.51	38,124.91	469,792.67	449,520.15
41	MAINTENANCE				
42	Supervision and Engineering	200.18	232.38	3,729.31	3,663.99
43	Structures and Improvements	48.40	441.93	4,208.42	2,923.16
44	Coal Storage, Handling and Weighing Equipment	937.74	922.29	8,671.59	4,471.03
45	Furnaces and Setting	69.78	94.65	5,062.99	4,449.34
46	Boiler Apparatus	3,585.29	644.50	18,345.41	11,922.19
47	Steam Piping and Accessories	244.93	113.66	1,376.53	946.10
48	Prime Movers and Generators	19.89	321.21	8,138.99	2,766.28
49	Accessory Electric Equipment	38.25	252.94	373.30	642.23
50	Miscellaneous Power Plant Equipment	56.78	91.50	187.60	299.98
51	TOTAL MAINTENANCE	4,400.24	3,963.50	43,093.44	32,284.74
52	RENTS	15.00		1,588.75	1,454.75
53					
54	TOTAL GENERATION EXPENSES	44,069.15	42,088.41	463,676.86	423,697.34
55	Steam Transferred (Cr. or Dr.)	11,749.38	9,631.17	78,765.49	38,792.16
56	Joint Expenses—Cr.				
57	TOTAL COST OF POWER GENERATED	32,319.77	32,457.24	374,911.37	349,905.18
58	Power Cost Per Net K.W.H. Generation	.005 609	.005 793	.005 785	.005 533

Printed in U. S. A.

Part of Defendant's Exhibit 82-25.

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Q. From the records and files that are included in Exhibit 82? A. That is correct.

Q. Now, will you produce the records and files that show the figure contained in the columns which are headed (1) and (2)? A. They are in the operating reports.

Q. Will you produce those?

Defendant's Exhibit 82-25 was received in evidence. It consists of the monthly operating reports of Dakota Public Service Company for the year 1944. As a sample of the information and data contained therein the report for the month of December, which consists of 39 pages, is summarized and in part reproduced as follows:

Pages 1 and 2 show the revenues and consumption for electric customers and in detail under that heading the total kilowatt-hours sold; the total electric operating revenue; the total electric customers; the total KWH per customer; the total revenue per customer; and the total revenue per KWH. They state such figures for the current month and cumulatively for the year 1944, and also in each case comparative figures for 1943.

Pages 3, 3a, 4 and 5 are as follows:

DAKOTA PUBLIC SERVICE COMPANY — Company

DEC 1944 — Page No. 50

SUMMARY OF ELECTRIC OPERATION

Line No.		CURRENT MONTH — THIS YEAR	CURRENT MONTH — LAST YEAR	12 MONTHS TO DATE — THIS YEAR	12 MONTHS TO DATE — LAST YEAR
1	K.W.H. Generated	6 689 946	6 923 460	79 [illegible]	71 428 040
2	K.W.H. Station Use	765 529	674 727	8 930 271	8 092 111
3	K.W.H. Net Generated	5 924 937	5 [illegible] 495	65 [illegible] 463	63 335 [illegible] 260
4	K.W.H. Purchased and Interchanged	629 070	832 890	9 457 406	10 301 160
5	K.W.H. Total Output	5 995 467	4 776 249	55 739 453	53 034 700
6	K.W.H. Supplied Gas Dept.				
7	K.W.H. Supplied Ice Dept.				
8	K.W.H. Supplied Water Dept.				
9	K.W.H. Supplied Railway Dept.				
10	K.W.H. Supplied Company Lighting	17 785	16 642	196 162	220 484
11	K.W.H. Supplied Free Light	4 692	5 024	47 098	50 966
12	Total K.W.H. Supplied	22 397	21 666	243 258	271 450
13	K.W.H. Delivered to Transmission System	5 972 870	4 754 579	55 496 001	52 763 250
14	K.W.H. Loss—Transmission				
15	% Loss—Transmission Loss [illegible] K.W.H. Loss	3 749 900	3 357 796	40 799 512	38 450 296
16	K.W.H. Delivered to Distribution System				
17	K.W.H. Loss—Distribution [illegible] Total	1 523 570	1 396 781	14 696 719	14 622 954
18	% Distribution Loss				
19	% Total Loss	24 88	24 26	22 14	22 72
20	EXPENSES				
21	Steam Generation Expenses—Labor	8 252 32	7 261 27	94 949 35	87 127 75
22	—Fuel	28 951 98	27 660 93	286 641 60	274 634 38
23	—Other Operation*	2 955 21	2 [illegible] 31	26 201 92	25 [illegible] 22
24	—Maintenance	4 492 64	2 963 50	43 [illegible] 44	35 951 72
25	—Rents	15 00		1 [illegible] 75	2 154 25
26	—Steam Transf'd (Dr. or Cr.)	11 949 38	9 621 17	78 [illegible] 49	78 294 45
27	Total Steam Generation Expenses	32 317 77	31 467 24	294 870 89	276 [illegible] 19
28	Per K.W.H. Net Generated	005 569	005 522	005 783	005 227
29	Hydro Generation Expenses—Labor				
30	—Water for Power				
31	—Other Operation*				
32	—Maintenance				
33	—Rents				
34	Total Hydro Generation Expenses				
35	Per K.W.H. Net Generated				
36	Int. Comb. Generation Expenses—Labor	272 83	190 51	2 823 76	2 324 69
37	—Fuel	459 95	29 87	4 823 54	1 719 96
38	—Other Operation*	137 29	35 66	1 [illegible] 93	1 [illegible] 11
39	—Maintenance	852 79	169 71	3 [illegible] 43	919 34
40	—Rents			160 25	160 25
41	Total Internal Comb. Generation Expenses	1 722 25	509 25	12 [illegible] 91	6 [illegible] 85
42	Per K.W.H. Net Generated	821 [illegible]	329 [illegible]	025 478	044 [illegible]
43	Purchased Power Cost				
44	Per K.W.H. Purchased				
45	Interchange Power Cost or Credit	2 312 65	3 [illegible] 95	37 279 60	42 991 80
46	Per K.W.H. Interchanged				
47	Total Production Expenses	37 227 37	37 922 04	349 914 68	327 252 34
48	Power Cost per K.W.H. Total Output [illegible]	[illegible] 197	[illegible] 230	[illegible] 278	[illegible] 185
49	Transmission Expenses—Operation	3 002 53	2 [illegible] 64	32 197 84	32 454 56
50	—Maintenance	458 69	641 03	4 871 00	3 [illegible] 04
51	Total Transmission Expenses	3 461 22	3 [illegible] 22	37 068 84	35 [illegible] 60
52	Distribution Expenses—Operation	2 221 61	1 [illegible] 55	24 878 96	22 [illegible] 17
53	—Maintenance	3 565 05	2 [illegible] 00	27 [illegible] 43	25 [illegible] 19
54	Total Distribution Expenses	5 786 66	4 [illegible] 35	52 [illegible] 39	48 [illegible] 36
55	Total All Above Expenses	46 475 25	45 [illegible] 51	489 [illegible] 91	451 [illegible] 30
56	Less-Cost of Electricity Supplied Other Depts.				
57	Gas				
58	Water				
59	Ice				
60					
61	Total	- -	- -		- -
62	Total Departmental Expenses	46 475 25	45 [illegible] 51	489 [illegible] 91	[illegible] 30
63	Rate Per K.W.H. Supplied Other Depts.	- -	- -	XXX	XXX

*Includes Joint Expense—Dr.

Part of Defendant's Exhibit 82-25.

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M. W. Stand. 217—1-38-37

BAKOTA PUBLIC SERVICE COMPANY

Company

DEC 1944

Page No. 4

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ANALYSIS OF ENERGY PURCHASED AND SOLD

	Name of Company Purchased From	CURRENT MONTH THIS YEAR	CURRENT MONTH LAST YEAR	FISCAL YEAR TO DATE THIS YEAR	FISCAL YEAR TO DATE LAST YEAR
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
KWH					
Cost					
	Name of Company with Which Interchanged				
KWH	Energy - Interchange	850 100	1 002 000	10 835 200	11 621 100
Amount	Northwestern Pub Ser Co	$ 850 50	$ 910 00	$ 54 446 50	$ 53 105 50
KWH	Energy Purchased from	224 830	129 110	1 458 910	1 817 940
Amount	Northwestern Pub Ser Co	1 105 15	645 55	9 141 50	5 109 90
KWH	Total Energy to	629 070	732 870	9 [illegible]	10 803 160
Amount	Pur & Sold	$ 1456 35	$ 1 [illegible]	$ [illegible]	$ 57 [illegible]
KWH	Firm Capacity Charges for				
Amount	Northwestern Public Service Co	$ 22 70	2 [illegible]	7 [illegible]	$ [illegible]
KWH	Total Interchange	629 070	873 870	9 [illegible]	10 803 160
Revenue		$ 2 312 65	$ 1 [illegible]	$ [illegible]	$ [illegible]
KWH					
Revenue					
KWH					
Revenue					
KWH					
Revenue					
KWH					
Revenue					
KWH					
Revenue					
KWH					
Revenue					

INTERSTATE TRANSACTIONS—KWH	CURRENT MONTH THIS YEAR	CURRENT MONTH LAST YEAR	FISCAL YEAR TO DATE THIS YEAR	FISCAL YEAR TO DATE LAST YEAR
State of North Dakota				
Delivered out of State @	1 536 979	1 [illegible]	19 [illegible]	[illegible]
Received From out of State				
State of				
Delivered out of State				
Received From out of State				
State of				
Delivered out of State				
Received From out of State				

(Printed in U. S. A.)

Part of Defendant's Exhibit 89-95

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Page 6 sets forth the figures for the company showing heating earnings and expenses, for the current month and cumulatively, and also comparatively with 1943.

Page 7 is as follows:

							DEC 1944	
	262.1, 262.2		262.31, 262.32		262.4	262.5	TOTAL 262	2114
	8.86		101.05	[illegible]	1.18	147.02	1,287.63	957.83
	1.41		188.23	432.44	—	23.39	346.94	461.34
	—	2.64	59.21	[illegible]	1.95	141.27	1,688.91	1803.57
	12.49	1.64	233.63	[illegible]	3.13	312.16	3,523.48	3,229.74
			[illegible]					
	16.26	—	934.39	[illegible]	26.10	1052.38	12,224.94	12,418.05
	24.12	—	1686.07	[illegible]	42.24	556.35	8421.90	7,645.44
	64.20	15.27	2129.24	[illegible]	41.34	1344.19	14,911.67	14,982.95
	24.46	15.27	2823.82	[illegible]	106.92	1734.19	36,[illegible]5.67	35,056.46

Pages 8 through 13 set forth the same type of information as that set forth on page 7 but with respect to individual steam generating plants, being Beulah, Bismarck, Mandan, Dickinson, Ellendale and Mobridge, respectively.

Pages 14 through 18 set forth the same type of information as that included on page 7, but with reference to the internal combustion plants, page 14 being for all of such plants combined and pages 15 through 18 being for the individual plants located at Mott, Dickinson, Gettysburg and Lemmon, respectively.

Page 19 is as follows:

M. W. Stand. 220—1 Rev. 1-41

Page No. 38

_____ Company

_____

UNDISTRIBUTED OPERATING EXPENSES

Line No.		CURRENT MONTH		12 MONTHS TO DATE	
		THIS YEAR	LAST YEAR	THIS YEAR	LAST YEAR
1	CUSTOMERS' ACCOUNTING AND COLLECTING EXPENSES				
2	Supervision	891 85	885 00	3 569 24	3 520 91
3	Stationery, Postage and Cases	73 00	36 83	905 28	504 25
4	Credit Investigations and Records				
5	Meter Reading	1 291 55	1 [illegible] 36	14 704 92	13 366 25
6	Collecting	2 317 85	1 907 96	23 063 39	20 015 87
7	Customers' Billing and Accounting	1 774 [illegible]	1 176 45	17 156 12	14 [illegible] 19
8	Miscellaneous Expenses	140 52	103 23	1 [illegible] 56	1 510 [illegible]
9	Uncollectible Accounts	-		1 [illegible] 00	1 517 [illegible]
10	Rents	535 51	577 35	5 [illegible] 51	5 [illegible]
11	TOTAL CUSTOMERS' ACCTS. & COLLG. EXP. (1)	5 [illegible] 85	5 140 73	67 [illegible] 56	60 [illegible]
12	SALES PROMOTION EXPENSES				
13	Supervision	187 77	[illegible] 68	1 754 52	1 [illegible] 19
14	Salaries and Commissions	782 39	[illegible] 69	5 103 65	3 [illegible] 11
15	Demonstrators	150 19	158 65	1 161 79	1 [illegible]
16	Advertising	781 52	[illegible] 65	10 [illegible] 25	10 [illegible]
17	Miscellaneous Sales Expenses	14 56	107 30	[illegible] 14	1 [illegible]
18	Rents				
19	Memberships, Utilities and Contract Work (2)	[illegible] 68	[illegible] 00	[illegible] 76	1 [illegible]
20	TOTAL SALES PROMOTION EXPENSES (2)	1 [illegible] 15	2 [illegible] 97	[illegible] 81	[illegible]
21	ADMINISTRATIVE AND GENERAL EXPENSES				
22	Salaries of General Officers and Executives	838 85	[illegible] 65	11 [illegible] 35	10 [illegible]
23	Other General Office Salaries	1 [illegible] 05	1 [illegible] 73	[illegible] 00	[illegible]
24	Expenses of General Officers	300 [illegible]	[illegible]	3 [illegible] 17	3 [illegible]
25	Expenses of General Office Employees	511 [illegible]	[illegible]	5 [illegible] 85	5 [illegible]
26	General Office Supplies and Expenses	1 [illegible] 78	1 [illegible]	12 [illegible]	11 [illegible]
27	Management and Supervision Fees and Expenses	1 [illegible] 00	1 112 39	11 [illegible] 67	12 [illegible]
28	Special Services	1 [illegible] 01		1 [illegible] 70	2 [illegible]
29	Legal Services	125 00	125 00	2 [illegible] 25	1 [illegible]
30	Regulatory Commission Expenses				
31	Insurance	1 [illegible] 12	1 137 00	11 [illegible]	13 [illegible]
32	Injuries and Damages			[illegible]	
33	Employees' Welfare Expenses	[illegible] 60	[illegible] 16	[illegible]	[illegible]
34	Pensions	1 [illegible] 72	1 [illegible]	14 [illegible]	14 [illegible]
35	Miscellaneous General Expenses	[illegible] 12	[illegible]	1 [illegible]	2 [illegible]
36	Maintenance of General Property				
37	Structures and Improvements	[illegible] 12	[illegible]	[illegible]	1 [illegible]
38	Office Furniture and Equipment	[illegible] 32	[illegible]	[illegible]	[illegible]
39	Communication Equipment				
40	Miscellaneous Property				
41	General Rents	[illegible]	[illegible]	[illegible]	[illegible]
42	Commissions Paid under Agency Sales Contracts				
43	Franchise Requirements	[illegible]	[illegible]	[illegible]	[illegible]
44	Duplicate Miscellaneous Charges—Credit				
45	Administrative and General Expenses Transferred—Credit	[illegible]	[illegible]	[illegible]	[illegible]
46	Joint Expenses—Debit or Credit				
47	TOTAL ADMINISTRATIVE AND GENERAL EXPS. (2)	[illegible]	[illegible]	[illegible]	[illegible]
48					
49	Total Maintenance of General Property (Above)	[illegible]	[illegible]	[illegible]	[illegible]

(1) [illegible]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

(2) [illegible]

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Part of Defendant's Exhibit 82-25.

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M. W. Stand. 221—1-28-37 Printed in U. S. A

DAKOTA PUBLIC SERVICE COMPANY Company

DEC 1944

Page No. 19

ELECTRIC TRANSMISSION EXPENSES

Line No.	a	CURRENT MONTH THIS YEAR	CURRENT MONTH LAST YEAR	12 FISCAL YEAR TO DATE THIS YEAR	12 FISCAL YEAR TO DATE LAST YEAR
1	EXPENSES OF OPERATION				
2	Supervision and Engineering	959 05	13 04	2827 80	2 24 67
3	Load Dispatching Labor and Expenses	254 27	2 5 62	2105 54	2 855 85
4	Station Labor		21 52	342 85	401 01
5	Station Supplies and Expenses	29 53	45 27	647 78	480 46
6	Overhead Lines	623 87	415 01	5000 87	5 554 92
7	Underground Lines				
8	TOTAL TRANSMISSION OPERATION	1335 87	707 98	11 922 84	11 326 21
9	MAINTENANCE				
10	Supervision and Engineering	67 39	85 96	803 00	969 50
11	Structures and Improvements			7 50	
12	Station Equipment	31 37	203 98	357 10	862 84
13	Towers and Fixtures		284 94		
14	Poles and Fixtures	82 12		1432 12	4 711 43
15	Overhead Conductors and Devices	271 41	66 80	2270 28	1658 27
16	Conduit				
17	Underground Conductors and Devices				
18	Roads and Trails				
19	TOTAL TRANSMISSION MAINTENANCE	458 69	641 08	4871 00	8 202 04
20	RENTS	1666 66	1666 66	20 274 00	20 328 25
21	JOINT EXPENSES (Dr. or Cr.)				
22		. . .	. . .	. . .	. . .
23	TOTAL TRANSMISSION EXPENSES	3 461 22	3 015 72	37 069 84	40 956 60
24					
25	Miles of Pole Line Owned and Operated	742 90	742 90		
26	Miles of Pole Line Operated but Not Owned				

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Part of Defendant's Exhibit 82-25.

Pages 20 through 22 set forth the same type of information as that set forth on page 19 but with respect to separate divisions, being Bismarck, Dickinson and Mobridge, respectively.

Pages 23 and 23a are as follows:

M. W. Stand. [illegible] DULUTH PUBLIC SERVICE COMPANY

Page No. 423

Company

DEC 1944

ELECTRIC DISTRIBUTION EXPENSES

Line No.	all	CURRENT MONTH THIS YEAR	CURRENT MONTH LAST YEAR	FISCAL YEAR TO DATE THIS YEAR	FISCAL YEAR TO DATE LAST YEAR
1	EXPENSES OF OPERATION				
2	Supervision and Engineering	1 841 25	262 59	10 312 29	2 [illegible] 46
3	Load Dispatching Labor and Expenses				
4	Distribution Maps and Records	3 95	12 25	128 36	335 61
5	Other Distribution Office Expenses	110 46	62 42	1 146 26	598 50
6	Station Labor	191 64	209 13	2 722 63	2 [illegible] 15
7	Station Supplies and Expenses	111 82	95 45	1 866 02	1 [illegible] 42
8	Storage Battery Labor				
9	Storage Battery Supplies and Expenses	[illegible]		[illegible]	
10	Overhead Lines	329 64	220 69	3 [illegible] 65	4 [illegible] 62
11	Underground Lines				
12	Removing and Resetting Line Transformers	53 53	65 91	779 [illegible]	1 [illegible] 91
13	Removing and Resetting Meters	1 211 37	911 93	12 [illegible] 66	12 [illegible] 84
14	Other Services on Customers' Premises	2 [illegible] 23 41	2 [illegible] 31	34 [illegible] 51	31 [illegible] 99
15	Overhead Street Lighting System	532 57	498 28	5 [illegible] 36	6 [illegible] 54
16	Underground Street Lighting System				
17	TOTAL DISTRIBUTION OPERATION	9 221 61	5 [illegible] 65	93 [illegible] 36	69 [illegible] 13
18	MAINTENANCE				
19	Supervision and Engineering	827 67	300 40	2 [illegible] 90	3 [illegible] 90
20	Structures and Improvements				
21	Station Equipment	15 04	71 61	2 [illegible] 32	2 [illegible] 28
22	Storage Battery Equipment				
23	Poles, Towers and Fixtures	520 41	411 81	6 [illegible] 46	5 [illegible] 52
24	Overhead Conductors and Devices	486 12	361 96	4 [illegible] 61	4 [illegible] 57
25	Conduit				
26	Underground Conductors and Devices				
27	Line Transformers and Devices	481 27	229 81	3 [illegible] 81	2 [illegible] 05
28	Services	305 86	192 66	3 [illegible] 90	2 [illegible] 42
29	Meters	169 62	128 81	1 [illegible] 83	2 [illegible] 61
30	Installations on Customers' Premises	17 84	12 56	178 91	[illegible] 99
31	Leased Property on Customers' Premises				
32	Street Lighting and Signal System	412 02	583 02	3 [illegible] 91	3 [illegible] 05
33	TOTAL DISTRIBUTION MAINTENANCE	2 565 05	2 [illegible] 00	27 [illegible] 81	25 [illegible] 42
34	RENTS		1 00	9 [illegible] 50	[illegible] 00
35	TOTAL EXPENSES (Sts. 17 & 33)				
36					
37	TOTAL DISTRIBUTION EXPENSES	9 786 66	7 [illegible] 65	102 [illegible] 17	95 [illegible] 42
38	Miles of Pole Line	867 60	882 15		

Miles of Pole Line

Outside of boundaries 2300 V & over

Owned & operated	478	15
Operated but not owned	17	40
Total	495	55

Inside of boundaries

Owned & operated	402	05
Total	891	60

Servicing Customers Installations

Revenue	1	229	94	35 056	46
Cost	2	955	60	21 179	17
Net		294	14	3 877	29

Part of Defendant's Exhibit 82-25.

695

Pages 24 through 26 set forth the same type of information as that set forth on page 23 but with respect to separate distribution centers, being Bismarck, Dickinson and Mobridge, respectively.

Pages 27 through 32 set forth the same type of information as to heating earnings and expenses as that set forth on page 6 but with reference to the individual steam plants, being Beulah, Bismarck, Mandan, Dickinson, Ellendale and Mobridge, respectively.

Page 33 is as follows:

Pages 34 through 37 set forth the same type of information as that contained on page 33 but with reference to separate divisions and to the general office, such divisions being Bismarck, Dickinson and Mobridge.

The same kind of data and information is contained in the monthly operating reports for each of the other months.

Q. I show you book and record marked Defendant's Exhibit 82-25, and ask you if that is a record [your] produced from which you took the figures shown in Columns (1) and (2) under the year 1944, in Exhibit 82-12? A. Yes.

Q. That is one of the exhibits that is included in the Exhibit No. 82, isn't it? A. Yes.

Q. In speaking of your experience, I assume as a qualification, you answered your counsel that you had, on one occasion, been stationed out in the field on one of the properties of the plaintiff corporation. Is that right?

A. Yes.

Q. Where was that? A. Williston, North Dakota.

Q. You have a power plant there, do you?

A. Yes, we had.

Q. Is that one of the larger stations of the plaintiff company?

A. It is a subsidiary station for that company.

Q. How much generation do you have there?

A. That station has one 2000 KW unit.

Q. Does the plaintiff maintain an organization at that place? A. Yes.

Q. When was this that you were there?

A. I was there from about May, 1926 until late in October, 1927.

Q. What were you doing?

A. I was sent out to develop an accounting organization.

Q. Did they maintain an engineer at Williston.

A. Part of the time I believe we had a graduate engineer there.

Q. A man who handled and supervised the distribution?

A. We had a construction superintendent, yes.

Q. A man who had been with the company a long time, I take it? A. The company was not very old at that time.

Q. You also had a chief engineer, didn't you?

A. In the power plant, yes.

Q. Did he have an organization in the power plant under him as chief engineer?

A. Certainly he had an operating crew.

Q. Was this a division point of the plaintiff company, or a district office?

A. It was an enlarged division point. It has since been broken up into three divisions.

Q. At that time it was a large division point?

A. Yes. I divided it into two parts at that time.

Q. Did you have a district manager at that point?

A. We had a division manager.

Q. He was a man who was experienced in handling utility work, was he not?

A. I would say his experience was quite limited. We got him with the property we bought.

Q. Anyway he was there?

A. I testified before he was there about two thirds of the time.

Q. Along with this, I take it, that this division point carried the usual organizations so far as field work was concerned, line men, etc.?

A. At that time largely construction crews.

Q. How many people do you think were employed—Was this in May of what year? A. I went out in May, 1926.

Q. May 1926? A. Yes.

Q. You had just been with the company a year or two?

A. I had been there since July, 1924.

Q. How many men in the various departments do you think were employed at that division headquarters when you were there on this accounting work?

A. Talking about the whole division now?

Q. I am talking about the number working in and out of that Williston station?

A. Well, the staff was divided. The power plant crew was probably eight people, perhaps. There was a crew of distribution and construction men who worked in the communities around. It varied. I suppose probably twenty

men on an average. Transmission line and construction gang might be thirty. I am just making an estimate. There was another power plant at Kincaid which was at that time handled out of this office.

Q. You had men in charge of that plant, too?

A. There was a chief engineer, yes. Probably ten people in that plant. Then there were meter readers and such throughout the territory. In the combined areas probably twenty people. Then my accounting staff. Maybe ten cashiers locally. At three outlying points at that time.

Q. You didn't mean to infer to the Court then that you were running that division up there, did you?

A. I didn't make that statement, no.

Q. So there may be no question about that. What records did you use for the preparation of this tabulation, 82-9?

A. Well, the rentals, which I would find on the ledger sheet.

Q. What ledger sheet would that be?

A. Well, it appears in two places. It appears as accounts payable on Northern Power & Light, later Dakota Public Service. And accounts payable to Northwestern in monthly regular amount, $1666.67, with the odd $1666.66.

Q. Would that be billed separately each month?

A. I don't know that it was billed each month, but it was recorded each month. The first year, 1936, there was an item that had this item exclusively. Later it was buried among other items but always set out as a separate figure.

Q. Then, in your reserve capacity charges shown in Column 2, of 82-9, from what source did you get those figures?

A. That likewise appears on the ledger sheet as accounts payable item on the books of Northern Power & Light Co. and later Dakota Public Service Co., in favor of Northwestern Public Service Co. And appears also in an expense account, I believe, part of the time it was interchange power and part of the time it is power purchased. And further confirmed by the supplements to the interchange contract, the annual supplements.

Q. Was that likewise billed monthly?

A. Yes, it was entered monthly on the records.

Q. I observe that on your audit or tabulation, Exhibit 82-9, that you show a balance or payment for reserve ca-

pacity being made to the defendant by plaintiff's predecessor for that year of $12,685.20. Is that correct?

A. That is right.

Q. You didn't mean to infer that each separate month was a payment made to the defendant, did you, under that entry? A. No, that would not be correct.

Q. Now, will you refer again specifically to the reserve capacity paid for September, 1940? A. I have it.

Q. Who paid who there?

A. That was a charge by the Dakota to Northwestern of $234.30 for that month.

Q. Referring to October, November and December, 1940, were there some charges made by plaintiff's predecessor to the defendant, and payments made therefor?

A. That is right.

Q. Do you find any place in that account, Exhibit 82-38, where there is any refund to the defendant, or repayment to the defendant, of the amount of $234.50, for September, October, November and December, 1940, each month?

A. I take it you are speaking of $234.30?

Q. Yes. A. No, there is no such refund in this record.

Q. While we are speaking about interconnection rentals and the reserve capacity payments between the parties, I think your Exhibit 82-9 shows that the interconnection payments of $20,000.00 a year were paid each year from 1936 to 1945. Is that correct? A. Yes.

Q. And you say on a monthly basis. That is, it was allocated in monthly billing?

A. Yes. The charges were carried each month.

Q. It is a fact, isn't it, that that interconnection facility rental was predicated in that first instance on the 1936 contract? A. I assume it was, yes.

Q. And was the amount always the same?

A. Except for the variation of one cent every three months.

Q. That was to absorb the differential in the monthly allocations, wasn't it? A. That is right.

Q. I observe also on Exhibit 82-9 that you have a reserve capacity charge beginning with the year 1938 through 1945, all years inclusive. Do you find that on the exhibit? A. Yes.

Q. And that was predicated on the 1938 contract. Is that right?

A. I assume it has its origin in 1938 and successive contracts.

Q. But the method of computing the rates, etc., remained the same during the life, covering the years 1938 to 1945, inclusive?

A. Are you limiting your definition of rates to dollars and kilowatt of reserve capacity?

Q. Yes. A. Then the amount is the same.

Q. $13.20 per kilowatt? A. Yes, per year.

Q. Split into monthly payments under the contract. Is that correct? A. Yes.

Q. You have testified concerning the elimination of certain power units. I am not sure we got all of the names. Selfridge, Williston, Steele, Dawson, all in North Dakota. In South Dakota, Eureka, Ipswich, Lemmon, Leola, McLaughlin, Pollock. Do you have any others?

A. I guess that is all.

Q. You mentioned Lemmon in connection with this series of towns?

A. I said Lemmon was changed from steadily operated plant to a standby station.

Q. The power plant was not moved out then? A. No sir.

Q. Will you produce the records and files from which you get and make this statement?

A. 1930 operating reports for both companies.

Defendant's Exhibits 82-39 and 82-40 were received in evidence. They consist of, respectively, the financial statement of December, 1928 of Northern Power and Light Company, called "Interchange Report" and the operating report of the same company for 1930.

Q. Now, will you refer to Exhibit 82-39, insofar as it shows retirement of plants on the Northern Power & Light Co. system?

A. It shows that they were operating in the year 1928. It shows the amount of kilowatt hours produced in the station.

Q. Now, will you refer to the stations that you gave us? Is Selfridge on the northern companies' property? A. Yes.

Q. Did they generate in 1928?

A. They are not on this list, no. I believe they were acquired after that date.

Q. So there is nothing on that exhibit that shows Selfridge? A. That is right.

Q. What does it show there as the plant cost of kilowatt generation for that station at Eureka?

A. It shows a cost for that $4748.17, cost of generation in that plant.

Q. That is split down so it applies to kilowatt hour, is it not? A. Yes.

Q. And how much? A. 4.57 cents.

Q. That would be 42.7 mills? A. 45.7 mills.

Q. Now, you have, I presume, generally acquainted yourself with these other stations, haven't you, that you have mentioned? A. I think I am familiar with them.

Q. In each instance, without taking the time of the Court, these were rather isolated, worn-out type of generating machinery, weren't they?

Mr. Benson: We will admit that.

A. I won't admit it. For Eureka, that equipment was sent down to Kentucky to go into service.

Q. Anyway, when they generated electricity it cost 45.7 mills to generate it?

A. Certainly. That was the point in building transmission lines.

Q. All of this stuff was very expensive and inadequate generation?

A. It was the going plant of the day until transmission lines were built out there.

Q. And then it could not compete with the transmission line method in the sale of energy?

A. That was a natural evolution.

Q. That is what I am talking about. In some instances in these stations, generating costs ran as high as 150 mills, didn't it? A. I don't know as to that.

Q. You have one of them 184 mills?

A. It could if it was shut down a good deal of the time.

Q. So, as you say, it was just the process of elimination. Can you tell the Court now when any of those stations were either sold or disposed of or closed down?

A. No, I have no record of it. I have looked it up. I

know they were not operating in 1929, a good many of them. And those that were, were dropped out in 1930 or 1931.

Q. And that was in accordance with the engineering advice of Lucas & Luick? A. That is right.

Q. And that was before the defendant had anything to do with the system, wasn't it?

Mr. Fellows: We object to that as a statement of fact. The evidence shows here the joint and dual directors. Calls for the conclusion of the witness.

Mr. Royhl: I don't see anything about dual directors before 1929.

The Court: Do I understand the question is withdrawn?

Q. I am talking about the engineering advice that the northern company received and which you put in evidence here yesterday.

A. The engineering report is dated March, 1928, and that is about a year and a quarter before there was an actual transfer to the Middle West System, Middle West organization.

Q. I believe you testified yesterday that you found that on the Gettysburg substation some transformers had been changed which, at the time of the construction, actually belonged to the northern company. Is that right? A. Yes.

Q. I think you said that you found this out in making your audit. Is that right? A. That is right.

Q. Now, will you produce the ledger page showing the Gettysburg substation? The exhibit which you have now produced pursuant to the request is in two pages, one of which is marked Defendant's Exhibits 214-E and 214-F. Is that correct? A. That is correct.

Q. These are part of the records and files upon which you prepared your tabulations concerning interconnection facility costs?

A. That is the source of the information, yes.

Q. In addition to those, what did you produce, or what can you produce in support of your tabulations marked Plaintiff's Exhibit 88, in one page, and Plaintiff's Exhibit 88-A in four pages?

A. Do you mean in the way of ledger sheets?

Q. Whatever you used to build up those tabulations. Have you produced other papers?

A. This group. And also work order ledgers. I don't know where they are. What I mean is, I made an examination of those at Huron a year and a half ago.

Q. Did you hand me, in addition to 214-E and F, the ledger pages, 214-I, 214-B, C, D, G, H, and 214 and 214-A? Are those what you have handed me now?

A. I believe that is correct, yes.

Defendant's Exhibits 214 through 214-I were received in evidence. They are as follows:

			DESCRIPTION			1140	1143	1145	1146				PERIOD BALANCE
						340	343	345	346				
						LAND	SUB GR	POLES	O H COND				
		1925 J	382 AUTH 45 POLE LINE HURON - WOLSEY					8126 93					8126 93
		1927 J	777 AUTH N183 33 KV CURRENT HURON- "					2081 98	19447 28				21529 21
		1926 J	1074 AUTH N112 POLE LINE-HIGHMORE-REE HTS			82 93		6310 73					6393 66
		1926 D	RECT CHARGES - HIGHMORE TO REE HEIGHTS					334 50					334 50
		1926 J	9-1077 AUTH N138 POLE LINE-HIGHMORE-HARROLD			104 40		6644 89					6749 89
		1926 D	RECT CHARGES - HIGHMORE TO HARROLD					155 92					155 92
		1928 J	3-205 AUTH N254 NEW 33 KV LINE-WOLSEY-REE H			783 59		19262 76	33585 37				53631 72
		1928 J	3-205 AUTH N664 METALICIZE TEL LINE-REE H						601 77				601 77
		1928-29	DIRECT CHARGES WOLSEY-REE HTS					211 21					211 21
		1930 J	10-66 WO397 33 KV LINE HARROLD-BLUNT ALSO 33 KV CIRCUIT-REE HTS TO HIGHMORE					13880 37	22421 43				35511 80
		1930 J	10-66 WO420 33 KV LINE BLUNT TO GETTYSBURG ALSO 33 KV CIRCUIT-HIGHMORE TO HARROLD					28252 68	73072 48				101325 16
		1930 D	RECT CHARGES					261 75	214 64				47 11
		1931 J	3-64 WO757 CHOKE COILS NEAR HARROLD						670 74				670 74
		1931 J	3-64 WO759 METALICIZE TEL CO LINES -HARROLD					92 72	157 25				249 97
		1931 J	11-64 WO 1039 CHOKE COILS NEAR WOLSEY-BLUNT					94 16	430 13				524 29
		1931 J	12-99 WO 1069 CHOKE COILS NEAR REE HEIGHTS					46 97	195 11				242 08
		1932 J	10-62 WO 1008 J 11-55 INT NEW ARMS-VAYLAND TO ST LAWRENCE					681 24	106 72				787 96
		1932 J	11-63 WO 1009 R RETIRE NEW ARMS-VAYLAND-S.L.					315 25					315 25
		1934 J	11-61 WO 1243 R RETIRE PART OF EQUIP.-AUTH N254 NEAR WOLSEY					844 58	2987 90				3832 48
		1934 J	11-62 TRANSFER SWITCHES FROM SUB PER AUTH N254						1332 48				1332 48
		1931 J	3-64 WO609 NUMBER POLES					247 00					247 00
			TRANSFER BALANCE FROM OLD ACCT 1119				24851 86						24851 86
			TRANSFER BALANCE ACCT 1100.8 SUB LAND			175 00							175 00
			TOTAL 1-1-37 AFTER RECLASSIFICATION			1145 92	24851 86	84212 23	149247 50				259457 51
	1937												
		J 12-27	PWO					17 47					17 47
		J 5-29	PWO RET					16 45					16 45
		J 12-29	PWO RET					8 55					8 55
			TOTAL 12-31-37			1145 92	24851 86	84201 70	149247 50				259449 98
	1938												
		J 8-27	PWO				261 82	60 68	7 74				330 24
		J 8-31	TRANSFER EQUIP				39 24						39 24
		J 4-27	PWO					69 55					69 55
		J 5-27	PWO					28 73					28 73
		J 8-28	WO 1800 REBUILD WESSINGTON-VAYLAND					2749 69	623 26				3372 95
		J 9-27	PWO					86 37					86 37
		J 4-29	PWO RET					81 95					81 95
		J 5-29	PWO RET					32 36					32 36
		J 8-29	PWO RET					43 70					43 70
		J 8-30	WO 1801 R RET WESS.-VAYLAND FROM AUTH N254					672 73	393 92				1066 65
		J 9-29	PWO RET					105 29					105 29
						1145 92	25074 44	86263 69	149484 58				261968 63

FORWARDED

FORM 509 10M 11-50

SUBSIDIARY LEDGER SHEET

Northwestern Public Service Co.
COMPANY

ABERDEEN SUBSTATION #3A
DIVISION OR PLANT

GEN'L LEDG. OR CONTROL DEPART. RECORD — CO. A/C NO. 3148

SUB LEDG. — FPC A/C NO. —

SHEET NO. 8

DATE	REFERENCE	DESCRIPTION	ITEM NO	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
[illegible]	J 12-28	#0 2229 MAIN POWER CABLES CONTROLS ETC		157.43				
		#0 2243 1-DISC SWITCH 34.5 KV 400 AMP		665.83	[illegible]			
		2-12' CROSS ARMS		64.37				
		1-1 3/8 LH PIN		1.76				
		1-45 KV INSUL		3.80	[illegible]			
		#95-#1.3 STRAND COPPER WIRE		31.03				
		35 #1500 SUSP INSUL		222.05	[illegible]			
		1 #30413 5000V INSUL		17.05				
		1-#200S KEES INSTRUMENT TRANS		22.42				
		1-5000 KVA TYPE OISC 34.5-69 TO 13.2 KV TRANS SERIAL # 3461723		19,027.27				
		1-OUTDOOR METALCLAD SWITCHGEAR		13,604.50				
		FOUNDATION FOR TRANS & CUBICLES		2,402.90				
		150' #4VCL 2/0 9KV CABLE		250.87				
		400' 1/500,000 CM LEAD COVERED CABLE		1,136.69				
		100' 1/0 STRAND 25/34 VC-SBFMR CABLE		173.77				
		100' 1/500,000 CM 25/34 VC-SBFMR CABLE		333.42				
		1100' 4 COND 19/25 FLAMENAL CONTROL CABLE		576.82				
		10 CONCRETE CABLE DUCTS		215.37				
		5- GE #3563250G15-18 POINT TERMINAL BOARDS		26.02				
		8- EBONY ASBESTOS BARRIERS & SUPPORTS		33.03				
		5- ERONIZED PANEL BOARDS		30.01				
		3-GE 94X117 TYPE ADS 0-300 AMP AMMETERS		80.15				
		1-GE 250X97 TYPE 9AD13MAA1 60 CY SYNCHROSCOPE		211.36				
		1-GE 94X360 TYPE 8ADSKR415 REACTIVE KVA METER WITH TYPE 12X259 GE AUTO TFR		84.64				
		1-GE 94X235 TYPE ADS 5 AMP 115V SCALE 0-8 MEGAWATTS 3 PH 3 WIRE WATTMETER		74.37				
		3-GE 94X108 TYPE ADS SCALE 0-150V-8ADSVAK15 VOLTMETER		87.20				
							178,670.59	

FORWARDED 41

721

Defendant's Exhibit 214-C.

COMPANY NORTHWESTERN PUBLIC SERVICE COMPANY
UTILITY ELECTRIC
CONTROL A/C TANGIBLE

PLANT
LOCATION HURON SUB TO BETTYSBURG TAP LINE NO. 9
12.9 Miles

BETTYSBURG

PREVIOUS BALANCE	DATE	REFERENCE	DESCRIPTION	CO. ACCT. NO. / P. P. C. ACCT. NO. / ITEM	TA40 360 LAND	TA43 363 SUB S/A	TA45 365 POLES O/H COND	TA46 366				PRESENT BALANCE
261968 63	1939	J 10-28	WO 1906 Right of Way - No Wires		350 65		600 06					
262928 32		J 10-30	WO 1907R				257 17					262671 15
262671 15		J 11-29					20 59					262650 56
			Total 12-31-39		1,496.87	25,074.44	86,894.97	149,484.58				
262650 56	1940	J 1-27	PWO ADD				27 45					262678 01
262678 01		J 5-29					30 59					262647 42
262647 42		J 6-27	PWO ADD				93 53					262740 95
262740 95		J 6-29	PWO RET				56 69					262684 26
262684 26		J 8-27					79 12					262763 45
262763 45		J 8-29					52 88					262670 57
262670 57		J 12-83					29 50	92 04				262549 08
			Total 12-31-40		1,496.87	25,074.44	86,585.48	149,392.54				
262549 08	1941	J 8-27	PWO ADD				34 11					262583 14A
262583 14		J 8-29	PWO RET				28 60					262554 54A
			Total 12-31-41		1,496.87	25,074.44	86,590.99	149,392.54				
262554 54	1942	J 2-27	PWO ADD				48 35					262602 89A
262602 89		J 4-30	SRWO CL			4853 82						257949 07A
257949 07		J 5-27	PWO ADD				16 72					257965 79A
257965 79		J 9-29	PWO RET				13 20					257952 59A
257952 59		J 11-27	PWO ADD				18 48					257971 07A
			Total 12-41-42		1,496.87	30,680.88	86,891.34	149,353.84				
257971 07	1943	J 7-27	PWO ADD				204 28					258175 35A
258175 35		J 7-29	PWO RET				191 50					257983 85A
257983 85		J 9P27	PWO ADD				155 04					258138 89A
258138 89		J 9-29	PWO RET				197 72					257941 17A
257941 17		J 9-31	MISC			1628 65						256312 54A
256312 54		J 11-27	PWO ADD				41 05					256353 59A
256353 59		J 11-27	PWO ADD					6 98				256360 57A
256360 57		J 11-29	PWO RET				35 36					256325 21A
256325 21		J 11-28	SWO COMP WO 1916			2210 00						258535 21A
			Total 12-31-43		1,496.87	38,001.99	86,697.13	149,399.52				
258535 21	1944	J 4-31	MISC			2710 23						255824 99A
255824 99	1944	J 10-31	MISC			113 59						255711 30A

Filed Feb 19. 1948
Roy D Marker
Clerk

98

PLANT LEDGER RECORD

COMPANY
UTILITY NORTHWESTERN PUBLIC SERVICE CO
ELECTRIC
CONTROL T.I TANGIBLE

PLANT
LOCATION TRANSMISSION
HURON SUB TO GETTYSBURG SUB LINE NO 9
129 MILES.

GETTYSBURG

PREVIOUS BALANCE	DATE	REFERENCE	DESCRIPTION (CO. ACCT. NO. / F.P.C. ACCT. NO. / ITEM)			1140 340 LAND	1143 343 SUB 9A	1145 345 POLES	1146 346 O H COND				PRESENT BALANCE
255711 39	1944	J 11-29	PWO RET					26 85					255684 54
			Total Dec 31, 1944			1,496.57	18,178.17	86,610.28	149,399.52				
255684 54	1945	J 6-27	PWO ADD					39 46					255724 00
255724 00		J 6-29	PWO RET					44 28					255679 72
255679 72	1945	J 8-27	PWO ADD					12 40					255692 12
255692 12	1945	J 9-27	PWO ADD					58 71					255750 83
255750 83		J 9-29	PWO RET					54 65					255696 18
			Total 12-31-45			1,496.57	18,178.17	86,681.82	149,399.52				
255696 18		J 6-27	PWO ADD					114 41					255810 59
255810 59	1946	J 6-29	PWO RET					121 30					255689 09
255689 09	1946	J 9-27	PWO ADD					44 94					255734 03
255734 03		J 9-29	PWO RET					45 56					255688 47
			Total Dec. 31, 1946			1,496.57	18,178.17	86,614.21	149,399.52				
255688 47	1947	J 1-27	PWO ADD					46 64					255735 11
255735 11	1947	J 3-29	PWO RET				512 52						255222 59
255222 59		J 3-31	BISC				3718 29						251444 30
251444 30		J 9-27	PWO ADD					43 58					251487 88
251487 88		J 9-29	PWO RET					59 86					251428 02
251428 02	1947	J 10-27	PWO ADD					1404 42					252832 44
252832 44		J 10-29	PWO RET					1691 95					251290 49

Filed Feb 19. 1948
R Boy D Mayhew
Clerk

4.

FORM [illegible] SM 1-28

SUBSIDIARY LEDGER SHEET

GETTYSBURG SUBSTATION # 9A DIVISION

APPROPRIATION

ESTIMATED COST STATION

DETAIL RECORD

ACCOUNT

ACCOUNT NO. 2143 SHEET NO. 2

DATE	REFERENCE	QUANTITY AND DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
AUG 3[illegible]	J 8-27	PWO 9428 2-8X64509 Meter						
		Form W11S V BOCYC GE		146 46				
		2 77x313 TR 20 A 3W 3PH						
		Watt Hr Meters GE		50 61				
		1 #14 3W Lead C BLE		6 00				
		MiscMat and Stores Expen[illegible]		82				
		Installation		50 30				
		3% Admin & Gen Exp		7 63			25 113 68	
	J 8-31	Transfer 1 Dis-7 GE Sa Met[illegible]						
		[illegible] Stock		39 24			25 074 44	
		NO.2156R						
APR 30 42	J 4-30	3[illegible]000KVA TRANSFORMERS 22000/2300V			3,968.66-		21,105.78	
APR 30 42	J 4-30	OVERHEADS			685.16-		20,420.62	
SEP 30 43	J 9-31	SET OF 3 22 KV S.E. ARRESTORS			1,000.00			
		LABOR			191.31			
		OVERHEADS			437.32		[illegible]	
SEP 30 43	J 9-31	CORR			1,000.00		18,791.99	
		CORR			191.31			
		CORR			437.32		20,420.62	
SEP 30 43	J 9-31	SET OF 3 22 KV E.E. ARRESTERS		1,000.00				
		LABOR		191.31				
		OVERHEADS		437.32			18,791.99	
NOV 30 43	J 11-28	WO 2416 2 G.E. VOLTAGE						
		REG TYPE IRS 24KVA 2400V 100						
		AMP SER #6794973 74		2,006.34				
		INSTALLATION		126.86				
		OVERHEADS		76.80			21,001.99	
APR 30 44	J 4-31	1 WHSE SWITCH HOUSE WITH						
		EQUIP TRSF'D TO BITCHOCK						
		SUB 216A		1,664.12				
		ORIG LABOR 19.1306%		318.36				
		ORIG OVERHEADS						
		36.7089%		727.75			18,291.76	

FORWARDED

45

727

Defendant's Exhibit 214-E.

SUBSIDIARY LEDGER SHEET

Detail Record

Riverton Substation # 3 A DIVISION

APPROPRIATION

ESTIMATED COST STATION

ACCOUNT

ACCOUNT NO. 1143 SHEET NO. 2

DATE	VOUCHER	QUANTITY AND DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
		Labor			W.O. 1081		100.41	
		Labor			W. O. 278		904.27	
		Incidentals			W. O. 278		980.07	
		Labor & Incidentals			M-194		748.14	
		10-100/200 Amp. P.V. Regulators					) 12,775.55	
		6-9 Pole Disconnects					) 698.56	
		Labor					) 734.15	
		Incidentals			W.O. 495		) 525.90	
		Interest					) 644.54	
		Supervision					) 1,153.82	
		Balance per Physical Inventory Nov 30, 1934					110,614.79	
1935	J 12-9	FWO 8 3-842 3393 M C						
		Relays		68.63				
		2% Supervision		2.06			110,685.48	
	J 4-23	FWO #287 Remove st.light post and floodlight unit not in use			148 80		110 536 98	
1937	J 2-9	3 SV2Relays		67.45				
		Labor & Incidentals		22.42			110 626 85	
	J 3-9	Misc Material		4.03				
		Install Relays		38.84				
		Contingencies		3.50				
		Add Supervision		4.09			110 677 31	
	J 4-27	FWO #250 Labor & Material						
		Installing relays		6 16				
		Overhead Const Costs		18			110 683 85	
SEP 30		Engineering Distributed		26 67				
		D & Z amp adjustment 59.93		1 003 10			109 707 22	
SEP 30	J 9-27	JULY CMBS-1 46x382 TR 1200 AMP 120-2400V POLYPHASE WATTHOUR METER 60CY TYPE D321 3 WIRE 3 PHASE CT 1200 5 PT 2400 120 DETENT CO 72487 SER 19795768		67 15				
		OVERHEADS		2 01			109776 38	

Filed Feb 19, 1948
Roy L Marker clerk

FORWARDED

Defendant's Exhibit 214-B.

FORM NO. 303 SM 1-33

SUBSIDIARY LEDGER SHEET

ABERDEEN SUBSTATION # 3 A — DIVISION — ACCOUNT

APPROPRIATION

ESTIMATED COST — STATION

DETAIL RECORD

ACCOUNT NO. 1143 SHEET NO. 3

DATE	REFERENCE	QUANTITY AND DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
NOV 39	J 11-27	INSTALLATION ON TYPE DS 21 G.E. WATTHOUR METER. CO #72487		16.78				
		OVERHEADS		.50			109,793.66	
SEP 30 40	J 9-27	1-DELTA STAR TRANSFORMER		30.00				
		3% AD & GEN EXP		.90			109,824.56	
NOV 30 40	J 11-27	4 MANHOLE COVERS WITH GASKET AND GROUND STUDS		37.34				
		OVERHEADS		1.13			109,863.23	
DEC 31 40	J 12-27	1 POTENTIAL TRANSFORMER #3236782 TYPE E 126 50/60 500-23000V KD SER # 6407480		649.90				
		OVERHEADS		19.50			110,532.63	
JAN 31 41	J 1-27	1-PLATFORM FOR POTENTIAL TRANSFORMERS		9.95				
		OVERHEADS		.30			110,542.88	
[illegible] 28 41	J 2-27	LABOR INSTALLING TYPE E-126 500VA 23000V POTENTIAL TRANSFORMER		22.79				
		OVERHEADS		.82			110,566.49	
[illegible]OV 30 41	J 11-28	1-G.E. TRANSFORMER [illegible] 5000V KVA 39900Y/33000 SER#6622297		12,901.11				
		INSTALLATION		381.74				
		OVERHEADS		478.19			124,327.53	

FORWARDED

43

Defendant's Exhibit 214-B.

717

FORM 888 1BM 11-38

SUBSIDIARY LEDGER SHEET

Northwestern Public Service Co
COMPANY

GEN'L LEDG OR CONTROL DETAIL RECORD

CO A/C NO 113

ABERDEEN S STATION #3A
DIVISION OR PLANT

SUB LEDG

FPC A/C NO

SHEET NO 3

DATE	REFERENCE	DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
EC 31 41	J12-28	WO 2129 16 GROUND RELAYS		794.42				
		2 CURRENT TRANSFORMERS						
		OUTDOOR TYPE		64.14				
		TEST SWITCHES		88.27				
		106 CONDUIT		31.06				
		145' CABLE AND WIRING		176.76				
							125,482.18	
EC 31 41	J12-28	OVERHEADS		41.57				
							125,523.75	
PR 30 42	J 4-27	1-CURRENT TRANSFORMER WHSE TYPE KO 4600V 700 TO 5 AMP						
		CO#70413		22.97				
		1-CURR TRANSF WHSE TYPE W-12 4500V 250 TO 5 AMP CO# 70414		21.18				
		OVERHEADS		1.50				
							125,569.40	
MY 31 42	J 5-27	2-TYPE CO WHSE RELAYS		42.56				
		2 TYPE MC WHSE AUXULIARY RELAYS 23V STYLE #423391		25.83				
		OVERHEADS		2.33				
							125,640.12	
NE 31 42	J 7-27	INSTALLATION COSTS ON MATL CLEARED						
		J 4-27 & J 5-27		97.04				
		OVERHEADS		3.30				
							125,740.46	
MY 31 44	J 5-28	#0 2470 1 34.5 GROUND FAULT NEUTRALIZER						
		(PETERSON COIL) COMP		6,650.55				
		FOUNDATION & FOOTINGS		353 16				
		OVERHEADS		266 14				
							133,010.31	
EC 31 45	J 12-28	#0 2229 MAIN POWER CABLES, CONTROLS, SWITCHGEAR, PENCILS ETC.		5,303.92				
							138,314.23	

Filed Feb 19, 1948
By L Marker Clerk

FORWARDED

4.

Defendant's Exhibit 214-C.

719

SUBSIDIARY LEDGER SHEET

Northwestern Public Service Co.

GEN'L LEDG. OR CONTROL - DEBIT RECORD — CO. A/C NO. 1145

SUB. LEDG. - — FPC A/C NO. —

[redacted] — SHEET NO. 8

DATE	REFERENCE	DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
[illegible] 31 46		1-GE 250X68 TYPE DS38 3 PH 3 #IRE						
		#ATTHOUR METER		55.29				
		2-1658-1-82 GE CONTROL S#ITCHES						
		FOR OCB		52.51				
		1-16581CF1 GE VOLTMETER S#ITCHES		12.94				
		1-GE 121AC53IR TYPE IAC 3						
		PH RELAY		125.41				
		2-GE 71983-25VA 115/24V						
		TRANS		7.05				
		1-#HSE S-1163958 TYPE MG4						
		RELAY		23.86				
		#232 #2 MHD BARE COPPER #IRE		136.35				
		2- GROUNDS		11.16				
		#58 1/4 X 2" X 20 COPPER						
		BUSS BAR		55.14			179,150.30	
[illegible] 31 47	J 10-25	1-DISC S#ITCH 34.5 KV						
		400 AMP			665.83			
		1-45 KV INSULATOR			3.80			
		36-#1900 SUSP INSUL			222.05		178,258.62	

Filed Feb 19. 1948
Ray D Mosher, Clerk

Defendant's Exhibit 214-D.

SUBSIDIARY LEDGER SHEET

Detail Record

Gettysburg Substation # 9A DIVISION ACCOUNT

APPROPRIATION

ESTIMATED COST STATION ACCOUNT NO. 1128 SHEET NO. 1

DATE	REFERENCE	QUANTITY AND DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
		Items ruled out are retired						
		Substation Structure - Pacific Elec. Co. with following Equipment:						
		6 - PE - 37 KV Switches, 1 pole # Q6718			W.O. 420		2,284.70	
		21- PE - 7.5 KV Switches, 1 pole PE 7102						
		2 - PE - 37 KV Switches, 3 pole						
		2 - West Switch houses with following Equipment each:						
		1 - 4500 V Reclosing OCB						
		1 - Slate Panels						
		2 - CO Relays			W.O.420		3,288.24	
		1 - Magnetic Contactors						
		1 - KWH Meter						
		1 - Recl. Relays						
		2 - CT 120-5 Amps.						
		2 - PT, 2300-110 V						
		~~2 - 250 Outdoor Regulators, 6,600 - 333 KVA - 2300 V~~			W.O. 420		~~3,620.98~~	
		~~Foundations~~			"		214.70	
		1 - G.E. 33 KV of Arrester			"		1,141.34	
		~~1 - G.E. 33 KV of Arrester~~			"		~~1,060.00~~	
		Labor			"		1,796.17	
		Overheads			"		4,100.98	
		Poles from old Nolsey Sub.			Auth N-234		214.17	
					Overheads N-[illegible]		42.85	
		6 - 200 KVA, 33000-2300 V Transformers from Mitchell Sub.			N-18		3,125.80	
					" Overhead		287.00	
		~~3 - 500 KVA - 33000-2300 V Transformers from old Gettysburg Sub.~~			Appraisal		3,968.84	
					Overheads		635.16	
		2 - 3 KVA, 2300 V-115/230 V Transformers			From 1127		97.20	
		Balance per Physical Inventory Dec 30. 1934					[illegible]	
	J	~~3-9-19 XD M-6 Meter trsfd from Sub. 38.10~~						
		~~3% Supervision 1.14~~					23,821.86	
		Metering equipment						
		1 GE A-6 10 Amp 33000						
		Serial #275102						
		1 Combination Potential						
		with metering cabinet		1,000.00				
		3% Supervision		30.00			24,851.86	
		The concrete foundation, conduit, wiring & connections for the above was charged direct to expense.						

Filed Feb 19. 1948
Roy E Mosher
Clerk

FORWARDED

Defendant's Exhibit 214-E.

SUBSIDIARY LEDGER SHEET

Northwestern Public Service Co

GEN'L LEDG. OR CONTROL

CO. A/C NO 1383

SUB. LEDG. SUBSTATION # 9A

PPC. A/C NO

SHEET NO 3

DATE	REFERENCE	DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
31 47	J 10-31	3 PE 7.5 KV SWITCHES 1 POLE BB 7182		113.59			18,178.17-	
31 47	J 3-31	2-IRS REG 69 11 1/2 KVA 2300V TO HURON SUB						
		299A		2,319.93				
		LABOR		443.82				
		OVERHEADS		1,014.54			14,399.88	
31 47	J 3-29	FOUNDATION FOR REG			314.70			
		LABOR			60.20			
		OVERHEADS			137.62		13,887.36	

Filed Feb. 19. 1948
Cora D. Wacker
Clerk

Defendant's Exhibit 214-F.

COMPANY NORTHWESTERN PUBLIC SERVICE COMPANY
UTILITY ELECTRIC
COUNTY [illegible]

PREVIOUS BALANCE	DATE	REFERENCE	DESCRIPTION	LAND											
		1939 J	10-66 WO 404 28 1-2 M 22000 V 3 PH LINE				28835 24	37450 73							
		1951 J	3-64 WO 609 NUMBERING POLES				65 00								
		TOTAL	3-1-37 AFTER RECLASSIFICATION				28820 24	37450 73							64370 97
64370 97	1940	J 5-28	WO 2040 [illegible]				1913 64	196 58							65689 19
65689 19		J 5-30	WO 2041a [illegible]				367 56	57 67							65183 98
65183 98		J 12-28	WO 2068 1-4 MI ADD AT IPSWICH				226 38	454 28							65864 56
			Total 12-31-40				27,888.78	38,041.84							
65864 56	1941	J 8-30	SWO COMP WO 2068R				2690 45	4178 45							60098 68
			Total 12-31-41				30,138.30	34,908.39							
60098 68	1942	J 5-27	PWO ADD				30 80								60069 48
60069 48		J 5-29	PWO RET				27 79								60041 69
			Total 12-31-42				30,138.30	34,908.39							
60041 69	1943	J 8-27	PWO ADD				43 67								60085 36
~~60085 36~~		~~J 8-29~~	~~PWO RET~~				~~44 21~~								60041 15
60085 36		J 8-29	PWO RET				44 21								60077 42
60041 15		J 11-28	PWO ADD				36 27								60048 16
60077 42		J 11-29	PWO RET				29 26								60097 69
			Total 12-31-43				30141.77	34,908.39							60050 26
60048 16	1944	J 8-27	PWO ADD				49 53								60523 95
60097 69		J 8-29	PWO RET				47 43								60256 30
60050 26		J 8-28	SWO COMP WO 2517 CROSSOVER				217 60	256 09							
60523 95		J 8-30	WO 2518 R CROSSOVER				101 30	76 25							
			Total Dec 31, 1944				28169.97	35086.33							
60256 30	1945	J 6-27	PWO ADD				44 42								60900 72
60900 72		J 6-29	PWO RET				42 00								60258 72
			Total 12-31-45				28,172.39	35,086.33							

Filed Feb 19 1948
Ray D. Markee
Clerk

43

PLANT LEDGER RECORD

COMPANY NORTHWESTERN PUBLIC SERVICE COMPANY
UTILITY ELECTRIC
CONTROL 1.1 TANGIBLE

PLANT TRANSMISSION
LOCATION ABERDEEN SUB TO BARNARD SUB NO 1
20 miles

PREVIOUS BALANCE	DATE	REFERENCE	DESCRIPTION	CO. ACCT. NO. / P.P.C. ACCT. NO. / ITEM	1140 340 LAND	1143 343 SUB	1145 345 POLES	1146 346 O H COND	PRESENT BALANCE
		1930 J	10-66 WO 404 22000v 3PL TRANS. LINE 20 MI				19533 00	27807 00	47340 00
		1931 J	3-64 NUMBERING POLES				30 00		30 00
		1927 J	11-1299 RIGHT OF WAY		98 00				98 00
		TOTAL	1-1-37 AFTER RECLASSIFICATION		98 00		19563 00	27807 00	47468 00
	1938								
		1938 J	2-27 PERM WORK ORDERS				8 55		8 55
		J 3-27	PWO SWITCH STOOLS				199 72		199 72
		J 4-27	PWO				42 35		42 35
		J 7-27	PWO				15 45		15 45
		J 4-29	PWO RET				56 84		56 84
		J 7-29	PWO RET				19 37		19 37
		TOTAL	12-31-38		98 00		19752 86	27807 00	47657 86
	1939								
		J 7-27	PWO				116 24		47774 10
			Total 12-31-39		98.00		19,869.10	27,807.00	
47774 10	1940	J 5-29	PWO RET				28 24		47745 86
47745 86		J 7-27					137 74	13 04	47896 64
47896 64		J 7-29					79 40		47817 24
47817 24			Total 12-31-40		98.00		19,889.20	27,820.04	
47830 59	1941	J 3-27					67 76	45 59	47830 59
47824 90		J 3-29					12 62	93 07	47824 90
			Total 12-31-41		98.00		19,954.34	27,772.56	
47894 41	1943	J 5-27	PWO ADD				69 51		47894 41
47844 50		J 5-29	PWO RET				49 91		47844 50
47995 68		J 7-27	PWO ADD				151 10		47995 68
47838 79		J 7-29	PWO RET				156 81		47838 79
			Total 12-31-43		98.00		19968.33	27,772.56	
47816 16	1944	J 4-29	PWO RET					22 63	47816 16
47878 59		J 5-27	PWO ADD				62 43		47878 59
47833 51		J 5-29	PWO RET				45 08		47833 51
47872 85	1944	J 9-27	PWO ADD				39 34		47872 85
47832 49	1944	J 9-29	PWO RET				40 36		47832 49
			Total Dec. 31, 1944		98.00		19984.56	27749.93	
47878 76	1946	J 7-27	PWO ADD				38 48	7 79	47878 76
47825 67		J 7-29	PWO RET				43 07	10 02	47825 67
			Total Dec. 31, 1946		98.00		19,979.97	27,747.70	

Filed Feb 19 1948
Ron D Walker
Clerk

FORM NO. 210 SM 1-48

SUBSIDIARY LEDGER SHEET

Aberdeen Substation # 3A DIVISION

APPROPRIATION

ESTIMATED COST STATION

ACCOUNT [redacted]

ACCOUNT NO. 1143 1

DATE	REFERENCE	QUANTITY AND DESCRIPTION	ITEM NO.	DEBIT	CREDIT	PREVIOUS BALANCE	BALANCE CURRENT MONTH TO DATE	BALANCE CURRENT YEAR TO DATE
		Sub Structure and Equipment						
		Delta Star Type T, Form 176, La Hice						
		Steel Structure - Bus Copper						
		6-D.S. PM-34, # 1125021-6-37 K.V. Switches, 3 Pole						
		14- D.S. CEM, # 2560021-6-37 KV Switches, 3 Pole						
		6- D.S. PB-2, # 620084-7.5 KV Switches, 1 Pole						
		6-D.S. PB-2, # 620082- 7.5 KV Switches, 1 Pole			W.O. 404		17,013.80	
		3-D.S. PM-34, #1170021-3-37 KV, 2 Pole						
		6-D.S. DLO, #770072-3- 37 KV, Bus Supports						
		3-D.S. DLO, #770082-3- 37 KV, Bus Supports						
		28-D.S., DLO, #700182-3- 37 KV, Bus Supports						
		28-D.S. DLO, #728218-3-37 KV, Bus Supports						
		3-Galv. Iron Stands for 3-CT & 1-PT						
		3-Galv. Iron Stands for 1 PT						
		Foundations for Structure, etc.			W.O. 404		3,016.32	
		" " " "			E-194		147.49	
		Control Panels and Instruments			W.O. 404		3,978.74	
		600 MCM-5,000 V, 3 Cond. Cable-300'			W.O. 404		1,577.07	
		" " " " " "			W.O. 404		408.99	
		Control Cable - 300'			E-194		113.37	
		Conduit, Potheads and Junction Boxes			W.O. 404		975.98	
		3 - Arresters - G.E. type of 37-60 KV			W.O. 404		3,189.24	
		" " " " " "			E-194		1,068.41	
		3/- Arresters - G.E. Type of 28-37 KV			Original Sub.		1,068.41 Appr. O.C.	
		3 - G.E. Breakers, Type FKD-126-60 KV-400 Amps.			W.O. 404		4,770.39	
		" " " " " " " "			E-194		4,479.88	
		3- G. E. Breakers, Type FKD-126-37 KV-300 Amps.			W.O. 404		2,696.81	
		All breakers equipped with 120 V D.C. Solenoid Control						
		4- G.E. P. T. 22,000/110-600 V.A. Type E-116			W.O. 404		2,470.88	
		2-G.E. P. T. 34,500/115-600 V. A. Type E-116			W. O. 40		1,315.79	
		2- G.E. P. T. 33,000/110-600 V.A. Type E-116			E-194		998.16	
		6- G.E. C. T. 60 KV-25/50-5 Amps, Type EC-220			W.O. 404		2,688.17	
		3- G. E.C. T. 37 KV-25/50-5 Amps, Type EC-215			W.O. 404		888.56	
		4- G.E. C. T. 37 KV-25/50-5 Amps, Type EC-61			E-194		998.36	
		3- G.E. C. T. 37 KV-50/100-5 Amps, Type EC-215			Original Sub.		1,314.18 Appr. O.C.	
		3-1667 KVA, 28,000/2300 V Transformers			W.O. 370		11,766.12	
		Moloney #2662015,6,7						
		1-6750 KVA-28,000-22,000/2300 V Auto Transformer						
		Moloney # 2662278			W.O. 1062		5,871.62	
		TOTAL MATERIAL					70,288.88	
		LABOR			W.O. 404		5,868.73	
							76,157.61	
		Construction Overheads			W.O. 404		11,179.88	
					E 194		1,020.00	
					W.O. 370		1,407.88	
					W.O.1062		688.98	
					Original Sub.		478.81	
		Incidentals			W.O. 1062		116.00	

Filed Feb 19, 1948
Roy L. Meyer
Clerk

FORM

Defendant's Exhibit 214-I.

Q. And those, generally speaking, are ledger pages of the defendant company?

A. Those are the property ledger sheets.

Q. And they reflect the cost of the Gettysburg substation. Is that right?

A. They reflect the charges which are supposed to represent the cost of the substation.

Q. And you used these, I take it, in the preparation of your tabulations, 88 and 88-A?

A. That was the source of my information. I went back into the record behind it, of course.

Q. Now, you say you went behind the record. What additional records and files did you get on this subject?

A. I think I had the work orders.

Q. They are part of the general Exhibit 55, are they?

A. Yes.

Q. By reference to the ledger pages you can indicate the work orders that you used, can you? A. That is right.

Q. Will you refer to the ledger sheets and give us the number of the work orders you used?

A. Work order 404, 420, 397, and N-138. Those are the primary construction work orders. There are minor changes since that date.

Q. Can you find those?

A. I believe so. I suppose all of these work orders have a bearing. They have been requested or subpoenaed and are here. The primary ones are the original construction I referred to. No. 397 I believe is already an exhibit.

Q. You said these you are now producing are a part of general Exhibit 55?

A. That is right. Perhaps I better give you a few more.

A. (Cont) I had better include work order 1081 also.

Defendant's Exhibit 55-18 was received in evidence. It is in part as follows:

LIBRARY
SUPREME COURT, U.S.

Vol. III

TRANSCRIPT OF RECORD

(Pages 737 to 1008)

Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER,

vs.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1950.

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United States Court of Appeals,

EIGHTH CIRCUIT.

No. 13,887.
CIVIL.

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AUTHORIZATION APPLICATION

NORTHWESTERN PUBLIC SERVICE COMPANY

Division HURON Application No. 454

Department Transmission Highmore-Harrold Line Authorization No. N-136

Date April 24, 1926

To The Albert Kimmel Co., Inc.: Authority is asked for the expenditure of $ $8,595.72 for Construction / Retirement 9150 / Replacement, purposes in the month of August 192

Instructions: In making out these applications always remember to give the following information:
1st—Give full description of work necessary or desired, with sketch where possible.
2nd—Check mark all items in your stock available for this job.
3rd—Be sure to state revenues to be gained or economies to be effected by completion of this work.
4th—State when these expenditures will be required.
5th—Any unusual or RUSH application must be accompanied by full explanation and reasons, otherwise 30 days may be considered reasonable time for application approval or denial.

General Description:

Authority is asked for the above sum to build a 6600 Volt line from Highmore to Harrold. This line will be a duplicate in every respect of the line from Highmore to Ree Heights line.

Filed Feb 19 1948
Roy E Marker
Clerk

Application Received - 9-7-26.
Work completed 8-1-26

Details on opposite side of sheet, or may be attached.

Approved by A E Burns
Authorized by C B Zeigler
Date Authorized 9-9-26

Recommended by C P Money, E L Hart, E Blake, J A Ward

Work begun
Completed

Estimated Cost $ 8595.72.
Actual Cost $

737

Defendant's Exhibit 55-18.

DETAILED ESTIMATE OF COST

Quantity Estimated	Quantity Actual	Item	Estimated Cost	Actual Cost
		15 - 30'6" W.R.C. Poles	96.00	
		300 - 35'7" " "	3510.00	
		15 - 40'8" " "	225.00	
		4 - 45'8" " "	80.00	
		350 - 8' - 4x6 arms	315.00	
		350 - 60 x 18" x 1 3/4" Angle Braces	297.50	
		85 - 5/8 x 22" D.A. Bolts	17.00	
		325 - 5/8 x 14" Thrubolts	26.00	
		350 - 5/8 x 10" "	24.50	
		2000- 5/16 x 2 ¼" Sq. Washers	20.00	
		700 - ½ x 6" Carriage Bolts	21.00	
		1050 - 990 lead head pins	525.00	
		1050 - 13000 V pin Insulators	315.00	
		6 - sets 7500 V susp. Ins. & Clevises	18.00	
		56 - 615 Chance Anchors	126.00	
		4500' - 3/8" Galv. Guy Strand	72.00	
		100 - Pole Plates & x8	9.00	
		100 - Guy Hooks	9.00	
		100 - 1/2 x 4" lags	3.00	
		200 - 3 bolt 6" Guy clamps	40.00	
		14500 lbs #4 ACSR wire	3770.00	
		30 lbs. .05 x .3" flat armour	8.00	
		450 lbs. #6 al. tee wire	117.00	
			9644.00	
		Right of Way and Testing	300.00	
		Labor	2537.50	
			12481.50	
		10% Omissions & Contingencies	1248.15	
			13729.65	
		15% Engineering	2059.44	
		6½% labor for Insurance	164.94	
		2% Overhead	274.59	
		1% Interest	137.30	
			16365.92	

Defendant's Exhibit 55-18

Defendant's Exhibit 55-19 was received in evidence. It is in part as follows:

...Power Company COMPANY

W. O. No. [illegible]
Acct. No. [illegible]

WORK ORDER

Gross Expenditure 140,569.19

Office of Origin Aberdeen, S. D.

Date September 9th, 1929

GENERAL DESCRIPTION New outdoor substation at Aberdeen to handle 2 - 33 KV and 2 - 33 KV lines and 33 KV line from Aberdeen to Barnard and Aberdeen to Ipswich.

ADDITIONAL DETAIL DESCRIPTION The line between Aberdeen and Barnard and Ipswich is necessary to improve service to the towns on the Northern Power & Light Company and to enable us to carry some of the load on that system. The present substation is housed in a wooden structure and is not safe. Since we have the new spray pond on the north side of the plant we will be able to operate an outdoor substation. The substation will be so arranged that 66000 or 110,000 volt bays can be added later. Since it is imperative that we have this line working as soon as possible we are ordering the line material db case.

Since the bulk of the North Dakota Power & Light Company and the Northern Power & Light Company systems are 33 KV, we plan to build the substation and lines for that voltage but for the present will be operated at 22 KV as the lines in the vicinity are operating at that voltage. We plan to use a 1000 KVA transformer originally purchased for Milbridge for the transformation from 33 to 22 KV

EXPENDITURE

New Work Material & Exp.	118,479.79
Labor	14,089.00
Total	132,189.79
Labor Removing Old Work	
Maintenance	
Stores Dept. Chgs. 10%	
Gen. Office Supervision	13,510.00
Int. On Idle Investment	2,869.40
Gross Expenditure	140,569.19
Less Contributions	
Net Cost to Company	140,569.19

PROPERTY TO BE RETIRED

Original Cost

Return to Stock At Orig. Cost

Salvage Value

Depreciation

BENEFITS ACCRUING

Net Rev. $18,000

Per Years

Of Annual Cost 85

ADDITIONAL INVESTMENT NECESSARY AND WHICH IS TO BE CHARGED TO THE PERMANENT WORK ORDERS

Transformers $

Meters $

Budget Schedule No.

Budget Estimate $

Work Order No.

M. W. U. CO. Eng. Dept. Approved Date 9-26-29

RECEIVED SEP 28 1929

APPROVED 9/26/29

Estimated length of time required to complete work after approval

Date Completed Total Actual Amt., $

MATERIAL

Value on Hand

To Be Purchased

Total Material

Submitted by Thad Rigg Title Engr

Checked 9/11/29 By E K Abbott

Approved By

9/11/29 By M F [illegible] Vice President.

9-25-29 By J. G. [illegible] President.

Filed Feb 19 1948 Cor D Marker Clerk

13

(OVER)

741

Defendant's Exhibit 55-19.

WORK ORDER NO.

CLASSIFICATION OF MATERIAL	TOTAL	NEW WORK CONSTRUCTION	MAINTENANCE	LABOR COST REMOVING OLD WORK	ORIGINAL COST	PROPERTY TO BE RETIRED TO STOCK COST	SALVAGE VALUE	DEPRECIATION
1110 MAT & EXP		44,369.00						
LABOR		3,371.00						
TOTAL	47,740.00	47,740.00						
1182 MAT & EXP		18,435.90						
LABOR		5,800.00						
TOTAL	24,235.90	24,235.90						
1183 MAT & EXP		45,045100						
LABOR		4,000.00						
TOTAL	49,045.00	49,045.00						
MAT & EXP								
LABOR								
TOTAL								
MAT. & EXP								
LABOR								
TOTAL								
MAT & EXP								
LABOR								
TOTAL								
MAT & EXP								
LABOR								
TOTAL								
MAT & EXP								
LABOR								
TOTAL								
MAT & EXP								
LABOR								
TOTAL								
STORES DEPT CHGS. 10%								
INCIDENTALS	12,100.39	12,100.39						
GEN. OFFICE SUPERVISION	13,310.98	13,310.98						
INT. ON IDLE INVESTMENT	2,928.42	2,928.42						
TOTAL	148,349.19	148,349.19						

Defendant's Exhibit 55-19.

Form No. 73-4927

Final Return Sheet Auth. W.O. 404

Aberdeen Division. Description New outdoor substation at Aberdeen also 33 KV line Aberdeen to Barnard and 33 KV line from Aberdeen to Ipswich

Est. Cost 149,349.19 Date Started Oct. 1929 Acct. Chg'd. $

Act. Cost 152,126.60 Date Completed Sept. 1930 Acct. Chg'd. 1119 $

% Over—Under 21.95 Acct. Chg'd. 1122.1 $

Date Cleared Oct. 1930 Journal Entry J 10-66 Acct. Chg'd. 1123.1 $

(-777.21 [illegible] along

Item No.	ITEM	QUANTITY Est.	QUANTITY Act.	AMOUNT Estimate	AMOUNT Actual	DIFFERENCE Actual	DIFFERENCE Estimate	ACCT. CHG'D.
1	50' poles	10	11	250 00	275 00	27	25.00	1122.1
2	45' poles	20	26	400 00	460 00	60	15.00	1122.1
3	40' poles	240	264	3,120 00	4,442 88	922	13.00	1122.1
4	35' poles	510	561	6,171 00	8,967 00	796	12.90	1122.1
5	10' cross arms	1106	1619	1,216 00	2,795 84	1579	1.10	1122.1
6	7' cross arms	200	46	280 00	46 84	92	1.40	1122.1
7	72" cross arms braces	1106	1361	996 00	1251 84	1255	.90	1122.1
8	28" cross arms braces	440	520	70 40	90 10	2019	.16	1122.1
9	Heavy pins and spur washers	3300	3901	2,046 00	3,276 85	5101	.62	1122.1
10	Light pins and spur washers	80	95	16 00	465 65	1836		1122.1
11	Anchors	180	213	468 00	781 65	917		1122.1
12	Anchors guys	30		300 00				1122.1
13	Anchor rods	30	34	24 00	64 65	96		1122.1
14	5/8" galvanized guy wire	16000	20[illegible]	240 00	321 65	3074		1122.1
15	Guy hooks	300	330	24 00	25 84	720		1122.1
16	Strain plates	300	330	24 00	25 80	670		1122.1
17	Bayonets	82	77	328 00	104 65	77		1122.1
18	Static clamps	1106	1218	116 00	90 14	1082		1122.1
19	11" machine bolts	1106	1218	116 00	90 55	995	.081	1122.1
20	14" machine bolts	1000	1171	116 00	116 80	1171	.099	1122.1
21	18" D.A. bolts	200	225	36 00	84 98	913	.407	1122.1
22	1/2 X 4 1/2 lag bolts	600	1100	18 00	44 10	1100		1122.1
23	1/2 X 6" carriage bolts	2200	2400	66 00	936 00	2400	.425	1122.1
24	5/8 X 4 1/2 carriage bolts	600	1200	16 00	325 80	1324	.231	1122.1
25	Spur washers	3000	3400	120 00	408 00	5978	.472	1122.1
26	1/4" S. and M. strand	2000[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	.0[illegible]	1122.1
27	Eyelets	100	100	25 00	25 00	261		1122.1
28	S bolt & 6" clamps	600	1200	120 00	312 00	1465		1122.1
29	5/8 X 6" machine bolts	1106	1218	116 00	160 84	1444	.256	1122.1
30	5/8 X 16" machine bolts	90	100	8 00	20 00	2510	.111	1122.1
31	45 KV insulator	3600	3960	2,400 00	2,640 00	6240	1.734	1122.1
32	S.O. A.C.S.R.	140000	154000	2,240 00	2,464 00	4[illegible]	.286	1122.1
33	4 unit strain insulators	180	198	1,296 00	1,426 32	198	9.32	1122.1
34	Aluminum strain clamp	180	198	288	316 80	917		1122.1
35	.06 X .3 alumi armour	10000	11000	300 00	330 00	1521		1122.1
36	#4 alumi tie wire	1000	1100	300 00	330 00	1086		1122.1
37	3 pole 50,000 V air break	No. 3		600 00	660 00	1		1122.1
38	Aberdeen substation structure	1	1	3,000 00	12,000 00	X		1119
39	[illegible] KV oil circuit brk.	2	2	2,400 00	2,640 00	X		1119
40	33 KV potential transformers	3	3	1,200 00	1,320 00	X		1119
41	33 KV C.T. 25/50 to 5 amp	3	3	600 00	660 00	[illegible]		1119
42	33 KV current transformers	3	3	2,400 00	2,640 00	[illegible]		1119
43	33 KV potential transformers	3	3	1,200 00	1,320 00	[illegible]		1119
44	600 MCM 3 conductor cable	3000	3300	1,200 00	1,320 00	X		1119
45	Control cable	3000	3300	300 00	330 00	X		1119
46	33 KV connectors	9	9	2,400 00	2,640 00			1119
47	Conduit and fittings			600 00	660 00	X		1119
48	Piping			1,200 00	1,320 00	X		1119
49	Foundations			1,200 00	1,320 00	X		1119
50	Control panels and instruments			1,200 00	1,320 00	X		1119
							44	

Defendant's Exhibit 55-19.

Form No. 78—4-37

Return Sheet — Auth. W.O. 404 Con't'd.

Division. Description

Est. Cost — Date Started — Acct. Chg'd. — $

Act. Cost — Date Completed — Acct. Chg'd. — $

% Over—Under — Acct. Chg'd. — $

Date Cleared — Journal Entry — Acct. Chg'd. — $

Item No.	ITEM	QUANTITY Est.	QUANTITY Act.	AMOUNT Estimate	AMOUNT Actual	DIFFERENCE	ACCT. CHG'D.
X 51	Substation structure - Barnard		OK	1,809 00	1,854 80	X	1119
X 52	50 KVA 22,000 - 6,600 trans-		OK				
	formers	3		1,350 00	1,718 80	X	1119
X 53	50 amp regulators	2	✓	2,500 00	320 00		1119
X 54	Foundation		✓	250 00	250 75	X	1119
X 55	6,600 V reclosing switch	1	✓	1,700 00	1,786 50	X	1119
X 56	25 KVA 6,600 - 2,300 V trans-						
	formers	3	✓	600 00	720 00	X	1119
57	Labor on structures		✓	5,800 00	1,682 42	<	1122.1
58	Labor on conductors		✓	4,000 00	5,000 15	<	1122.1
59	Labor on substation		✓	3,500 00	3,171 97		1119
60	Incidentals		✓	12,100 00	5,015 46		Overheads
61	Supervision		✓	13,310 00	5,500 00	12.71%	Overheads
62	Interest		✓	2,000 42	5,000 00		Overheads
				110,340	102,125 60	(38,777 41)	

Summary

	Expenditures	Percentage	Overheads	Total
Acct 1122.1	37,525.00	25 47%	9,005 16	46,530 16
Acct 1123.2	33,150 06	24 24	12,000 40	44,000 24
Acct 1119	56,031.84	38 27	17,444 44	73,476 28
	146,536.10	100 00	38,387.00	102,125 60

40.97%

Design work Barnard — 60 455 15 — 86 733 % — 49,916.52

9 487 13 — 13 267 %

69 709 82

Maintenance Design started on 1936 & 5-37

	Under Sub	Barnard Sub	Total
Labor	5352.64	818 76	6171 37
Overheads	1781.78	1807 08	13620 86
	17166 32	2 625 84	19792 23

560.98
533.19
1093.17

50

Defendant's Exhibit 55-19.

Defendant's Exhibit 55-20 was received in evidence. It is in part as follows:

M. W. Stand. 103 Rev.—5-29.

NORTHWESTERN PUBLIC SERVICE COMPANY

W. O. No. 420

Acct. No.

WORK ORDER

Schedule #382

GENERAL DESCRIPTION Extend 33 KV circuit from Highmore to Wolsey and build 33 KV line from Blunt to Gettysburg and tie in substation at Gettysburg.

Includes 66 KV work at Highmore from west to Blunt.

ADDITIONAL DETAIL DESCRIPTION This will tie our system in with the Northern Power & Light Company at Gettysburg and will make two way service available to all towns between Bowdle and Wolsey. In addition to the net revenue shown on this work order for Northwestern there will be a direct saving of $5000 per year to the Northern Power & Light Company in operating labor at Blunt and Gettysburg plants.

OPERATING DEPT. M.W. RECEIVED OCT 11 1929 APPROVED 10/11

Filed Feb 19, 1948
Roy D Marker Clerk

ADDITIONAL INVESTMENT NECESSARY AND WHICH IS TO BE CHARGED TO THE PERMANENT WORK ORDERS

TRANSFORMERS $

METERS $

BUDGET BOARDING NO.

ESTIMATED LENGTH OF TIME REQUIRED TO COMPLETE WORK AFTER APPROVAL 6 Months

DATE COMPLETED TOTAL ACTUAL AMT. $

SUBMITTED BY Title

CHECKED 10/5/29 By E K Gellert

APPROVED 10/4/29 By C V Linnett

APPROVED 10/4/29 By M L Bell VICE PRESIDENT.

APPROVED 10-9-29 By T J Parker PRESIDENT.

10-12-29 Auth.

(OVER)

Gross Expenditure 114,138.10

Office of Origin Huron, S. D.

Date October 3rd, 1929

EXPENDITURE

New Work Material & Exp	88,751.56
Labor	14,700.00
Total	103,451.56
Labor Removing Old Work	
Maintenance	
Stores Dept. Chgs. 10%	
Gen. Office Supervision	10,345.15
Int. On Idle Investment	341.39
Gross Expenditure	114,138.10
Less Contributions	
Net Cost to Company	114,138.10

PROPERTY TO BE RETIRED

Original Cost	
Deduct for Stock or Orig. Cost	
Salvage Value	
Depreciation	

BENEFITS ACCRUING

Increased Net Rev Per Year	12,000
% Incr. Rev. to Company Cost	11%
Decreased Exp. Per Year	
% Decr. Exp. to Company Cost	

MATERIAL

Value on Hand	$0000.00
To Be Purchased	88,751.56
Total Material	88,751.56

15

Defendant's Exhibit 55-20.

WORK ORDER NO._____

CLASSIFICATION OF MATERIAL		TOTAL	NEW WORK CONSTRUCTION	MAINTENANCE	LABOR COST REMOVING OLD WORK	PROPERTY TO BE RETIRED ORIGINAL COST	RETURN TO STOCK AT ORIG. COST	SALVAGE VALUE	DEPRECIATION
1122.1	MAT & EXP		18,301.30						
	LABOR		7,500.00						
	TOTAL	25,801.30	25,801.30						
1123.1	MAT & EXP		47,374.00						
	LABOR		5,000.00						
	TOTAL	52,374.00	52,374.00						
	MAT & EXP		18,850.00						
	LABOR		1,500.00						
	TOTAL	20,350.00	20,350.00						
	MAT & EXP								
	LABOR								
	TOTAL								
	MAT & EXP								
	LABOR								
	TOTAL								
	MAT & EXP								
	LABOR								
	TOTAL								
	MAT & EXP								
	LABOR								
	TOTAL								
	MAT & EXP								
	LABOR								
	TOTAL								
	MAT & EXP								
	LABOR								
	TOTAL								
	STORES DEPT CHGS. 10%								
	INCIDENTALS	4,926.26	4,926.26						
	GEN. OFFICE SUPERVISION	10,345.15	10,345.15						
	INT. ON IDLE INVESTMENT	341.39	341.39						
	TOTAL	114,138.10	114,138.10						

Defendant's Exhibit 55-20.

Form No. 78-4-27

Final Return Sheet — Auth. **W.O. 420**

Hunson Division. Description **33 KV circuit Highmore to Harrold and line Hlunt to Gettysburg and substation at Gettysburg**

Est. Cost **114,138.10** Date Start **Nov.1929** Acct. Chg'd. $

Act. Cost **125,545.42** Date Compl. **Sept.1930** Acct. Chg'd. **1119** $ **24,220.26**

% Over Under **9.99** Acct. Chg'd. **1122.1** $ **25,252.68**

Date Cleared **Oct. 1930** Journal Entry **J 10-66** Acct. Chg'd. **1123.1** $ **73,072.48**

Item No	ITEM	QUANTITY Est.	QUANTITY Act.	AMOUNT Estimate	AMOUNT Actual	DIFFERENCE	ACCT. CHG'D.
1	30' poles	40	28	250 00	156 00		1122.1
2	35' poles	700	650	8,575 00	8,015 45		1122.1
3	40' poles	50	40	750 00	581 40		1122.1
4	45' poles	20	15	330 00	250 60		1122.1
5	50' poles	10	9	180 00	174 00		1122.1
6	10' cross arms	400	1251	480 00	2,356 04		1122.1
7	7' cross arms	810		810 00			1122.1
8	8' cross arms	320	248	352 00	416 20		1122.1
9	18" D.A. bolts	300	572	54 00	85 80		1122.1
10	12" machine bolts	1100	44	121 00	3 45		1122.1
11	14" machine bolts	400	826	52 00	74 34		1122.1
12	Pole top pins and eyebolts	810		1,215 00	1 08		1122.1
13	60" pole top pin and eyebolt	1530	2222	1,530 00	1,666 40		1122.1
14	1/2 X 6" carriage bolts	5060	2482	91 80	88 55		1122.1
15	10" machine bolts	2400	1218	84 00	90 88		1122.1
16	Steel pins 1 3/8"	2220	1564	1,974 00	856 8 1		1122.1
17	Steel pins 1"	960	1748	288 00	950 60		1122.1
18	Washers	10000	514	200 00	14 39		1122.1
19	Anchors	150	154	330 00	387 86		1122.1
20	Anchor legs and 8' rods	50	46	250 00	41 38		1122.1
21	3/8" guy strand	25000	12645	375 00	464 24		1122.1
22	Strain plates	500	117	24 00	10 01		1122.1
23	Guy hooks	300	474	2 4 00	34 37		1122.1
24	3 bolt clamps	300	427	24 00	78 05		1122.1
25	1/2 X 4" lags	300	740	7 50	22 20		1122.1
26	#4 A.C.S.R.	130000	82940	3,250 00	5,128 07		1123.1
27	2/0 A.C.S.R.	150000	85644	34,500 00	37,861 35		1123.1
28	#4 tie wire	1500	1841	450 00	519 38		1123.1
29	alumi armour wire	500	252	150 00	87 84		1123.1
30	45 KV insulators	3630	5708	7,986 00	11,562 61		1123.1
31	15 KV insulators	960	894	288 00	99 06		1123.1
32	Strain units	100	107	750 00	742 64		1123.1
33	6,600 V disconnects	2		50 00			1119
34	33 KV air break	2		600 00			1119
35	Substation structure	1		2,000 00	1,284 70 X		1119
36	2,300 V meter equip. to switch	2		2,000 00	3,328 24 X		1119
37	225 K.V.A. transformers 12000- 2300	2		9,000 00	8,928 26 X		1119
38	100 amp outdoor regulator	2		2,200 00	2,219 98 X		1119
39	Substation fence	1		300 00			1119
40	Substation foundations	1		500 00	314 70 X		1119
41	Arrestors	2		2,000 00	2,141 24 X		1119
42	Labor on structure			7,500 00	6,851 45		1122.1
43	Labor on conductors			5,000 00	4,889 95		1123.1
44	Labor on substation			1,500 00	1,796 17		1119
45	Incidentals			4,824 20	9,702 20		Overheads
46	Supervision			10,247 15	9,332 48		Overheads
47	Interest			341 45	2,230 41		Overheads
				114,138 10	125,545 42	11,407 32	

See page #2 for summary

Defendant's Exhibit 55-29.

Return Sheet Auth. W. O. 497 Cont'd.

Division. Description

Est. Cost Date Started Acct. Chg'd. $

Act. Cost Date Completed Acct. Chg'd. $

% Over—Under Acct. Chg'd. $

Date Cleared Journal Entry Acct. Chg'd. $

Item No.	ITEM	QUANTITY Est.	QUANTITY Act.	AMOUNT Estimate	AMOUNT Actual	DIFFERENCE	ACCT. CHG'D.
		[illegible]					
		Summary					
	Expenditure	[illegible]		Overheads	Total		
Acct	1122.1	28	28	4,706	28,262		FIX
Acct	1122.1	28	28	12,281	75,072		Cont
Acct	1119	19	28	4,105	24,280		sub
		100	100%	21,092	125,545		

23466 / 6691 = 39.2%

16126

15000 / 4698 = 3.3%

6427.8

Defendant's Exhibit 55-20.

Defendant's Exhibit 55-21 was received in evidence. It is in part as follows:

M. W. Blank. 123 Rev.—5-36

Cleared

WORK ORDER

INVESTMENT

W.O. No. 1081
Budget Sched. No. 30
Acct. No. 1119

NORTHWESTERN PUBLIC SERVICE Company
Date 1-22-48 Location Aberdeen Utility Electric

Description

Installation of a 3 phase, 3000 KVA, 33000 to 22000 or 38000 volt, auto-transformer at Aberdeen substation to tie in between our 33 KV system and the Northern Power & Light Company 22 KV system. This transformer will be built for future 33 to 38 KV operation as the lines of the Northern Power & Light Company will ultimately be cut over to 38 KV.

Filed Feb 19 1948
Roy D Marker
Clerk

Dkt 4055-21
AC

See Retirement / Investment Work Order No. 1082 R

Date Work To Be Started April 1, 1948
Date Work To Be Finished May 1, 1948

ESTIMATED COST OF WORK TO BE APPROVED	Amount
Material To Be Purchased	5800.00
Material To Be Used From Stock	
Salvage Material To Be Used	
Transferred Equipment	
Labor	100.00
5% contingencies	280.00
Total	5580.00
Stores Department Charge 10%	
General Office Supervision	558.00
Interest On Idle Investment	35.00
Total Cost of Work To Be Approved	6171.00

PERMANENT WORK ORDERS	Amount
Transformers and Installation	
Meters and Installation	
Services	
Short Extensions	
Total Permanent Work Orders	
TOTAL COST OF NEW WORK	6171.00
Less: Salvage To Be Used	
Transferred Equipment	
Contributions	
Refundable Deposits	
Permanent Work Orders	
TOTAL	
TOTAL COST TO BE CHARGED TO NEW WORK	6171.00
Submitted By E K Gilbert	
Checked By E K Gilbert	1-27-48
Checked By	
Checked By	1-29-48

BENEFITS ACCRUING FROM NEW WORK	Amount
Increased Gross Revenue Per Year	None
% Increased Gross Revenue To Company Cost	
Increased Net Revenue Per Year	
% Increased Net Revenue To Company Cost	
Decreased Expense Per Year	6000.00
% Decreased Expense To Company Cost	97%

ESTIMATED RETIREMENT CHARGE	Amount
Original Cost of Property Retired	
(How Computed)	
Cost of Removing Property Retired	
TOTAL	
Salvaged Mat.—Junk Value	
Salvaged Mat.—Ret. to Stock	
TOTAL SALVAGE MATERIAL	
NET RETIREMENT CHARGE	

Approved	E K Gilbert	1-26-48
Approved	M D Jensen	1-26-48
Approved	L T Boettcher	1-26-48
Approved	C J Stibbe	1-25-48
Approved		
Approved	T C Power	1-27-48
Approved	O K Sanders	1-29-48
Authorized	J W Elliott	1-30-48

*Investment-Retirement-Maintenance-Suspense

(Over)

17

Defendant's Exhibit 55-21.

257

DETAILED ESTIMATE OF COST (Itemize Labor & Material Below)

Account Number	Items	Size	Quantity	Cost Per Unit	Amount
1119	1 - Transformer with air blast cooling, etc.	3000 KVA	1	5200.00	5200.00
"	2 - Labor unloading and installed				100.00
"	3 - 5% contingencies				260.00
					5560.00
"	4 - 10% G. O. supervision				556.00
"	5 - ½ of 1% per month interest				55.60
					6171.60

TOTAL COST OF NEW WORK—BY MONTHS		
Month		Estimate
January	19	
February	19	
March	19	
April	19 32	3085.80
May	19 32	3085.80
June	19	
July	19	
August	19	
September	19	
October	19	
November	19	
December	19	
TOTAL		$ 6171.60

Reason Why Work Should Be Done:

By installing this transformer at Aberdeen and moving the present transformer to Mobridge to increase the 38 to 22 KV lie in capacity there, we estimate that we can use approximately 2,500,000 KWH more of Beulah current on Northwestern Public Service Company in 1932 than we did in 1931. This will make a saving of approximately ½¢ per KWH after deducting all losses.

18

Defendant's Exhibit 55-21.

Final Return Sheet

W. O. No. 1081

Aberdeen Division Description Installation of 3000 KVA Auto Transfor-
mer in Aberdeen Sub Station

Est. Cost 6171.60 Date Started 4/1/32 Acct. Chg'd. $

Act. Cost 6219.60 Date Completed 5/21/32 Acct. Chg'd. $

% Over—Under .008 Acct. Chg'd. 1119 $ 6219.60

Date Closed July 1932 Journal Entry J-62 Acct. Chg'd $

ACCOUNT NO.	ITEM NO.	ITEM	QUANTITY EST.	QUANTITY ACT.	AMOUNT ESTIMATE	AMOUNT ACTUAL	DIFFERENCE QUAN.	DIFFERENCE AMT.
1118	1	Transformer & air blast cooling,						
		3000 KVA	1	1	5200.00	5165.00		(35.00)
1119	2	Labor unloading and installing			100.00	138.32		[illegible]
	3	Contingencies			290.00	116.00		[illegible]
						[illegible]		[illegible]
					5890.00	[illegible]		[illegible]
		Salvage			556.00	807.64		251.64
		Setout			55.60	18.43		(37.17)
					6171.60	6219.60		48.00

Defendant's Exhibit 55-21.

A. (Con't) Now, I believe I gave you the principal ones covering the value as to the insufficiency of this contract. All of these other work orders enter into these very facilities at some time or another.

Q. I am speaking now of your Exhibit 88 and 88-A. Have you produced everything you will need in order to talk about the figures shown on those tabulations?

A. I think I better give you all of these in that event.

Q. Do you want anything except from what is technically called a "work order"?

A. I would not like to restrict it to that. I don't know right now that I would need anything else, but I don't like to cut off my sources of information.

Q. Referring to the folder that you hand me, do you want one or all of those papers put in evidence to use?

A. All of the information in this folder appears to apply to the facilities that haven't been included as part of the interchange facilities. There are substation items in Aberdeen that refer to specific 32,000 volts. There are portions of transmission lines east of Highmore.

Q. Then you don't want those so far as Exhibit 88 is concerned?

A. Unless you want to throw the figures in as part of the facilities.

Q. I want to get at these in the order in which you made them. Is there anything more in that folder you want to submit to the Court in support of these tabulations, 88 and 88-A?

A. I would be inclined to let these two folders go into the record.

Q. The whole of them? A. Yes.

Q. Do you want all of this correspondence?

A. I haven't time to read it now so I don't want to limit myself.

Defendant's Exhibit 55-22 was received in evidence. It consists of miscellaneous correspondence in 1930 and 1931 relating to work order 420 and the construction work thereunder.

Defendant's Exhibit 55-23 was received in evidence and is in part as follows:

Form 4P-4M 4-3-28

RETIREMENT APPLICATION

W.C. 405R

Northwestern Public Service Company

Division Aberdeen Application No. _____

Department Electric Date Sept. 9th, 1929

Application is made to remove the following property from Fixed Capital Account.

General Description: Removing part of the 6600 volt line between Aberdeen and Barnard and removing old wooden substation structure at Aberdeen.

Details on Back of this Sheet

Reason for Retirement Changes being made in connection with the line to Barnard and Ipswich make these changes necessary.

Will the property to be retired be replaced? Yes If so, an authorization covering the new work must be sent with this application.

(Application No.
Authorization)
(Authorization No.

Estimated Cost

Cost of Retirement (Labor, etc.)	$2000.00
Less Salvage of Material	4472.00
Net Retirement Cost	$2472.00 * Red

Requested by _____

Recommended by _____

_____

Approved by _____
Treasurer.

Approved and Authorized by _____
President.

Cancelled _____

Completed _____

Closed _____

Retired from Capital Account

_____ 19___

_____
Treasurer.

Defendant's Exhibit 55-23

2763

INSTALLED COST OF PROPERTY TO BE RETIRED (STATE IF ESTIMATED)

Note: Include Costs of Materials, Labor, Freight, Incidentals, Supervision, Overheads, Etc. Original and Unit Costs to be filled in by General Office.

Acct. No.	ITEM	Quantity	Unit Cost	Original Cost	Estimated Salvage
11281	30' - 6" treated poles	100	8.14	814 00	600 00
	Pole top pins 24"	322	.78	251 16	80 00
	35' - 6" treated poles	35	10.79	377 50	150 00
11281	15 KV insulators	262	.31	81 22	65 00
	#2 ACSR	4500	.2245	1012 50	900 00
	#4 "	6000	.166	996 00	1200 00
1119	Lumber from substation			256 70	100 00
	45 KV gang operated 45° disconnects	5	45.35	226 80	1000 00
	46 KV knife switches 45° "	6	61.32	371 92	300 00
	Buss supports	15		25 00	15 00
	Buss copper			1000 00	50 00
	Strain insulators - 3 unit	12	1.25	10 00	24 00
	Selector switch 2300 V	1		30 00	15 00
	Foundations			374 89	
				5419 46	
	Installation 5%			270 97	
				5690 43	
	Supervision & contingencies 5%			284 52	
				5974 95	
	Indirect Overheads 25%			1493 73	
	If necessary use additional sheets				
	TOTAL			7468 68	4472 00

Details of Estimate Cost of Retirement

Labor retiring structures	750.00
Labor retiring conductors	500.00
Labor retiring sub equipment	750.00
	2000.00

To be filled in by General Office		
Total credit to Fixed Capital Account		7468.68
Cost of Retirement	7050.00	
Less Salvage	4472.00	2472.00
Net Charge to Renewal & Replacement Reserve (To be filled in by General Office)		4996.68

Note—If materials are shipped to stores freight is to be charged to this application.
If materials are shipped to another job freight is chargeable to new job.

Defendant's Exhibit 55-23.

765

Final Return Sheet Retirement W.O. No. [redacted] District [redacted]

Description [redacted] of material on Skeleton-Bennett line and [redacted] substation

Date Cleared [redacted] Debit Journal No.

Total Prop. Ret (Memo Only)	Res. from Earnings Acct. 85A	Res. from Appraisals Acct. 85B	Capital Surplus from Appraisals Acct. 80A	Res from Earnings Acct. 85A (Reti Cost Only)	Retire work Order Salvage Value	Total Debit
[redacted]	[redacted]			1,[redacted]	10,[redacted]	7,[redacted]

Credit

Acct. No.	Total Prop. Retired (Memo Only)	Prop. of App. Used for Securities	Prop. of App. Not Used for Securities	Additions Since App. used for Sec.	Res. from Earnings a/c 85A (Sal Val Only)	Retire work Order Retire Cost	Total Credit
[redacted]	[redacted]			[redacted]			
[redacted]	[redacted]			[redacted]			
[redacted]	[redacted]			[redacted]			
	[redacted]			[redacted]	[redacted]	[redacted]	7,[redacted]

Item	Quantity Est.	Quantity Act	Original Cost Est.	Original Cost Act.	Acct. to credit	Salvage Value	Retire Cost
[redacted]	[redacted]	[redacted]	[redacted]	2,[redacted]	1132.1	2,[redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	1,[redacted]		[redacted]	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	1132.1	[redacted]	
[redacted]	[redacted]	[redacted]	1,[redacted]	1,[redacted]		2,[redacted]	
[redacted]	[redacted]	[redacted]	1,[redacted]	[redacted]		1,[redacted]	
[redacted]			[redacted]	[redacted]	1132		
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]			
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]			
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]			
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
[redacted]			[redacted]	[redacted]			
[redacted]			[redacted]	[redacted]	1132.1		
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	
[redacted]				[redacted]		[redacted]	

53

792

Defendant's Exhibit 55-23.

Final Return Sheet Retirement W.O. No. [illegible] R.Post. District [illegible]

Description [illegible]

Date Cleared Journal No.

Total Prop. Ret Memo Only	Res. from Earnings Acct. 85A	Res. from Appraisals Acct. 85B	Capital Surplus from Appraisals Acct. 80A	Res from Earnings Acct. 86A (Reti Cost Only	Retire work Order Salvage Value	Retire work Order Retire Cost

Credit

Acct. No.	Total Prop. Retired (Memo Only)	Prop. of App. Used for Securities	Prop. of App. Not Used for Securities	Additions Since App. Used for Sec.	Res. from Earnings a/c 86A (Sal Val Only)	Retire work Order Retire Cost	Retire work Order Retire Cost

ITEM	Quantity Est.	Quantity Act	Original Cost Est.	Original Cost Act.	Acct. to credit	Salvage Value	Retire Cost
Messenger		[illegible]		11[illegible]	11[illegible]	[illegible]	
8 wire rack		1		[illegible]		[illegible]	
6' X arms		7		[illegible]		[illegible]	
806 insulators		19		[illegible]		[illegible]	
Shims		5		[illegible]			
40' poles		15		[illegible]		[illegible]	
50' poles		3		[illegible]		[illegible]	
Junk aluminum		500#		[illegible]	11[illegible]	[illegible]	
N.P. wire		2100#		[illegible]		[illegible]	
66000V insulators		[illegible] 42		1[illegible]		11	1[illegible]
Glass insulators		27		[illegible]			
St - Howlets		47		[illegible]		[illegible]	
G.E. 150 A cutout		2		[illegible]	1119	[illegible]	
2300 lighting arresters		1		1[illegible]		[illegible]	
2# 1/0 797 tape K.B. current transformers		2		[illegible]		[illegible]	
	5,419	44	11,21[illegible]	1[illegible]		1[illegible]	
Installation 16.60%(Estimate was 5%)	[illegible]	[illegible]	1,[illegible]	[illegible]			
	6,[illegible]	[illegible]	13,07[illegible]	[illegible]			
Omission & contingencies 10.53%(estimate was 5%)	[illegible]		1,[illegible]	[illegible]			
	9,07[illegible]	[illegible]	14,4[illegible]	[illegible]			
Indirect overheads 9.61%(estimate was 20%)	1,[illegible]	[illegible]	1,[illegible]	[illegible]			
	7,[illegible]	[illegible]	15,[illegible]	[illegible]		1[illegible]	1,[illegible]

Note:
Original cost taken from W.O.#49 and [illegible] also old work order on Aberdeen substation.

34

769

Defendant's Exhibit 55-23.

Defendant's Exhibit 55-24 was received in evidence. It is in part as follows:

FORM NO 75—SM-1-39

Final Return Sheet

Aberdeen, S. D. Division

W. O. No. 2470

Description Install Ground-Fault Neutralizer (Peterson Coil) together with associated tap-changing protection and by-pass - Aberdeen Sub Station.

Est. Cost 6465.68 Date Started Mar 1944 Acct. Chg'd $

Act. Cost 7269.85 Date Completed Apr 1944 Acct. Chg'd Sub 3A 1143 $ 7269.85

% Over—Under 12.4375 Acct. Chg'd $

Date Cleared May 1944 Journal Entry 5-28 Acct. Chg'd $

ACCOUNT NO.	ITEM NO.	ITEM	QUANTITY EST.	QUANTITY ACT.	AMOUNT ESTIMATE	AMOUNT ACTUAL	DIFFERENCE QUAN.	DIFFERENCE AMT.
1143	1	34.5 Neutralizer, 60/30 Amp. Protection & By-pass Equipment, Remote Tap Changer, complete	1	1	5701.00	5725.00	-	24.00
	2	Foundation & Footings			150.00	353.16		203.16
	3	Control Cable, Conduit, Wiring			150.00	363.28		213.28
	4	Stores Expense			15.00	26.13		11.13
	5	Installation Labor			200.00	401.41		201.41
	6	Transportation			—	8.20		8.20
	7	Engineering & Supervision			25.00	31.55		6.55
		TOTAL			6241.00	6908.73	703.71	667.73
		Admin & Gen'l Expense			224.68	266.14		
					6465.68	7269.85		804.17

Filed Sept 19, 1944
Roy S Marker clerk

Work Order Completed and Ready for Service

Signature Date

Private R.W.

Public R.W.

Tax Maps

Engineering

Property

Accounting

Signed [illegible] Dept Head Date

Signed [illegible] Chief Clerk 5-10-44 Date

Signed A R Morey Manager 5-11-44 Date

35 a3

WORK ORDER

INVESTMENT

W. O. No. 2470
Budget Sched. No. 75A
Acct. No. 1143
Franchise Exp. Date 1961

NORTHWESTERN PUBLIC SERVICE COMPANY Company
Date 11/4/43 Location Aberdeen Utility Electric

Description

Install ground-fault neutralizer (Peterson Coil) together with associated tap-changing, protective and by-pass equipment at Aberdeen substation on 33 KV transmission

This W.O. covers Aberdeen installation only; see W.O. #2471 [illegible] investment. Construction approved by W.P.B., serial #032961.

RECORDED
NOV 11 1943
BUDGET & [illegible] DEPT.

Date Work To Be Started 2/15/44 Date Work To Be Finished 3/[illegible]/44

Retirement
Sep
Investment
Work Order No. None

Proposed Expenditures—Budget Schedule No. 75A $ —
Previous Authorizations $ —
This Authorization 6,465.68 $ 6,465.68

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	5,851.00
2. Material To Be Used From Stock	150.00
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	200.00
6. Engineering & Supervision	25.00
7. Total	6,226.00
8. Stores Department Charge 10 % on 150.00	15.00
9. General Office Supervision 3.6 %	224.68
10. Interest On Idle Investment %	
11. Total Cost of Work To Be Approved	6,465.68
PERMANENT WORK ORDERS	AMOUNT
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	6,465.68
22. Less: Salvage To Be Used	—
23. Transferred Equipment	—
24. Contributions	—
25. Refundable Deposits	—
26. Permanent Work Orders	—
27.	—
28. Total —	
29. Total Cash Required for New Work to be Authorized	6,465.68
Submitted By J. F. Buckmaster	DATE 11-5-43
Checked By	
Checked By E H Kingdon	11-5-43
Checked By	

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	—
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	1,500.00
% Decreased Expense To Cost of New Work	23.2
ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	
(How Computed and Date Installed)	
Less: Transferred Equipment	
Original Cost of Property Retired	
Cost of Removing Property Retired	
TOTAL	
Salvage Mat.—Junk Value	—
Salvage Mat.—Ret. to Stock	—
	—
TOTAL SALVAGE MATERIAL	—
NET RETIREMENT CHARGE	

	DATE
Approved J. F. Buckmaster	11-5-43
Approved E. T. Swanstrom	11/9/43
Approved	
Approved	
Approved CONCURRED IN BY MIDDLE WEST SERVICE COMPANY	
Approved BY	
Approved	
Authorized	11/9/43

*Investment-Retirement-Maintenance-Operating-Suspense

(OVER)

773

Defendant's Exhibit 55-24.

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

ACCOUNT NUMBER	ITEMS	SIZE	QUANTITY	COST PER UNIT	AMOUNT
1143 /	34.5 KV Neutralizer, 60/30 amperes, protective and by-pass equipment, remote tap-changer, complete		1	5,701.00	5,701.00
2	Foundation and footings				150.00
3	Control cable, conduit, wiring				150.00
4	Stores expense, 10% on $150.00				15.00
5	Installation labor				200.00
6	Transportation				
	Engineering and supervision				25.00
	3.6% Admin. & Gen'l Exp.				224.68
					6,465.68

TOTAL CASH REQUIRED FOR NEW WORK—BY MONTHS	
MONTH	ESTIMATE
January 19	
February 19 44	5,851.00
March 19	614.68
April 19	
May 19	
June 19	
July 19	
August 19	
September 19	
October 19	
November 19	
December 19	
TOTAL	6,465.68

Reason Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

Installation will greatly reduce line disturbance and interruptions caused by phase-to-ground flashOvers and arcs. Anticipated savings in damage to equipment and reduced stand-by operation of Diesel plants should pay for installation in five years or less, without putting value on improved service.

23

7455

Defendant's Exhibit 55-24.

Defendant's Exhibit 55-25 was received in evidence. It is in part as follows:

K

Ofdt 4 55-25

FINAL RETURN SHEET Retirement W. O. No. 2069R District Ipswich

Description Retire 2 miles of 38 KV line at Ipswich

Date Closed Aug 1941 Journal No. 8-30

DEBIT

Total Property Retired Memo Only	Reserve from Earnings Account 88-1	Reserve from Appropriation Account 88-2	Capital Surplus from Appropriation Acct 80-1	Reserve from Retirement Acct. 88-1 Retirement cost only	Retiring Work Order Salvage Value	Total Debit

CREDIT

Acct No	Total Property Retired Memo Only	Proportion of Appraisal Used for Securities	Proportion of Appraisal not used for Securities	Additions since Appraisal used for Securities	Reserve from Earnings Acct 88-1 Bal. Val. Only	Retirement Work Order Retirement Cost	Total Credit
Line 2 1145	2690.43						
1146	3135.45				3375.72	358.47	2808.63
	5825.88						

Item	ITEM	Quantity Estimated	Quantity Actual	Original Cost Estimated	Original Cost Actual	Acct to Credit	Salvage Est.	Salvage Act.	Retirement Cost Est.	Retirement Cost Act.
1	40' Poles	19	18	262.43	249.42	1145				
2	35' Poles	23	22	299.66	285.67	"				
3	50' Poles	3	3	59.79	59.79	"				
4	45' Poles	17	19	257.51	287.81	"				
5	30' Poles	4	4	51.94	51.94	"				
6	4x5x10' X Arms	63	62	174.26	191.99	"				
7	4x5x8' X arms	23	27	36.75	43.15	"				
8	1 3/8" L.H. Pins	173	254	111.07	163.07	"				
9	45 KV Pin type insulators	251	252	344.89	346.25	1146				
10	45 KV Strain units	24	27	223.68	251.64	"				
11	Head Guys	21	9	45.15	19.35	1145				
12	Cross Guys	2	2	14.94	14.94	"				
13	Single down guys	7	8	37.73	43.12	"				
14	Double down guys	5	7	33.00	46.20	"				
15	Triple down guys	2	4	16.40	32.80	"				
16	6"x8"x20' X arms	2	2	19.20	19.20	2				
17	2/0 ACSR	21016'	7017'	1790.49	1618.12	1146				
18	1/4" Static Wire	1329'	7897'	97.43	67.91	"				
	Total			4875.26	3771.02					
19	Labor poles									
20	Labor conductors									
21	Transportation									
21A	meals & expense									
	Add 45.562% Org Install on RTF per WO 404			645.92	677.55					
	10.45% " " ONC " "			361.37	238.28					
				5882.55	4687.35					
	Add 24.289% Org Overhead			1428.84	1138.53					
				7311.39	5825.88					
		Summary								
					1145	1146	Total			
	Equipment Retired				1487.10	2283.92	3771	02		
	Add 45.562% Org Install on RTF per WO 404				677.55		677	55		
	Add 10.45% Org Install on ONC " "					238.28	238	28		
					2164.65	2522.20	4687	35		
	Add 24.289% Org Overhead				535.78	602.75	1138	53		
					2690.43	3135.45	5825	88		

Filed Feb 19 1948
Edgar L. Markley, Clerk

Defendant's Exhibit 55-25.

WORK ORDER

Retirement

W. O. No. 2069 R
Budget Sched. No.
Acct. No. 1145-1146
Franchise Exp. Date

Northeastern Public Service Company
Date 5-10-40 Location Ipswich Utility Electric

Description

Retire two miles of 38 KV line at Ipswich.

RECORDED
MAY 20 1940
BUDGET & ANALYSIS DEPT.

Date Work To Be Started | Date Work To Be Finished

See Retirement / Investment Work Order No. None

Proposed Expenditures—Budget Schedule No. $
Previous Authorizations $
This Authorization $

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	
2. Material To Be Used From Stock	
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	
6.	
7. Total	
8. Stores Department Charge %	
9. General Office Supervision %	
10. Interest On Idle Investment %	
11. Total Cost of Work To Be Approved	
PERMANENT WORK ORDERS	**AMOUNT**
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	
22. Less: Salvage To Be Used	—
23. Transferred Equipment	—
24. Contributions	—
25. Refundable Deposits	—
26. Permanent Work Orders	—
27.	—
28. Total	—
29. Total Cash Required for New Work to be Authorized	
Submitted By [signature]	DATE 5/13/40
Checked By [signature]	5-17-40
Checked By [signature]	5-17-40
Checked By [signature]	5-17-40

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	
% Decreased Expense To Cost of New Work	

ESTIMATED RETIREMENT CHARGE		AMOUNT
Original Cost of Property Removed		7311.39
(How Computed and Date Installed)		
NO 404 1930		
Less: Transferred Equipment		
Original Cost of Property Retired		7311.39
Cost of Removing Property Retired		$400.00
TOTAL		7711.39
Salvage Mat.—Junk Value		—
Salvage Mat.—Ret. to Stock	$3595.51	—
TOTAL SALVAGE MATERIAL	—	3595.51
NET RETIREMENT CHARGE		4115.88

	DATE
Approved [signature]	5-17-40
Approved [signature]	5/17/40
Approved [signature]	5/17/40
Approved	
Approved	
Approved	
Approved	
Approved MIDDLE WEST SERVICE CO.	
Authorized By [signature]	5-21-40

*Investment-Retirement-Maintenance-Operating-Suspense

(OVER)

26

642

Defendant's Exhibit 55-25.

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

Original Cost

ACCOUNT NUMBER	Item No.	ITEMS	Distribution	Quantity	Unit Cost	Total	QUANTITY	COST PER UNIT	AMOUNT
1145	1	40' Poles	Stores	19	14.38	273.22 ✓		13.812	262.43
"	2	35' Poles	"	23	10.84	249.32 ✓		12.985	298.66
"	3	50' Poles	"	3	23.22	69.66 ✓		19.914	59.74
"	4	45' Poles	"	17	14.61	248.37 ✓		15.146	257.52
"	5	30' Poles	"	4	7.79	31.16 ✓		12.985	51.94
"	6	4"x5"x10' Crossarms	"	63	2.80	176.40 ✓		2.766	174.26
"	7	4"x5"x8' Crossarms	"	23	2.95	67.85 ✓		1.598	36.75
"	8	1 3/8" IH Pins	"	173	.915	158.30 ✓		.642	111.07
1146	9	45 KV Pin type insulators	"	251	1.42	356.42 ✓		1.374	344.87
"	10	45 KV Strain Units	"	24	6.80	163.20 ✓		9.32	223.68
1145	11	Head Guys	"	21	2.15	45.15 ✓		2.15	45.15
"	12	Cross Guys	"	2	7.47	14.94 ✓		7.47	14.94
"	13	Single Down Guys	"	7	5.39	37.73 ✓		5.39	37.73
"	14	Double Down Guys	"	5	6.60	33.00 ✓		6.60	33.00
"	15	Triple Down Guys	"	2	8.20	16.40 ✓		8.20	16.40
"	16	6"x8"x20' Crossarms	"	2	9.60	19.20 ✓		9.60	19.20
1146	17	#2/0 ASCR	"	11,627'		1504.50 ✓		.2306	2790.18
"	18	1/4" Static wire	"	11,329'		130.69 ✓		.0086	97.43
		TOTAL MATERIAL				$3595.51			4575.26
1145	19	Labor Poles $250.00							
1146	20	Labor Conductors 75.00							
	21	Transportation 75.00							
		Total Retirements Cost $400.00							
		Add 45.526% Original Install. on Poles etc. per WO 404 (1146.79)							645.92
		" 10.455% " " " Wire etc. " " " ($3595.51)							161.37
		Add 24.2895% Original Overheads per WO 404							1128.55
									2311.30

TOTAL CASH REQUIRED FOR NEW WORK—BY MONTHS	
MONTH	ESTIMATE
January 19	
February 19	
March 19	
April 19	
May 19	
June 19	
July 19	
August 19	
September 19	
October 19	
November 19	
December 19	
TOTAL	

Reasons Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

This line will not be used after the Dakota Public Service Company reroute their lines to a point one mile north of the town of Ipswich.

Defendant's Exhibit 55-26 was received in evidence. It is in part as follows:

WORK ORDER

INVESTMENT

W. O. No. 2129
Budget Sched. No. 1941 Budget
Acct. No. 1143
Franchise Exp. Date Not applicable

NORTHWESTERN PUBLIC SERVICE Company
Date 12/9/40 Location Aberdeen Utility Electric

Description

To install 3 ground relays on each of two 38 KV circuits feeding from Aberdeen substation; to install necessary current transformer in neutral lead, to purchase and install test switches and relay cabinet and do necessary wiring.

RECORDED
DEC 23 1940
BUDGET & ANALYSIS DEPT.

Date Work To Be Started January 2, 1941 Date Work To Be Finished January 31, 1941

Retirement
See Work Order No. None
Investment

Proposed Expenditures—Budget Schedule No. $ 942.70
Previous Authorizations $
This Authorization $ 942.70

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	710.00
2. Material To Be Used From Stock	
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	150.00
6. Other expense	50.00
7. Total	
8. Stores Department Charge 7 %	5.25
9. General Office Supervision 3 %	27.45
10. Interest On Idle Investment %	
11. Total Cost of Work To Be Approved	942.70
PERMANENT WORK ORDERS*	AMOUNT
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Plant Investment @ $ Per KW	
21. TOTAL INVESTMENT	
22. Less: Salvage To Be Used	—
23. Transferred Equipment	—
24. Contributions	—
25. Refundable Deposits	—
26. Permanent Work Orders	—
27.	—
28. Total	—
29. Total Cash Required for New Work to be Authorized	942.70

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	None
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	None
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	None
% Decreased Expense To Cost of New Work	
ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	
(How Computed and Date Installed)	
Less: Transferred Equipment	
Original Cost of Property Retired	
Cost of Removing Property Retired	
TOTAL	
Salvage Mat.—Junk Value	—
Salvage Mat.—Ret. to Stock	—
TOTAL SALVAGE MATERIAL	—
NET RETIREMENT CHARGE	

		DATE
Submitted By		
Checked By	R. T. Mayer	12-9-40
Checked By	E. L. Bayha	12-9-40
Checked By		
Approved	L. F. Eyestone	12-9-40
Approved	R. T. Sanderson	12-20-40
Approved		
Approved		
Approved	CONCURRED IN BY NORTHWESTERN PUBLIC SERVICE COMPANY	
Approved	C. A. Thompson	12-24-40
Approved		
Approved		
Authorized	C. A. Thompson	12-26-40

*Investment-Retirement-Maintenance-Operating-Suspense

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Defendant's Exhibit 55-27.

FORM NO 70—SM-1-36

Final Return Sheet

W. O. No. 2127

Aberdeen Division

Description Purchase & Install 5000 K.V.A. 3 Phase Transformer 33/38 K.V., 3 Winding, Wye-Wye with Delta Tertiary to replace 3750 K.V.A. Auto Transformer Aberdeen Sub Station. Old unit to remain in service as spare transformer

Est. Cost 14,988.56 Date Started June 1941 Acct. Chg'd ____ $ ____

Act. Cost 13,761.04 Date Completed Oct 1941 Acct. Chg'd Sub 3A 1143 $ 13,761.04

% Over—Under 8.1892 Acct. Chg'd ____ $ ____

Date Cleared Nov 1941 Journal Entry 11-28 Acct. Chg'd ____ $ ____

ACCOUNT NO.	ITEM NO.	ITEM	QUANTITY EST.	QUANTITY ACT.	AMOUNT ESTIMATE	AMOUNT ACTUAL	DIFFERENCE QUAN.	DIFFERENCE AMT.
1143	1	Transformer 5000 K.V.A., 3 Phase 33000V to 38000V, 3 windings 33000V Wye, 38000V Wye, 2400V Delta. Separate neutral bushings brought out for each voltage winding	1	1	14,052.00	12,901.11		1150.89
1143	2	Minor rearrangement of bus work and alternations in supporting pad and track, to accomodate new installation			200.00	1.53	-	198.47
1143	3	Unloading and installing expense to transfer company			100.00	280.61	-	180.61
1143	4	Installation Labor			200.00	100.46		99.54
1143	5	Transportation- Car Expense				3.06	-	3.06
		TOTAL			14,552.00	13,282.85		1269.15
		Admin & Gen'l Expense			436.56	478.19		
					14,988.56	13,761.04		1227.52

Voted Feb 19 1942
Roy L Marker Clerk

Dis

Signed [signature] Dept Head Date 12-1-41 Signed [signature] Chief Clerk Date 12-2-41 Signed C P Mersey Manager Date 12-19-41

Defendant's Exhibit 55-26.

3882

WORK ORDER

INVESTMENT

W. O. No. 2127
Budget Sched. No. 1941 Budget
Acct. No. 1143
Franchise Exp. Date Not applicable

NORTHWESTERN PUBLIC SERVICE — Company
Date 12-9-40 Location Aberdeen Utility Electric

Description

Purchase and install new 5000 K.V.A., 3 phase, transformer 33/38 K.V., Three winding, Wye-Wye with Delta tertiary. To replace present 3750 K.V.A. auto transformer which is to be sold to Dakota Public Service Company for use at Bowdle.

RECEIVED
DEC 23 1940

Date Work To Be Started January 2, 1941 — Date Work To Be Finished January 31, 1941

See Retirement / Investment — Work Order No. 2126? (cancelled)

Proposed Expenditures—Budget Schedule No. 1941 $ 15000.00
Previous Authorizations $
This Authorization $ 14988.56

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	14,052.00
2. Material To Be Used From Stock	
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	200.00
6. Other	300.00
7. Total	14,552.00
8. Stores Department Charge %	
9. General Office Supervision %	436.56
10. Interest On Idle Investment %	
11. Total Cost of Work To Be Approved	14,988.56
PERMANENT WORK ORDERS	**AMOUNT**
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	14,988.56
22. Less: Salvage To Be Used	—
23. Transferred Equipment	—
24. Contributions	—
25. Refundable Deposits	—
26. Permanent Work Orders	—
27.	—
28. Total	—
29. Total Cash Required for New Work to be Authorized	14,988.56

	DATE
Submitted By	
Checked By	12-9-40
Checked By	12-9-40
Checked By	

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	None
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	None
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	None
% Decreased Expense To Cost of New Work	

ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	
(How Computed and Date Installed)	
Less: Transferred Equipment	
Original Cost of Property Retired	
Cost of Removing Property Retired	
TOTAL	
Salvage Mat.—Junk Value	
Salvage Mat.—Ret. to Stock	
TOTAL SALVAGE MATERIAL	
NET RETIREMENT CHARGE	

	DATE
Approved	12-9-40
Approved	12/11/40
Approved	
Approved	
Approved	
Approved	12-24-40
Approved	
Approved	
Authorized	12/24/40

CONCURRED IN BY NORTH WESTERN PUBLIC SERVICE CO. PARTY

*Investment-Retirement-Maintenance-Operating-Suspense

(OVER)

YB

785

Defendant's Exhibit 55-26.

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

ACCOUNT NUMBER	ITEMS	SIZE	QUANTITY	COST PER UNIT	AMOUNT
1143	Transformer. 5000 K.V.A., 3 phase, 33,000 V to 35,000 V. Three windings 33,000 v Wye, 35,000 v Wye, 2400 v Delta. Separate neutral bushings brought out for each High Voltage Winding	5000 KVA	1	14,052.00	14,052.00
2	Minor rearrangement of Bus Work and alterations in supporting pad and track, to accomodate new installation				200.00
3	Unloading and installing expense to Transfer Company.				100.00
	Total Material & Expense				14,352.00
4	Installation Labor				200.00
5	G.O. Supr. & Engrg. 3%				436.56
	Total				14,988.56

TOTAL CASH REQUIRED FOR NEW WORK—BY MONTHS	
MONTH	ESTIMATE
January 19[illegible]	14,988.56
February 19	
March 19	
April 19	
May 19	
June 19	
July 19	
August 19	
September 19	
October 19	
November 19	
December 19	
TOTAL	14,988.56

Reason Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

Present auto transformer size limits interchange power into new west line and ties neutrals of North and South systems solidly together, complicating ground protection and making use of resonant coil protection impossible. Planned future increase of generating capacity makes larger transformer mandatory eventually.

29

Defendant's Exhibit 55-26.

Defendant's Exhibit 55-27 was received in evidence. It is in part as follows:

Defendant's Exhibit 55-25.

FORM NO 70—SU-1-38

Final Return Sheet

Aberdeen and 2-33KV Division

W. O. No. 2129 1

Description Install 3 ground relays on each of two 38 KV circuits feeding from Aberdeen Substation #3A

Est. Cost 992.70 Date Started Feb 1941 Acct. Chg'd $

Act. Cost 1196.22 Date Completed Dec 1941 Acct. Chg'd 1143 $ 1196.22

% Over—Under 26.93 Acct. Chg'd $

Date Cleared Dec 1941 Journal Entry 12-28 Acct. Chg'd $

ACCOUNT NO.	ITEM NO.	ITEM	QUANTITY EST.	QUANTITY ACT.	AMOUNT ESTIMATE	AMOUNT ACTUAL	DIFFERENCE QUAN.	DIFFERENCE AMT.
1143	1	Ground Relays CWC	6	4	504.00		2	30.77
1143	2	Current Transformer - outdoor type	1	2	71.00	43.18	1	27.82
1143	3	Test Switches & Devices	6	--	60.00	59.42	6	.58
1143	4	Galvanized Conduit	100'	106'	25.00	19.57	6'	5.43
1143	5	Cable & Wiring	100'	145'	50.00	111.34	45'	61.34
1143	6	Stores Expense			5.25	8.99		3.74
1143	7	Labor Installing Sub-Station Equipment			150.00	373.63		223.63
	7A	Transportation				43.06		43.06
	1A	Overcurrent Relays Type SE	0	12		357.01		
					865.25	1154.65		289.40
		Engr + Supervision			50.00			
					915.25	1154.65		
		Admin + Gen Exp			27.45	41.57		
					992.70	1196.22		253.52

Filed Feb 19, 1948
Cozy D Marker Clerk

Work Order Checked As To:

	Signature	Date
Private R.W.		
Public R.W.		
Tax Maps		
Engineering		1-26-42
Treasury		1-26-42
Accounting		1-26-42

Signed [signature] 1/2/42 Signed [signature] 1-2-42 Signed

Dep't Head Date Chief Clerk Date Manager Date

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

ACCOUNT NUMBER	ITEMS	SIZE	QUANTITY	COST PER UNIT	AMOUNT
1143	1. Ground relays		6	$4.00	504.00
	2. Current transformer, outdoor type		1	71.00	71.00
	3. Test switches and devices		6	10.00	60.00
	4. Galvanized conduit		100'	.25	25.00
	5. Cable and wiring		100'	.50	50.00
	Total material				710.00
	S. F. & H. - 7%				5.25
	Labor installing substation equipment				150.00
	Engineering and estimating				50.00
	Administrative and General 3%				27.45
	Total Cost				942.70

TOTAL CASH REQUIRED FOR NEW WORK—BY MONTHS		
MONTH		ESTIMATE
January	1941	942.70
February	19	
March	19	
April	19	
May	19	
June	19	
July	19	
August	19	
September	19	
October	19	
November	19	
December	19	
TOTAL		

Reason Why Work Should Be Done:

If "Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

This system now has no ground protection except phase relays, which have proved to be inadequate, causing the loss of expensive transformers in several instances. Ground relaying will make for better fault protection on this system and prevent improper relaying on ground faults.

31

Defendant's Exhibit 55-27.

Defendant's Exhibit 55-28 was received in evidence. It is in part as follows:

Dfdt's 55-28
46

FORM NO. 70-GS-1-50

Final Estimate Sheet

W. O. No. 2416

Division Huron

Description Install 2 Regulators in Telephone Substation to regulate Voltage in Town of Bellefleur

Est. Cost 2310.72 Date Started July 1943

Act. Cost 2210.00 Date Completed August 1943

% Over-Under 4.357

Date Cleared Nov 1943 Journal Entry 11-28

Acct. Chg'd. $

Acct. Chg'd. 1143 Sub 2A $ 2210.00

Acct. Chg'd. $

Acct. Chg'd. $

ACCOUNT NO.	ITEM NO.	ITEM	QUANTITY EST.	QUANTITY ACT.	AMOUNT ESTIMATE	AMOUNT ACTUAL	DIFFERENCE QUAN.	DIFFERENCE AMT.
1143	1	Voltage Regulators - GE - ERS 2 KVA Ser# 6794973 - 74	2	2	1967.00	2006.34	—	39.34
✓	2	Installation Expense			257.00	126.86		130.14
✓	3	Clamps & Conf Eye 3.67			86.72	76.80		
					2310.72	2210.00		100.72

Filed Feb. 10, 1944
Fay S. Marker Clerk

Work Order Checked As To

	Signature	Date
Private R.W.		
Public R.W.		
Tax Maps		
Engineering	[illegible]	12/18/43
Treasury	[illegible]	[illegible]
Accounting	[illegible]	12-16-43
		12-20-43

2310.72 2133.70

Signed [illegible] Dept Head 12-2-43 Date

Signed [illegible] Chief Clerk 11-2-43 Date

Signed [illegible] Manager 11-2-43 Date

50

795

Defendant's Exhibit 55-28.

WORK ORDER

Investment

W. O. No. 2416
Budget Sched. No. 7
Acct. No. 1152
Franchise Exp. Date

Northwestern Public Service Company
Date April 14,1943 Location Gettysburg, S. D. Utility Electric

Description

Install 2 Regulators in Gettysburg Sub. to regulate voltage in town of Gettysburg, S. D.

RECORDED
APR 23 1943
BUDGET & ANALYSIS DEPT.

Date Work To Be Started Soon as equipment arrives Date Work To Be Finished 60 days

Retirement
See Work Order No. None
Investment

Proposed Expenditures—Budget Schedule No. 7 $ 2180.00
Previous Authorizations $
This Authorization $ 2310.72

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	1967.00
2. Material To Be Used From Stock	
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	
6. Installation Expense	267.00
7. Total	2234.00
8. Stores Department Charge	
9. General Office Supervision 3.5%	76.72
10. Interest On Idle Investment	
11. Total Cost of Work To Be Approved	2310.72
PERMANENT WORK ORDERS	**AMOUNT**
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	
22. Less: Salvage To Be Used	
23. Transferred Equipment	
24. Contributions	
25. Refundable Deposits	
26. Permanent Work Orders	
27.	
28. Total	
29. Total Cash Required for New Work to be Authorized	2310.72

		DATE
Submitted By	B. A. York	
Checked By		4-16-43
Checked By		4-20-43
Checked By		4-20-43

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	None
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	None
% Decreased Expense To Cost of New Work	

ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	
(How Computed and Date Installed)	
Less: Transferred Equipment	
Original Cost of Property Retired	
Cost of Removing Property Retired	
TOTAL	
Salvage Mat.—Junk Value	—
Salvage Mat.—Ret. to Stock	—
	—
TOTAL SALVAGE MATERIAL	—
NET RETIREMENT CHARGE	

		DATE
Approved	J. F. Buckman	4-20-43
Approved	R. T. Smith	11/20/43
Approved		
Approved		
Approved		
Approved		
Approved		
Approved		
Authorized		

CONCURRED IN BY
MIDDLE WEST SERVICE COMPANY
BY

*Investment-Retirement-Maintenance-Operating-Suspense

(OVER)

Defendant's Exhibit 55-28.

297

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

ACCOUNT NUMBER	ITEMS	SIZE	QUANTITY	COST PER UNIT	AMOUNT
1152	Voltage regulators 100 amps 2400 Volts 10% plus or minus				
	Freight Prepaid		2	983.50	1967.00
	Installation Expense				257.00
					2224.00
	General Office Supervision 3.6%				86.72
	Total Estimate				2310.72

TOTAL CASH REQUIRED FOR NEW WORK—BY MONTHS		
MONTH		ESTIMATE
January	19	
February	19	
March	19	
April	19	
May	19 43	2310.72
June	19	
July	19	
August	19	
September	19	
October	19	
November	19	
December	19	
TOTAL		

Reason Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

Present regulators loaded beyond capacity and must be replaced before peak season. W. P. B. has authorized this replacement. Present overloaded regulators will be used at some other location.

33

799

Defendant's Exhibit 55-28.

U. S. GOVT. PRINTING OFFICE 1-38 PRINTED IN U. S. A.

WORK ORDER

RETIREMENT

W. O. No. 2356R
Budget Sched. No. --
Acct. No. 1143
Franchise Exp. Date

NORTHWESTERN PUBLIC SERVICE Company
Date 3/27/42 Location Gettysburg, S.D. Utility Electric

Description

Retire 3 - 200 KVA 22000/2300 KVA Transformers from the Gettysburg Sub.

Date Work To Be Started **Date Work To Be Finished**

See Retirement / Investment Work Order No. None

Proposed Expenditures – Budget Schedule No. $
Previous Authorizations $
This Authorization $

ESTIMATED COST OF WORK TO BE APPROVED	AMOUNT
1. Material To Be Purchased	
2. Material To Be Used From Stock	
3. Salvage Material To Be Used	
4. Transferred Equipment	
5. Labor	
6.	
7. Total	
8. Stores Department Charge %	
9. General Office Supervision %	
10. Interest On Idle Investment %	
11. Total Cost of Work To Be Approved	
PERMANENT WORK ORDERS	**AMOUNT**
12. Transformers and Installation	
13. Meters and Installation	
14. Services	
15. Short Extensions	
16.	
17.	
18. Total Permanent Work Orders	
19. TOTAL COST OF NEW WORK	
20. Power Pool Investment @ $ Per KW	
21. TOTAL INVESTMENT	
22. Less: Salvage To Be Used	
23. Transferred Equipment	
24. Contributions	
25. Refundable Deposits	
26. Permanent Work Orders	
27.	
28. Total	
29. Total Cash Required for New Work to be Authorized	

	DATE
Submitted By	
Checked By C. M. Musser	3-31-42
Checked By E. L. Bayles	3-31-42
Checked By	

BENEFITS ACCRUING FROM NEW WORK	AMOUNT
Increased Gross Revenue Per Year	
% Increased Gross Revenue To Cost of New Work	
Increased Net Revenue Per Year	
% Increased Net Revenue To Cost of New Work	
% Increased Net Revenue To Total Investment	
Decreased Expense Per Year	
% Decreased Expense To Cost of New Work	

ESTIMATED RETIREMENT CHARGE	AMOUNT
Original Cost of Property Removed	4653.82
(How Computed and Date Installed)	
Gettys. Sub #9 A	
Less: Transferred Equipment	
Original Cost of Property Retired	
Cost of Removing Property Retired	
TOTAL	4653.82
Salvage Mat.—Junk Value	
Salvage Mat.—Ret. to Stock	
TOTAL SALVAGE MATERIAL	
NET RETIREMENT CHARGE	4653.82

	DATE
Approved C. F. Fitchner	4-1-42
Approved C. Trombley	4/1/42
Approved	
Approved	
Approved	
Approved	
Approved	
Approved	
Authorized C. Peterson	4/2/42

*Investment-Retirement-Maintenance-Operating-Suspense

(OVER)

SUB 32

Defendant's Exhibit 55-29.

Defendant's Exhibit 55-29 was received in evidence. It is in part as follows:

Dept 455 29 pl

Form No. 70-025-12-30
FINAL RETURN SHEET Retirement W. O. 2356 R District Hinsdale

Description Reface 3-200 KVA 22000/2300 V Transformers from Gettysburg Sub 90

Date Cleared April 1947 Journal No. 4-30

MEMORANDUM RECORD ONLY				CREDIT	
Salvage Value	Retirement Cost	Net Retirement Charge		Property Account Number	Amount
-	-	4653.82		1143	4653.82

ITEM	QUANTITY Estimated	QUANTITY Actual	ORIGINAL COST Estimated	ORIGINAL COST Actual	Account to Credit	Salvage Value Estimated	Salvage Value Actual	Retirement Cost Estimated	Retirement Cost Actual
200 KVA Transformers 22000/2300 V	3	3	3968.66	3968.66	1143	-	-		
Sec" 12 30 39									
" 12 30 40									
" 12 30 41									
Add Overhead			685.16	685.16					
Total retirement			4653.82	4653.82		-	-	-	-

Private Ltr. [illegible] 5/16/45
Public Ltr. [illegible]
Tax Dept. [illegible]
Engineering [illegible]
Accounting [illegible] 5-13-47
[illegible] 5-19-47

Filed Feb 19 1948
Roy D Marker Clerk

Signed ..... Dept Head Date Signed ..... Chief Clerk Date Signed ..... Manager Date

#9

IDB

Defendant's Exhibit 55-29.

DETAILED ESTIMATE OF COST (Itemize Labor and Material Below)

ACCOUNT NUMBER	ITEMS	SIZE	QUANTITY	1932 PER UNIT Cost	1932 AMOUNT Salvage
1183	22000/2300V Transformer Ser. #123039	200 KVA	1		
	# 123040	200 KVA	1	3968.66	—
	# 123041	200 KVA	1		
	Add Overheads			685.16	
	Total retirement			4653.82	—

TOTAL CASH REQUIRED FOR NEW WORK — BY MONTHS	
MONTH	ESTIMATE
January 19	
February 19	
March 19	
April 19	
May 19	
June 19	
July 19	
August 19	
September 19	
October 19	
November 19	
December 19	
TOTAL	

Reason Why Work Should Be Done:

If "% Increased Net Revenue to Total Investment" is less than 10% for depreciation and return, please explain fully reasons justifying expenditure.

In 1932, at the time that our substations were set up in detail, these transformers were shown as belonging to N.W.P.S.Co. Since that time it has been established that these transformers were the property of the Dakota Public Service Company. As all adjustments were made to the Reserve for Depreciation in the 1932 setup we are also now charging the Reserve with the write-off of these transformers.

55

Defendant's Exhibit 55-30 was received in evidence. It consists of subsidiary ledger sheets of defendant with reference to work order 420.

Defendant's Exhibit 55-31 was received in evidence. It consists of subsidiary ledger sheets of defendant with reference to work order 404.

Defendant's Exhibit 55-32 was received in evidence. It consists of subsidiary ledger sheets of defendant with reference to work order 397.

Defendant's Exhibit 55-33 was received in evidence. It consists of subsidiary ledger sheets of defendant with reference to work order 2069-R, work order 2127, work order 2356-R and work order 2416.

Q. Now, have you produced all of the records and files from which you built the tabulations known as Plaintiff's Exhibits 88 and 88-A?

A. Yes. Except we did have access to certain journal vouchers. There would be a great many of them which were withdrawn from the files in Huron in support of these things.

Q. You went through those, I take it, when you made your audit? A. That is right.

Q. You are familiar with them, are you?

A. I believe I know the ones I want.

Q. With the reservation that the interchange vouchers or journal vouchers were used to some extent in the completion of the tabulation, 88 and 88-A, have you produced everything else?

A. There is one other record that I used. It was a sort of computation by Mr. E. L. Bayles, which was produced for

me by Mr. Mauch or one of his assistants, and also Exhibit 216.

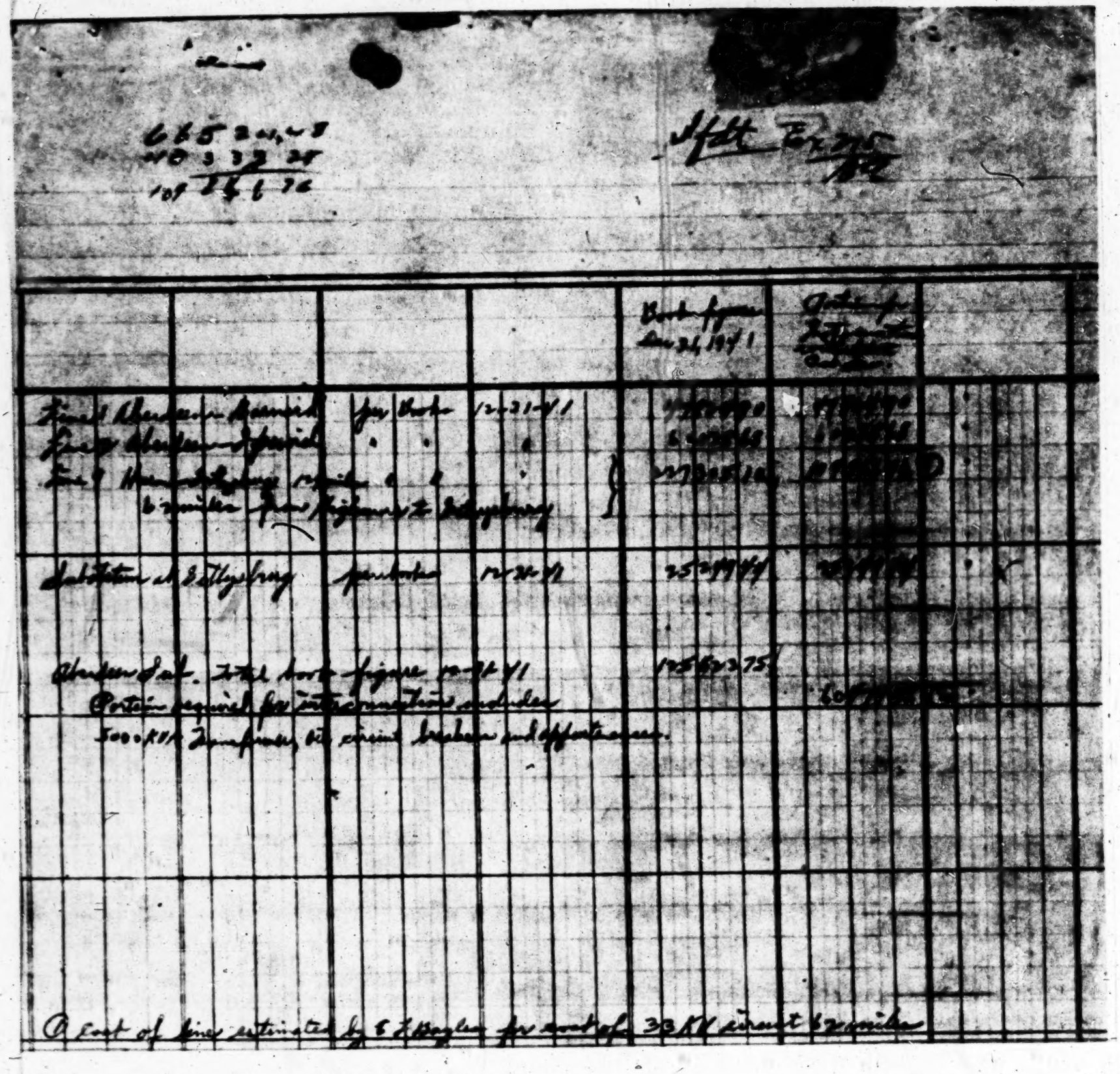
Q. Now, will you look at Plaintiff's Exhibit 216?

A. Yes, this is another document I used.

Q. Now, have you got everything except journal vouchers and cash vouchers?

A. As far as I can recall that is all of it.

Defendant's Exhibit 215 was received in evidence. It is as follows:



The lower part of this exhibit appears in next frame.

(1) Cost of line estimated by E. J. Bayless for part of 33 kV circuit between Highmore & Gettysburg. Estimated by assuming actual unit prices on this portion of line, approximately same result as obtained by pricing conductor line on basis of acreage basis.

$\frac{62}{144}$ of $237,805.10 = $ $102,944

(2) Cost of substation estimated by Bayless & Bayless from actual work orders as applicable to interconnection.

Filed Feb 18. 1948
Roy D. Marker
Clerk.

11

Defendant's Exhibit 215.

608

BLUNT TO GETTYSBURG LINE - 33 K.V.

1.	30' poles		29	$ 139.00
2.	35' poles		650	8,015.45
3.	40' poles		40	951.40
4.	45' poles		15	250.60
5.	50' poles		9	174.00
6.	Cross Arms - 10'	943 @ 1.73		1,631.39
9.	18" D. A. Bolts	339 @ .15		50.85
10.	12" Machine Bolts	27 @ .075		2.02
11.	14" Machine Bolts	49 @ .09		4.41
13.	60" Pole Top Pin & Eye Bolt	1995 @ .63		1,256.85
14.	½ X 6" Carriage Bolts	1853 @ .0335		62.08
15.	10" Machine Bolts	902 @ .075		67.65
16.	Steel Pins 1 3/8"	1165 @ .55		640.75
18.	Washers	514 @ .028		14.39
19.	Anchors			289.00
20.	Anchor Logs & 8' Rods			30.80
21.	Guy Strand 3/8"			348.00
22.	Strain Plates			7.49
23.	Guy Hooks			25.60
24.	3-Bolt Clamps			53.60
25.	½" X 4" Lags			16.50
26.	#4 A.C.S.R.			
27.	#2/0 A.C.S.R.			23,980.00
28.	#4 Tie Wire			387.00
29.	Aluminum Armour Wire			65.40
30.	45 K.V. Insulators			5,633.25
32.	Strain Units			554.00
		Material		$44,301.48
	Labor on Structures		$4,880.00	
	Labor on Conductors		3,430.00	
	Incidentals		7,120.00	
	Supervision		5,480.00	
	Interest		1,313.00	
		Overheads	$22,223.00	$22,223.00
				$ 66,524.48

$\frac{66,524.48}{33.5}$ = $1,985. per Mi.

Defendant's Exhibit 215.

811

33 K.V. LINE. [illegible] TO BENTT (OKLAHOMA)

33 K.V. built over 6600 V circuit. Poles charged to 6600 V. line.

26 Miles. 2/0 ACSR. 200' Span. 26 Spans per Mile.

Conductor 2/0 ACSR. 26 Mi. 76,440 lb. @ .243		18,574.92
Tie Wire #4 Aluminum		298.30
Armour Wire - Aluminum.		83.10
Cross Arms 10' - - - - - 754 @ 1.73.		1,304.42
½" X 6" Carriage Bolts- -1508 @ .0337		50.82
72" Angle Braces- - - - - 754 @ .884.		666.54
½" X 4" Lags - - - - - 754 @ .03		22.62
18" D.A. Bolts- - - - - 100 @ .15		15.00
14" Machine Bolts - - - - 554 @ .09		49.86
60" pole top pin and eye bolt - - - 676 @ .63		425.88
1 3/8" Steel Pins - - - -1352 @ .546.		738.19
Strain Units - - - - - - 62 @ 6.94.		430.28
45 K.V. Insulators - - -2028 @ 2.023		4,102.64
3/8" Guy Strand		268.00
Guy Hooks		19.80
Strain Plates		5.83
Material		$26,971.28
Labor on Structures	$3,840.00	
Labor on Conductors	2,710.00	
Incidentals	4,480.00	
Supervision	4,300.00	
Interest.	1,031.00	
	$16,361.00	16,361.00
		$ 43,332.28

$\frac{43,332.28}{26}$ = $1,665. per Mi.

Defendant's Exhibit 215.

818

Q. I show you Defendant's Exhibit 215, and ask you if this was a part of the papers and records that you used in the preparation of Exhibits 88 and 88-A? A. Yes, they are.

Defendant's Exhibit 216-B was received in evidence and is as follows:

Defendant's Exhibit 216-B.

Basis for Charging Northern Power & Light Company With Fixed Charges on Interconnecting Lines.

In 1929 Northern Power & Light and North Dakota Power & Light Company came under the same management and at that time common ownership of the properties was contemplated.

At that time the interconnected system of North Dakota Power & Light Company and Northern Power & Light Company was short of capacity on the south end of the system and it was necessary for Northern Power & Light Company to operate a number of small obsolete plants. In addition to power costs being comparatively high the relations in a number of towns were jeopardized and some of the better towns had threatened to install their own plants unless service was improved and rates lowered.

In order to remedy this condition it was finally decided to connect the lines of Northern Power & Light Company with Northwestern Public Service Company at three points, with the idea in mind of improving service to the towns served by Northern Power and Light Company. This also permitted shutting down of a number of small plants, and by operating the systems of the three companies as an interconnected system, power costs were substantially reduced. The protection afforded by the tie in on the south end with Northwestern Public Service Company permitted the Beulah plant to furnish a much greater proportion of the total requirements, and the operation of the Beulah station has been further improved by Northwestern Public Service Company taking dump current generated in this plant when it was available at approximately the fuel cost of Northwestern Public Service Company.

The effect of this interconnection on the power costs of the U. P. U. Companies is shown as follows:

Year	* Net K. W. H. Generated & Purchased	Cost of Power	† Cost per K. W. H.	——Effect of Savings—— * K. W. H. Sold	Savings Under 1929 Costs
1929	21,544,228	233,324	.0108	15,373,538	
1930	25,968,292	262,666	.0101	17,344,202	12,140
1931	29,662,785	235,297	.0793	18,057,206	54,634
1932	29,652,179	219,503	.074	17,953,431	61,041
1933	30,856,573	217,143	.0703	17,919,443	67,556
1934	32,747,164	238,866	.0729	20,892,413	73,332
1935	38,497,367	253,916	.0659	24,374,111	102,615

* Inter-Company elliminated.

† The figures under the column headed "Cost per K. W. H." for the years 1931 through 1935 are erroneously stated in cents in lieu of mills.

The above tabulation shows the reduction in power costs and the effect of this reduction when applied to the kilowatt-hour sales each year. If these companies had the same unit costs in 1935 as in 1929, production expenses would have been increased $102,615.

All of these savings are not due to the interconnection but certainly a substantial portion is, as the generating equipment is substantially the same as in 1929 and the cost of fuel, labor, etc. has not been substantially reduced since that time.

On account of the financial condition of the U. P. U. Companies at the time the interconnection was made and on account of the common ownership that was contemplated at that time, Northwestern Public Service Company made the entire investment. A short time later both holding companies went into receivership and the matter was held up pending reorganization of the holding companies. Following is a summary of the investment and fixed charges thereon. During this period Northwestern Public Service Company absorbed all the fixed charges but we now feel that some fair allocation should be made of these charges.

Allocation of Investment for Tie-in With Northern Power and Light Company

Aberdeen Substation

This sub has 5 bays, 3 of which are for equipment used only for the tie-in. Substation structure, foundations, fence

and other equipment of this nature are charged on a basis of 60% to the tie-in. Equipment identified as useful only for the tie-in is charged direct to the tie-in. Charges are as follows:

Charges to be prorated:

W. O. 404	Sub structure, air break switches and bus work	17,013.85
"	Control cable	498.99
"	Fence	290.10
"	Foundations	3,016.52
	Total Material	20,819.46
	Labor—13.12% of Material	2,731.51
	Total Labor and Material	23,550.97
	Overheads—25.595% of Material and Labor	5,556.85
	Total	29,107.82
	60% of above total allocated to tie-in	17,464.49
W. O. 404	3–38 KV OCB	7,010.20
"	3–33 KV Potential transformers	1,315.79
"	2–33 KV Current transformers	288.00
"	6–38 KV Current transformers	2,653.17
"	4–22 KV Potential transformers	2,470.23
"	2–38 KV Arresters	3,169.24
"	3–Control panels with relays and instruments	3,078.74
	13.12% Install. on equipment used solely for tie-in	2,621.10
	25.595% Overheads on mat. and labor used solely for tie-in	6,256.93
W. O. 1081	1–3750 KVA Auto transformer	6,219.60
	Total	52,547.49

Gettysburg Sub

All chargeable to tie-in

W. O. 420 ..... 24,851.86

Aberdeen-Ipswich Line

All chargeable to tie-in

W. O. 404 ..... 64,370.97

Aberdeen-Barnard Line

This line also serves Barnard, Westport, Columbia, and the Aberdeen City Waterworks. This load was formerly served by a 6900 volt line from Aberdeen. Our original investment in this line was $16,773.65. We feel that this amount should be allocated to the load we serve.

W. O. 404 Present investment in Aberdeen-Barnard line 49,573.99

W. O. 49 and N-271—6900 volt line..... 16,773.65

Net chargeable to tie-in..... 32,800.34

Highmore-Gettysburg Line

This line was built on two work orders. Work order 397 covered the extension of our 33 KV circuit from Ree Heights to Highmore, a distance of 13 miles, and the moving of the sub to Highmore. This is chargeable to the Highmore group. It also covered 13 miles of pole line and 33 KV circuit from Harrold to Blunt. This 33 KV circuit is all chargeable to the tie-in. Since a 6900 volt circuit was later added on this pole line to serve Blunt, only half the pole line investment is chargeable to the tie-in. Therefore, half of the transmission line investment on W. O. 397 is chargeable to the tie-in.

W. O. 397—allocated to tie-in..... 17,755.90

W. O. 420 covered a 33 KV line from Blunt to Gettysburg and a sub at Gettysburg. This is all chargeable to the tie-in. It also covered 13 miles of 6900 volt circuit from Blunt to Harrold which is not chargeable to the tie-in. The cost of this circuit including labor and overheads was approximately $9,300.

W. O. 420—Line investment allocated to tie-in: 101,325.16 — 9,300.00	92,025.16

Summary of Tie-in Investment

Aberdeen Sub	52,547.49
Gettysburg Sub	24,851.86
Aberdeen-Barnard Line	32,800.34
Aberdeen-Ipswich Line	64,370.97
Highmore-Gettysburg Line	109,781.06
	284,351.72

Annual Charges

13% of $284,351.72 for interest, depreciation and taxes	36,965.72
Maintenance at 1% of Investment	2,843.52
Operation of lines	1,030.00
	40,839.24

Based upon the above we are making an annual charge of $20,000 to Northern Power & Light Company as their proportion of the fixed charges upon these interconnection facilities, effective as of January 1st, 1936.

Basis of Inter Company Charge Between Northwestern Public Service Company and Northern Power & Light Company

Production Costs. First, we submit the following analysis of fuel costs, per KWH generated, in the Aberdeen sta-

tion, for the purpose of determining a maximum price per KWH of purchased power from the Northern Power & Light Company system at interconnection with Northwestern.

(1) Normal load on Aberdeen Station to system of Northwestern Public Service Company average approximately 3000 KW demand.

Water Rate—12.6#/KWH Gross Generated

Evaporation Boilers—4.25#/lb. lignite

Cost of Lignite—$3.07 per ton (Bunker)

Pounds Fuel per KWH (Gross)—2.97 lbs.

Fuel Cost per KWH Net Generated, equals—

$$\frac{2.97 \times 307 \times .83 \text{ (Eff.)}}{2000} = 0.549 \text{ or } 5.5 \text{ mills/KWH}$$

(2) Power to be purchased in excess of above normal load on Aberdeen plant will average around 2000 KW demand.

Water Rate—12.1#/KWH Gross Generated

Evaporation Boilers—4.4#/lb. lignite

Cost of lignite—$3.07 per ton (Bunker)

Pounds of Fuel per Gr. KWH Gen.—2.75 pounds.

Fuel Cost per KWH Net Generated, equals—

$$\frac{2.75 \times 307 \times .83}{2000} = -0.505 \text{ or } 5. \text{ mills/KWH}$$

(3) Overall station performance—Aberdeen Station—12 months operation is as follows:

Water Rate—15.6#/Kwh—Gross Generated

Cost of Coal—$3.07 per ton

Pounds of Fuel per Gr. KWH Generated—3.31 lbs. lignite (Deducted Banked Boiler Fuel).

Fuel Cost per Net KWH Generated—5.75 mills/KWH

Based upon the above analysis we made effective a rate of 5 mills per KWH for energy transferred between North-

western Public Service Company and Northern Power & Light Company. The benefits to Northern Power & Light Company are obvious, as they could not render dependable service to a number of their towns without this connection.

In the case of Northwestern Public Service Company out-of-pocket costs are not increased and there are many intangible benefits including centralized management and control.

C. J. STRIKE.

Q. I call your attention to Defendant's Exhibit 216-B, consisting of four pages, and ask you if those four pages are a portion of Exhibit 216, which you have now selected and identified as being material and records, from which you prepared the tabulation, Exhibit 88 and 88-A?

A. This is the document, but I worked only on the lower two thirds of page 2 and the entire page 3.

Q. You had the entire document before you, however, didn't you? A. That is right, but these are other subjects.

Q. Now, have we everything that you used, all records and files, other than the journal vouchers and cash vouchers in the preparation of this tabulation, 88 and 88-A?

A. I believe so.

Q. When did you say you first started in the accounting end of the electric and gas utility work? A. May, 1922.

Q. I believe on your direct examination you testified that beginning in 1937, and following the enactment of the Public Utilities Act in 1935, that you had established an accounting system by authority of FPC where the utility was subject to their control?

A. Yes. I referred to the uniform system of accounts for electric utilities, prescribed by Federal Power Commission.

Q. That didn't come until 1937, did it, or about that time?

A. I think it was made effective January 1, 1937, and was sent out to all of the utilities maybe a year in advance for comment and suggestion. It is much the same in general fashion as the old state commission form.

Q. Prior to that, each company handled accounts in accordance with the rules and practices of the accountants in charge. Isn't that right?

A. Subject to the jurisdiction of the state commissions.

Q. Where there was jurisdiction by a state commission. Is that right? A. That is right.

Q. There is no such commission control of utility companies in South Dakota, is there? A. No.

Q. I am speaking about electric and gas utilities?

A. That is right.

Q. Now, as I understand, and I am referring to Exhibit 88, the column on the right hand side, which is total of $303,449.26, and which is entitled "By Sandstedt's letter to FPC, dated 2/24/42". You got that from the Sandstedt letter and from the Bayles and Gazin tabulation which has been marked Defendant's Exhibit 215?

A. I took it from photostat of the Sandstedt letter to the Federal Power Commission.

Q. What did you say about the Bayles and Gazin tabulation?

A. I stated that was part of the records I used to determine the schedule.

Q. As a matter of fact, the Bayles and Gazin study shows on the first page of that Exhibit 215, the same figures you used in the third column to the right and on the right hand side of the page, Exhibit 88? A. They are identical.

Q. When did you first see the Sandstedt letter to the Commission and the Bayles & Gazin study, Exhibit 215?

A. I suppose I saw the Sandstedt letter, the photostat of the Sandstedt letter six or eight months ago, perhaps. The Bayles and Gazin study in November, 1946. I would not call it a study. A computation.

Q. You say Mr. Mauch showed you that?

A. Either he or one of the men he assigned to watch us.

Q. In that column then you have no computation of your own. You have simply inserted those as being computation that were in the interconnecting companies' joint office?

A. I haven't altered the figures in any way. I just put in the figures as the column head calls for.

Q. Now, the column on Exhibit 88, which is entitled "By Defendant's Exhibit 216", where did you get those figures?

A. I think that was the document that was last identified by the reporter.

Q. As 216-B? A. Yes, the three page exhibit, 216-B.

Q. And that was a part of the original exhibit 216, that you mention in your heading. Is that right?

A. I think that is correct, yes.

Q. That is as of 1936?

A. The document isn't dated, but I think that is correct.

Q. Now, we come to the column which is headed "By Elvig, 1/1/36." Which totals $255,699.54. The value shown therein are computations you made from the records and files of these companies as of January 1, 1936, are they?

A. Except the last item, which is identical in all three columns, and which is qualified by Note 2.

Q. Can we get back to the third column headed "By Sandstedt's Letter to FPC". As of what date were those figures assembled or purport to cover what time?

A. I am not going to try to say what Mr. Sandstedt implied or had in mind when he wrote the letter.

Q. In the checking of this matter from the ledger sheets can you determine the approximate time or times included in that column?

A. Yes, we could identify certain items as being approximately December 31, 1941, I believe, yes.

Q. Is that equally true of the Bayles and Gazin tabulation, Exhibit 215, which you said you had before you?

A. I assume that was made from Mr. Sandstedt's letter and Mr. Sandstedt's letter does not give a date, as far as I can recall.

Q. Referring to Exhibit 215, with that column heading there. Would that give you any information?

A. Yes. This is also dated December 31, 1941.

Q. And in your checking of the ledger and work sheets did that appear to be the approximate date covered by those? A. Yes.

Q. Now, referring to your Exhibit 88-A. The first page is marked "Sheet 1 of 2". Have you that page of your audit, Exhibit 88-A? A. Yes, I have.

Q. This shows a column "overheads". I assume these are figures taken from the work order and in the journal vouchers and in the cash vouchers. Is that correct? A. No.

Q. Where did you take the title "Overheads"?

A. I believe I took it off the property ledger sheet.

Q. And that was just a ledger sheet classification, was it?

A. It is so identified on the ledger, as overhead.

Q. As overhead? A. Yes.

Q. On the same Sheet 1 of 2, of Exhibit 88-A, you have a column which is marked "Excessive Overhead". Does any computation appearing in this heading appear as "excessive overhead" in any of the books and records which you have submitted here in support of this audit, Exhibit 88 and 88-A?

A. It is a judgment figure based on examination of the records.

Q. That is your opinion, isn't it? A. That is right.

Q. You don't pretend then to be anything—You are placing in there an arbitrary allocation as to your own opinion of what constitutes overhead and what constitutes excessive overhead?

A. It is my judgment, but I won't say it is arbitrary.

Q. It is nothing that appears from the records and files of the defendant company here except as it specifically itemizes each charge that enters into "Overheads"?

A. It is not so recorded on these work orders and ledger sheets.

Q. It is not recorded as excessive overhead?

A. That is right.

Q. Referring now to the Aberdeen substation and on your Exhibit 88-A, Sheet 1 of 2, you show a footing of $9,729.23, of so-called excessive overhead. Is that right?

A. That is correct.

Q. And that is the item you are talking about so far as the Aberdeen substation is concerned?

A. No. I go to Page 2 beyond.

Q. I am coming to that. Then you carry that forward on Sheet 2, Page 2, of Exhibit 88-A, a total of $13,180.57, don't you?

A. Yes, but that total includes not only that figure that you mention but separate groups, each group limited by a double ruling.

Q. But it all has to do with Aberdeen substation?

A. That is right.

Q. Now, of course, in exercising your experience and judgment and training and arriving at a claim of excessive overhead, you looked at each voucher and each work order? A. I looked at sufficient to form an opinion.

Q. Now, will you refer to those that were in the ag-

gregate amount of $13,180.50? Will you show those to us now?

A. There is no voucher figure that will show that amount. That is computation. What I did was eliminate all of the overhead except 3%.

Q. I thought you said you went to the vouchers?

A. I said I looked at some vouchers, yes.

Q. If it had on these vouchers under "overhead", if it had "Rubber gloves for workmen" you would not think that was an excessive overhead, would you?

A. Most of these jobs you would not expect to find rubber gloves, because they are cold jobs.

Q. Would you or wouldn't you?

A. I don't believe they would be charged to overhead. They would be charged to incidentals.

Mr. Fellows: Objected to as argumentative.

The Court: It is somewhat argumentative. Sustained.

Q. Do I understand then that irrespective of what the charge is under the classification of overhead, you arbitrarily charge out everything over 3%?

A. I used the customary auditing procedure of testing, and I have never refused to satisfy myself that 3% was adequate.

Q. That was your opinion? A. That is right.

Q. Irrespective of what constituted the charge that was contained in overheads?

A. I don't admit that that charge is correct on the books.

Q. You don't know anything about that, do you?

A. I know considerable about it.

Q. Will you produce those vouchers that you did examine? A. I will bring out one for example.

Q. Did you examine more than one?

A. Yes, but I didn't keep the numbers of them.

Q. May I see it? You are now producing one voucher only, are you?

A. Yes, but it is representative voucher issued once a month.

Q. Do you mean this is the only one you examined?

A. No, I didn't say that.

Q. Now, will you produce some that were incidentals

in this overheads account? Not only supervision but incidentals? A. I don't think I eliminated incidentals.

Q. That is what we want to check. We want to know what you have eliminated.

A. I say eliminated what was identified on the work order as overhead. Incidentals was entirely separate item.

Q. You just arbitrarily discounted overhead classification 97% didn't you? A. No.

Q. What did you do? A. I left 3% in.

Q. And took 97% out. What did you do?

Mr. Benson: Explain what you mean by 3%.

A. I allowed 3% of all the other costs except overheads as overheads, and your figures ran anywhere from 3% up to 2'%.

Q. Certainly in making up your audit, Exhibit 88 and 88-A, you ran through the account items that were shown under the classification, overhead, didn't you?

A. I made sufficient test to satisfy myself, which is customary procedure.

Q. Did you find incidentals charged into the overhead account? A. I have separate caption for incidentals.

Q. In a different account than overheads?

A. If you will produce one of the exhibits I will show you what I mean.

Q. Will you show me the ledger page of the account which establishes these facts?

A. I am referring to the work orders themselves, not vouchers or ledger sheets.

Q. But you have the ledger for this station, haven't you? You have already presented those, haven't you?

A. Those are summaries in which accounts are combined.

Q. I observe that on Sheet 1, Page 2, Exhibit 88-A, you have a comment in the lower left hand corner, "Allocate Overheads 3%". What item or charges or classification did you include in such 3% overheads?

A. Supervisory expense of personnel whose time is not directly charged to construction, and expenses related thereto.

Q. What expenses do you include under your condition, related thereto?

A. I refer to expense of an engineer, in addition to his

time, would be perhaps telephone calls, perhaps stenographic help, travel expense, items of that nature.

Q. Are those the only items?

A. No, I don't intend to be limited.

Q. Will you think of them all, as you made this entry, "allocate overheads 3%" and prepared the tabulation Exhibit 88-A?

A. I stated that was my judgment. I didn't make an itemization of it.

Q. Have you stated all of the items or classifications?

A. I would not attempt to try to state all of them, no.

Q. You have a figure at the bottom of Sheet 1, Page 2, under the column entitled "Overheads" $11,179.23. From what record or file did you obtain that figure?

A. That figure appears as a debit in this schedule of mine on the line entitled "Work Order 404". It does not appear at the bottom, but it came from an item on the work order ledger sheet for work on order 404.

Q. Is that the same figure or item that appears on Defendant's Exhibit 214-I, which reads "Construction Overhead, WO 404, $11,179.23"? A. That is the same item.

Q. Did you look at work order 404?

A. I think I have seen it.

Q. Is work order 404 Defendant's Exhibit 55-19?

A. That is the construction authorization, yes.

Q. That is known in this case as work order 404, isn't it? A. Yes.

Q. And that has to do with the substation at Aberdeen, a part of the interconnection facilities?

A. It has to do with that and other items.

Q. That and other items. Now, in your preparation of Exhibit 88-A, you had to find out where that figure, $11,179.23 came from that was shown on Defendant's Exhibit 214-I, didn't you? A. I don't recall right now.

Q. Will you examine work order 404, which is Defendant's Exhibit 55-19, and indicate the source of that item of $11,179.23? A. You mean it is on here some place?

Q. Yes. How is it arrived at? You are familiar with work orders, aren't you? A. I have an understanding of them.

Q. You say that that work order 404 includes more than the Aberdeen substation? A. Yes.

Q. It includes one or two additional projects. Which?

A. This work order covered one project, as I understand it. The Aberdeen substation, the line from Aberdeen to Barnard, the line from Aberdeen to Gettysburg.

Q. Isn't that sum, $11,179.23 taken from work order 404, an addition of items? No. 60, incidentals, $15,045.40; No. 61, supervision, $15,506.95; and No. 62, interest, $5039.06?

A. I believe your assumption is wrong on that.

Q. What is it taken from then?

A. It could come from a record of the costs, and this is merely a summarization of the costs.

Q. Isn't the figure I have read to you in this the cost?

A. This is a construction estimate made in advance.

Q. Here is the estimate.

A. This is some clerical tabulation from some set of books.

Q. Did you check that out? When you prepared this audit, 88-A, did you check that out?

A. I didn't check it out when I made 88-A. I looked at the records a year and a half ago when I was in Huron.

Q. You can't remember whether you looked at the work order enough to know from what source the $11,179.23 arose? A. I made a test.

Q. When you started your audit, you started it with this substation at Aberdeen ledger sheet?

A. I worked from that sheet.

Q. When you came to that entry I have read, 11 thousand plus, work order 404, then did you go to that work order? A. Yes.

Q. And did you discover the [sourse] of that figure, $11,179.23? A. May I see the work order ledger sheet?

Q. Yes. A. I went back to this sheet, yes.

Q. What sheet are you looking at now?

A. The ledger sheet entitled, Work Order 404.

Q. And that is exhibit number? A. 55-31.

Q. That is one of the pages of Exhibit 55-31?

A. Yes. And on that group of sheets you will find, under the caption, Supervision, a great many references to vouchers which I have just shown you.

Q. After that you went back to what you call the work order ledger sheet? A. Right.

Q. Which is part of Defendant's Exhibit 55-31. Did you then check it back to work order 404, which is Defendant's Exhibit 55-19?

A. I made comparison if that is what you mean. That is not an accounting record, speaking of the work order.

Q. You didn't discover then where the figure that you used in your Exhibit 88-A, $11,179.23, came from?

A. It came from this ledger sheet.

Q. Did you discover in any record that is now before the Court the basis of that figure?

A. I have pulled out five or six vouchers which represent allocation of joint office expenses. I have pulled out a few more which I would like to show you which represent allocation of joint office payroll, and, generally, those are the items that make it up.

Q. How did you know which vouchers to pull?

A. I picked out references here.

Q. How did you know what references to pull?

A. References from work order 404 ledger sheet. I picked out items in which I expected to find excessive overhead existed, from the information contained in column entitled—

Q. Did you find a key number in the accounting system referring to so-called overheads? A. No, I did not.

Q. You say you looked at the work order, 404, Defendant's Exhibit 55-9, and you saw the charge of overhead, didn't you? Did you or didn't you?

Mr. Benson: You are showing him a ledger sheet.

Mr. Royhl: No. I am showing him the work order.

A. The work itself is not an accounting entry. It is merely an authorization for construction, upon which later is placed a tabulation to show the deviation from the anticipated cost.

Q. But it includes the actual cost, too, doesn't it?

A. An accountant would not go there for it.

Q. I am asking you if you did?

A. I looked at that, yes.

Q. And you found that incidentals were keyed to the number, 60, didn't you?

A. I see it now. I may have seen it then.

Q. You found supervision keyed to No. 61?

A. I see that.

Q. And you found interest was keyed to No. 62, didn't you? A. I see that.

Q. Now, by checking back on these records which are now before you here, you could determine what items were included in 60, 61 and 62, couldn't you?

A. Yes. After an exhaustive study I might find a mass of detail in which we could salvage some items, yes.

Q. Isn't it a fact that you found, after this exhaustive study of the accounts 60, 61 and 62, that they were distributed over the three projects on the basis of per centage?

A. I don't recognize that as three projects.

Q. Did you find that in any other record?

A. The work order is one project. The accounts were mingled.

Q. Did you find that distribution in other records?

A. I don't recall.

Q. I am showing you Defendant's Exhibit 55-19, work order 404, and the entries, 60, incidentals, $15,045.49; 61, supervision, $16,506.95; 62, interest, $5,039.06. And below that a summary showing distribution to account 1122.1, 25-47, overheads, $9,065.16; Account 1123.2, per centage, 36-26, $12,905.48; overheads. Account 1119, per centage, 38-27, overhead, $13,620.86. Did you look at those?

A. I see them.

Q. Did you look at them when you made this audit, Exhibit 88-A?

A. I looked at them a year and a half ago in Huron.

Q. And you arrived at this proposition of $11,179.23 was a part of those entries, didn't you?

A. Yes, I explained that.

Q. Now, then, the Aberdeen sub tabulation, which is shown by you on Sheet 1 of 2, Exhibit 88-A, contains the entry that I have mentioned, $11,179.23, and you knew that was a part of the account 1119, didn't you?

A. It is so recorded.

Q. Did you look at account 1119?

A. You mean sub-division 1119 in the work order?

Q. Yes? A. Yes, I examined that.

Q. You have under the title "Excessive Overheads" an entry of $9,729.23, haven't you?

A. Under this work order, yes.

Q. And that is Exhibit 88-A?

A. That applies only to work order 404.

Q. I am asking you if you show that entry on 88-A?

A. I show that item, yes.

Q. Then you also have an entry on Sheet 2 of 2, 88-A, of $1318.57, haven't you, $13,180.57?

A. Yes, the total of all of the previous items in that column.

Q. That includes both Sheets 1 and 2. Is that right?

A. That is right.

Q. Now, do I understand that as you worked out this amount you learned that the account 1119, $13,620.86, referred to Aberdeen sub?

A. I understand account 1119 is classification number for substations.

Q. In view of the fact we were talking about, in these accounts, the Aberdeen substation, that probably would refer to the work order then, wouldn't it?

A. Except the Barnard substation was also in that work order.

Q. Going back to No. 60, 61 and 62, it was keyed to the work order, wasn't it?

A. Yes. Those are the item numbers.

Q. So you knew when you were applying the 3% allocation of overheads, that the figures in the defendant's records, and the figures which are now before you, included incidentals, didn't you? A. Yes.

Q. And you knew it included supervision, didn't you?

A. I knew it included the kind of supervision which I called your attention to.

Q. And you knew it included interest, didn't you?

A. Yes.

Q. Now, then, in making your audit did you determine what part of that was incidentals?

A. I determined that an allocation such as was made on this work order, at least on a dollar gross, is not a representative allocation between various accounts of construction, including this work order.

Mr. Royhl: We move to strike the answer as not responsive.

The Court: Technically the question should be answered by yes or no, but we will let the answer stand.

Q. Have you anything in your work sheets or on the audits or tabulations, 88 and 88-A, that show the items that were incidentals under this accounting work order 404?

A. No.

Q. Did you check the vouchers under that key number in this accounting that is now before you, to determine what items were incidentals under that account?

A. I generally know the nature of them, yes.

Q. Will you answer the question, please?

Q. (Read) Did you check the vouchers under that key number in this accounting that is now before you to determine what items were incidentals under that account?

A. I believe I checked some of them.

Q. You did not check them all? A. Certainly not.

Q. Then you have no tabulation of what the amount of $12,100.89 in the estimate, or $15,045.49 for actual incidentals, you have no account of what constituted those incidentals? A. I have made no tabulation.

Q. Now, did you make a tabulation of key No. 61, Supervision, $15,506.95?

A. I ran through the vouchers and the ledger sheet.

Q. Have you a tabulation of what entries were included in that?

A. I am not sure. I will have to look. Yes, I have such a tabulation.

Q. Do you have that there before you?

A. Yes. Likewise interest.

Q. This includes both the sub-division, Supervision, which is key No. 61, on the work order, and includes, Interest, which is key No. 62 under the work order?

A. I suppose they are tabulated under that.

Q. That would be the only way you can go back to the vouchers to determine these things?

A. Why not, you could not determine it from the work order.

Q. Now, will you refer to work order 404, which is Defendant's Exhibit 55-19, and the entry key No. 61, Supervision, actual, $15,506.95. And the work sheet which you say you prepared and which you have now shown me in answer to my inquiry, has followed that key No. 61 and checks out on each specific key to the account, doesn't it?

A. It checks out on supervision. On interest I believe the person who made the tabulation of this work order overlooked an item which I picked up.

Q. In your audit of this account, in checking supervision under your work order 404, it checked out and you marked it O. K., didn't you? A. That is not my work.

Q. It is made under your supervision? A. Yes.

Q. Now, then, you found out each voucher, didn't you, and checked each voucher on supervision, didn't you?

A. That is right.

Q. Everyone of them, as keyed to these accounts of the defendant company, didn't you? A. That is right.

Q. And the sub-division, 61, supervision, checked out O. K. Is that right?

A. When I say yes, I don't mean to imply that I approve—

Q. O. K., it checked out?

Mr. Benson: Go ahead and finish your answer.

A. (Con't) —of the charge. It is without foundation.

Mr. Royhl: We move to strike out the latter part of the answer as not responsive.

The Court: I think we will let the answer stand.

Q. So far as the figures are concerned, it checked out O. K.? A. That is right. The arithmetic is O. K.

Q. Then you took the sub-division interest, which is No. 62, and followed the work order, 404, and the key to the entire account, and you checked that out, didn't you?

A. Yes.

Q. You examined every voucher, didn't you?

A. That is right.

Q. And it checked out O. K., didn't it, in arithmetic?

A. No, it didn't.

Q. There was a few dollars off?

A. $504.00 the person who tabulated this overlooked. That is why I say this is not an accounting record.

Mr. Benson: When you say this is not an accounting record—

The Witness: Work order 404.

Q. What do you find interest to be?

A. I find the interest recorded on the book to be $5,544.00.

Q. What do you find it to be in the work order, 404?

A. The amount tabulated on this actual column of work order 404, is $5,039.06, and it is a defective figure.

Q. That is, they didn't charge as much interest as they could have charged?

A. They balanced it with the work order.

Q. Will you answer the question?

Q. (Read) That is, they didn't charge as much interest as they could have charged?

A. It is a matter of charging, it is a matter of classifying charges.

Q. Can you answer the question?

A. It is not a fair question.

Q. You can't answer it in the form it is in?

A. I have answered the question the way I think it should be answered.

Q. Mr. Elvig, you said that under your audit, 88 and 88-A, you checked the classification account, interest, key No. 62. Is that right? A. Yes.

Q. And in your audit what did you find that that should amount to? A. I found that they had charged—

Q. What amount did you find in your audit that should be?

A. I found that the amounts charged to interest from these various log sheets and recorded in this work order, 404, $5544.00.

Q. Even dollars? A. I believe so, yes.

Q. I show you Defendant's Exhibit 220, and ask you if that is a part of your work sheets in checking the defendant's records concerning their account designated "overheads"?

A. Exhibit 220 is a statement upon which we have shown the page number on the work order, the voucher reference, the amounts charged for supervision and the amounts charged for interest, and there is another column which we have not discussed, headed "payroll". It reflects the amounts which have been recorded on the defendants' books. I make no representation as to the accuracy of those figures.

Q. You actually were auditing the figures then, weren't you?

A. Yes. These are the figures that appear on the books.

Q. Now, on Exhibit 220, you checked back on the ledgers, work sheet ledger and general ledger, and the work orders, and you found every voucher that referred to supervision, and every voucher that referred to interest, didn't you? A. Yes.

Q. And you tabulated that on Exhibit 220, didn't you?

A. Yes.

Q. Now, you have tabulated nothing on this Exhibit 220 that referred to the key account 60, incidentals, did you? A. No.

Q. Of course, you found out what those vouchers were, in running the account, didn't you?

A. I have a general idea.

Q. Did you make any work sheet of what they constituted, [itemised]? A. No, I didn't.

Q. What is the record marked Defendant's Exhibit 55-31?

A. The record identified as Defendant's Exhibit 55-31 consists of six pages entitled,—sub and line Ipswich to Barnard—and three columnar sheets with tabulations.

Q. Generally speaking what is the nature—are they ledger sheets?

A. They look like they had been removed from loose leaf ledger.

Q. Did you see those when you made your audit, 88 and 88-A? A. Yes.

Q. You say you did? A. Yes.

Q. And you used them in your audit, I take it? A. Yes.

Q. You knew that this item in 60, incidentals, was a part of the account "overheads", didn't you?

A. Yes, I believe it was included.

Q. By referring to the columnar ledger sheets, line from Aberdeen to Barnard, Ipswich, substations Aberdeen and Barnard, you could see a tabulation of the incidentals under that key No. 60, couldn't you? A. Yes.

Q. Now, it also contained the voucher number, didn't it?

A. That is right.

Q. So that by referring to this ledger and to the voucher

number you could check the voucher and the item that was included in that voucher, couldn't you? A. Yes.

Q. Did you do that?

A. No. The ledger sheet carries a column of explanation and it was not necessary to refer to the vouchers for most of the items.

Q. It was plain enough in the ledger sheet itself, wasn't it? A. That was the situation.

Q. You knew that was a part of the so-called overhead account, did you?

A. Yes. I knew that was included in that.

Q. Now, this account, as built up, was first a columnar sheet, wasn't it?

A. That is a summary record which supports the other record. Which is first I don't know.

Q. Will you look at these?

A. I can't tell in which order it was made.

Q. Part of it was on the columnar order, with the information in it, and part of it is on machine made sheet?

A. Yes.

Q. But it refers to the same account? A. That is right.

Q. There is no information on that portion of the account that is machine made, is there?

Mr. Benson: What exhibit is this?

Mr. Royhl: 55-31.

A. Yes, there is some information.

Q. But it doesn't show the nature of the item?

A. Some of that does, supervision, payroll, interest.

Q. Those are the only ones?

A. The rest of them are marked "Voucher".

Q. You knew where the vouchers were?

A. No. I was denied access to all but such records as were brought to me as I requested them.

Q. Did you request voucher No. 60 in addition to reference 5-555?

A. Probably not. I limited my requests as much as possible because I was having difficulty getting records.

Q. You noted it was Item 60. A. I see that now.

Q. But you didn't find out what that item was.

Q. I hand you Defendant's Exhibit 55-34.

Mr. Fellows: He hasn't answered your question.

A. I am wondering now if this record is complete. It seems to end in December.

Q. Of what year?

A. I don't think it shows, but it must be 1929. The last tabulation I see.

Q. This is 1930, isn't it? That is just a continuation on the machine? A. Yes.

Q. They had made hand written ledger sheet and machine made ledger sheet. Is that right? A. Yes.

Q. Now, referring to your entry that refers to column 5-555, that refers to the voucher, doesn't it? A. Yes.

Q. Did you look at that voucher?

A. I don't recall whether I did or not.

Q. I hand you voucher, Defendant's Exhibit 55-34, for $822.20, and ask you if you ever saw that before?

A. I don't know.

Q. Did you ask to see it?

A. I don't know that either, but I don't think I saw it.

Q. When you made the examination of the defendant's records and books in 1946, did you call for any vouchers of that kind?

A. I called for a lot of them, but I was having trouble to get them.

Q. Did you call for this voucher? A. I don't recall.

Q. Now that you know that this item was in the incidental account, is it an item that you would disregard in that overheads account?

A. There is nothing on this voucher to indicate where this gravel was used. Maybe I can clear up something.

Q. Would you say that keying it to the ledger account would indicate it was a part of that project?

A. When I said I didn't know where it was used, the voucher don't say where it was used. I mean, I don't know whether it was substation or out on the transmission line. It might have been even in the Barnard substation from all I can tell from that voucher.

Q. According to the records and books of the defendant company, it was on this project, this Aberdeen substation?

A. This also includes the Barnard substation.

Q. If it belonged to the Aberdeen substation it was a matter that should have been properly allowed, wasn't it?

A. If it was a charge applicable to Aberdeen substation it should be included.

Q. Did you make any effort to find out whether this was or was not?

A. I don't recall. I didn't make a detailed investigation of every voucher. It is not customary to do so.

Q. Then when you took the overhead account, so-called, in the accounting system of the defendant, and which you audited, you paid no attention to items included except supervision and interest. You have ignored the other items, have you? A. That is not correct.

Q. What other items except supervision and interest have you taken into consideration?

A. If you wish to refer to the next tabulation which covers Barnard and Ipswich, Aberdeen and Barnard, you will note that I have allowed the full allocation on supervision. That is, I have inserted the full figure in supervision and later taken it apart. I have allowed the interest to stand, and I have allowed indirect costs to stand, which I understand are items other than material and labor.

Q. We are talking about your account now, Sheets 1 and 2 of 2. Will you make your answer apply to those sheets?

A. I made an examination of this group of three sheets which cover a period of construction in 1929, and made a note of the items thereon, and I determined that practically all of the incidental items related to transmission line construction. I have allowed such items on transmission line construction, I believe.

Q. Will you show where you have allowed those?

A. I am sorry, but I believe the item of incidentals is included in the overhead.

Q. You mean you have included no part of that 15 thousand plus dollars in your Barnard to Aberdeen project, that being the incidental account?

A. I believe that has been omitted in the overhead.

Q. As I understand, in making your audit and preparing the Exhibit 88-A, Sheet 1 and 2 of 2, you have entirely ignored the item keyed to No. 60, incidentals, $15,045.49?

A. I believe it is omitted from my tabulation.

Q. Now, referring again to the items on work sheet 404, Defendant's Exhibit 55-19, which are keyed to No. 60, incidentals, $15,045.49; No. 61, supervision, $15,506.95; and

No. 62, interest, 5,039.06, you have made an allowance in lieu of that 35 thousand plus dollars, of a 3% amount. Is that right?

A. That would be an accurate statement. It does not admit the items of supervision and interest are—

Q. I am asking you what you allowed in lieu of those?

A. That is right.

Q. Will you tell us, from your audits, what that amount is under your 3% claim that you allowed in lieu of that 35 thousand? Included in [Acounts] 60, 61 and 62? In giving those figures will you give the pages and lines upon which it is shown in Exhibit 88-A?

A. It is not shown separately on the exhibit. It appears in the item "structures", $693.00.

Q. That is on Sheet 1 of 2?

A. Yes, next to the bottom line. Under "33000 volt substation", $83.00; under "interconnection facilities", $674.00, and on the page covering reconstructed book costs of lines from Aberdeen to Barnard and Ipswich, under the caption, "Total supervision" under column entitled "Balance for Barnard Line", a balance $838.90, to which should be added 50% for the amount deducted for the portion of the Barnard line not assigned.

Q. What figure on your audit are you using now for your 3% allocation?

A. Under the line "total supervision" and the column entitled "Net Barnard Line", an amount of $806.99—

Q. Where is that? That is the third column from the right hand side of the page?

A. Yes. Entitled "Net Barnard Line". An amount equal to half of that would be allowed in this column entitled "Deduct 1/3 from Barnard Line."

Q. One half of that?

A. Yes. Under the last column on the same line, $1663.25.

Q. That is in the last column, the figures under captioned column, "Net Ipswich Line"?

A. Yes. Then on the line entitled "Total Interest" and the column "Net Barnard Line" and amount $838.90, to which again 50% would be added for the amount eliminated under "Billed to Barnard Service". And also in the last column on the same line, "Net Ipswich Line", $1729.02. I believe that is all.

Q. Let me see if I get you correct. In lieu of the three items, 60, 61 and 62, incidentals, supervision and interest, as shown on work order 404, total $35,591.50, you, under that 3% provision, allow $7,308.10?

A. That is what the statement will show.

Q. I am speaking of your audit, 88-A? A. Yes.

Q. Did you allow all of the interest that was charged under account No. 62, in work order 404?

A. I allowed it to stand in the transmission line.

Q. Did you eliminate any of the interest charged under account No. 62, which totaled $5,039.06?

A. There was no separate amount set out for the substation, as I recall it.

Q. Then did you eliminate some of the interest charged to this joint account? A. Yes.

Q. How much?

A. To the extent that it applied to the substation.

Q. How much in dollars and cents?

A. I don't know as the figure appears anywhere.

Q. From your audit you can show, can't you, to the Court, what allowance was made for the account keyed as No. 62, under work order 404, which is $5,039.06?

A. I allowed $3110.00 to stand, of the amount shown on the books.

Q. Those were interest charges to the transmission lines?

A. That is right.

Q. You allowed nothing on the substation at Aberdeen?

A. That is right.

Q. That amount you say was 3 thousand plus?

A. The amount I allowed was 3 thousand plus. I don't remember the figure.

Q. When you were reading you said $813.90, 495.35, 739.02, which totalled $2987.37. Is that the amount of interest you allowed?

A. I allowed the difference between the amount, $311.61 and the amount you took from my work sheets and made an exhibit of. The amount shown in that schedule.

Q. Will you give it to me in dollars?

A. If you will give me the exhibit.

Q. I hand you Defendant's Exhibit 220.

A. The amount disallowed was $2434.00 approximately.

Q. $2434.00 disallowed? Will your account show what part of the key No. 61, supervision, $15,506.95, was dis-

allowed in dollars? As shown by your audit, Exhibits 88 and 88-A?

A. I don't think I can tell that without making a bit of a tabulation of it.

Q. Aren't there some entries in your audit that will show?

A. That is reflected. It is buried in this general field of figures.

Q. Then from the figures which you have given us as being allowed, you have allowed $7308.10, part of that being interest and the rest of it being supervision?

A. I haven't had an opportunity to write these figures down. I would rather not answer unless I can make a study of it.

Q. Do you want pencil and paper to check your audit on that?

A. If I could do it at the end of court I would do it then.

Q. Do you want a recess?

A. That would suit me, yes.

(At this time a recess of fifteen minutes was taken, after which the cross examination of the last witness proceeded as follows):

Q. (Read) Then from the figures which you have given us as being allowed, you have allowed $7308.10, part of that being interest and the rest of it being supervision?

A. I have no such figures here. I would like to explain what I have.

Q. You can't give it to us in dollars and cents?

A. Not in a lump sum, no.

Q. And the figures in your audit don't show that? I am referring to Exhibits 88 and 88-A?

A. There are quite a number of items enter into this.

Q. I am asking you if your audit shows the figures that will determine it?

A. Not in a lump sum, no.

Q. I am speaking now of the Aberdeen sub and of the Barnard line and the Ipswich line. I think they are reflected on work order 404? A. Yes.

Q. I am speaking of the figure shown on that work order as $35,591.50, under the classification "Overheads"?

A. Yes.

Q. Now, according to your audit, Exhibits 88 and 88-A, you have disallowed on the Aberdeen substation $13,180.57 of that amount. Is that right? A. That is right.

Q. That is correct, isn't it? A. Yes.

Q. And on the Barnard line you have disallowed the sum of $1774.61? A. Yes.

Q. And on the Ipswich line you have disallowed $3657.60? A. That is right.

Q. And in any of those instances you disregarded entirely, incidentals, didn't you?

A. I would like to state I overlooked it. I didn't have time to work on the records here. I worked from my work sheets which I made a year and a half ago at Huron, and I made it in the evening under pressure.

Q. When you told the Court this audit, Exhibits 88 and 88-A were true and correct audits, you were mistaken?

A. Yes, I admit it so far as incidentals are concerned.

Q. Then you want to include as being allowed on the Aberdeen substation the amount of $15,045.49, incidentals?

A. Yes.

Q. And those were not allowed in your audit, 88 and 88-A, exhibits?

A. That is right. But I must qualify that statement a little bit. The $15,500 applies not only to the interconnection facilities, it includes the Barnard substation, and it includes a portion of the Aberdeen substation, which is not part of the interconnection facilities. So I don't admit the entire 15 thousand dollars belongs to interconnection facilities.

Q. Will you indicate what part of this you do not admit?

A. It will be the proportionate share charged from this work order.

Q. You can determine that from these vouchers, can you?

A. I think you can determine from that.

Q. Will you do so in dollars and cents, the portion of the account No. 60, incidentals, totalling actually $15,045.49 what parts you did not include?

Mr. Benson: Does not include where?

The Court: As I understand, he admits they are all included but they are not included in that particular application.

A. I am stating that this incidentals figure, 15 thousand dollars, represents incidentals recorded on the books under work order 404, and that work order includes, in addition to the interconnection facilities, the Aberdeen substation and the Aberdeen Barnard line and the Aberdeen Ipswich line, and also includes the 33,000 volt station which serves the southern part of the system, and also includes the Barnard substation, and the applicable part of this 15 thousand dollars would be assigned to this. To that extent I don't think it should be considered as having been eliminated.

Q. Do I understand it is your contention there is some part of that that should be charged to the defendant's properties? A. That is right.

Q. And not to interconnection facilities?

A. That is right.

Q. Do you have that amount?

A. I don't think I can give you the amount precisely.

Q. Can you give us the items you claim, or the voucher numbers, or the vouchers, you claim cover that?

A. What I am saying is, on the item "Overheads" $15,045.49, a portion applies to each dollar of cost in work order 404, and included in those items is Barnard substation, so pro-rata, a part would be assigned to that. And also to the various items in the Aberdeen substation which are not claimed to be a part of the interconnection facilities.

Q. But you have not computed that and your audit does not show that. Is that right? A. That is right.

Q. So you can't tell us now what portion of the $15,045.49 you will allow on a conformed and reformed audit. Is that right?

A. I can't state right now. I will be glad to bring in figures which I think we can agree on.

Q. We are talking now about that portion of your exhibits 88 and 88-A that refers to reconstructed book cost of lines from Aberdeen to Barnard and Ipswich. Have you got that page? A. Yes.

Q. I notice you have a heading there, in about the fourth column from the left of the sheet, entitled "Deduct underbuild material, labor, etc." Have you got that? A. Yes.

Q. How much did you deduct for that?

A. In total, $4475.04.

Q. What did you find in the records and files of the defendant company, which you say are here before you, which makes that deduction?

A. Well, I will explain it. The first item—.

Q. I want to know what records and files you found?

A. I have the following list of materials which are materials which can't be used for a voltage—

Q. You are making an engineering study out of this, are you, now?

A. I have picked out materials charged to this work order which could not be used on 38,000 volt line.

Q. Will you refer to the records and papers which show that material?

A. I find among other things, reference to 1836 light pins and spur washers, value $405.45. I find 42 seven foot cross arms, value $48.84. I find an item not shown separately on your work order which we find in analysis, 13,000 volt insulators, $776.47.

Q. You say that is not on the work order at all?

A. It doesn't appear in there but it appears among items of material charged out.

Q. Where does it appear? You didn't find it was ever charged in, did you?

Mr. Benson: Wait a minute. You ask him one question.

Q. Where does it appear?

A. It appears as inventory adjustment. This line was apparently built and inaccurate charge of material made, and from the record it appears a physical inventory was taken after the line was completed, and this entry appears on voucher 9-53, for September, 1930, and in one column it shows physical inventory, presumably, and then in successive columns it shows the amount which had been charged out and the additional amount necessary to be charged out to reach the physical inventory.

Q. Will you give the items that are included in what you are talking about?

A. On this particular item we are referring to No. 1111, Westinghouse, 13,500 volt pin insulators, which says,

"Charged out, 412, to be charged out, 2606, price .3067, amount $799.26."

Q. You are reading from your own notes, are you?

A. Yes.

Q. Did you find anything in the records and files of the defendant company from which you took that?

A. I believe I can find it. It is journal voucher 9-53 for the month of December, 1930. I am referring to a page in the inventory form. And directly to the item of Westinghouse No. 1111 insulators.

(Defendant's Exhibit 55-35 marked for identification.)

Q. Do you refer to Defendant's Exhibit 55-35 when you comment about the item of $799.26? A. That is right.

Q. And do you refer to the item in particular appearing on that Exhibit 55-35, which reads, under column headed "Actual inventory of line", following down that line to 3018, No. 1111 Westinghouse 13,500 V pin insulators?

A. I think that is a typographical error.

Q. No. 412, No. 2606, under column appears 3067, under amount $799.26? A. That is right.

Q. Now, will you refer to work order 404, which is Defendant's Exhibit 55-19, and tell us whether or not any such item is included therein?

A. I don't find the item in this list.

Q. Was that the list you were working from and which made up the amount shown as Barnard line?

A. I think I testified before I usually work from the accounting records and not from engineering summary.

Q. Is there any such charge as that shown in the ledger pages of this project?

A. May I see the ledger, the work order ledger?

Q. This is the property ledger, is it not, Defendant's Exhibit 214-H?

A. I would like to see the work order ledger.

Q. Do you find any such item charged there?

A. No. This starts with the beginning figure, 1930, which is not detailed.

Q. What other records do you want?

A. I would like to see the work order ledger, 404.

Q. Is it Defendant's Exhibit 55-31? A. Yes.

Q. What are you referring to?

A. You asked me if that is Exhibit 55-31 and I said yes.

Q. Do you find any such an item as is shown on Exhibit 55-35 which you say should be deducted, referring to Westinghouse insulators?

A. I find this inventory adjustment in the total amount of $9922.35, charged to this work order.

Q. Do you find that on any books and records of the defendant? A. Yes.

Q. Where? Will you refer to it?

A. This journal voucher, 9-53, in the month of September, on the last page of the work order.

Q. That is where it is charged out?

A. That is where it is charged out to the work order.

Q. That refers to where there is a charge-out?

A. A charge from inventory to property.

Q. Do you find any place where it is charged in? Will you take this work order again, 55-19, and the ledger, and when I asked you concerning it, you referred to an entry of $47,340.00, and said it was not itemized. Is that right?

A. That is right.

Q. Now, isn't the work order that you hold in your hand, 404, Exhibit 55-19, that entry?

A. I never understood that that was an accounting entry, and I don't believe it is.

Q. Will you examine that and see if that refers to the same entry?

A. May I have the work order ledger sheet again? May I explain that the way I understand—

Mr. Royhl: Read the question.

Q. (Read) Will you examine that and see if that refers to the same entry?

A. I have tried repeatedly to explain to counsel that the work order is the engineer's estimate of what a construction project will cost, and later, when the job is finished, some engineering clerk or accounting clerk has tabulated the cost and checked them to that column for comparison with the original estimate. I do not understand it is an accounting entry. Never have. I would never honor it as an accounting entry. If there is a conflict between that and the books, the books stand.

Q. Do you find any place where the item you say was charged out was ever charged into this project?

A. Certainly.

Q. Where?

A. In September, 1930, journal voucher 9-53, included in inventory adjustment, 9900 and some odd dollars.

Q. That was charged out?

A. That was charged out of stores and into the work order, from your warehouse to your construction project.

Q. You say this is included in that?

A. If you will compare the total amount of your work order, the final balance, with the total amount shown on your work order, where the engineering clerk or someone has, you will find they are practically identical, including the 9 thousand dollar adjustment.

Q. If they were charged into this project shouldn't it be shown on the property ledger account?

A. You have a gap between the two. There is no reference that I can find here.

Q. Now, as a practical matter, if you served Leola and Wetonka off of a 40,000 wire, or a 22,000 wire, would you have to have substations at those towns?

A. Yes, I believe so.

Q. Did you find any charge in the interconnecting facilities for substation at Barnard?

A. I am not sure I know just exactly what you mean.

Mr. Royhl: Will you read the question?

Q. (Read) Did you find any charge in the interconnecting facilities for a substation at Barnard?

A. Do you mean is there a cost included in this contract representing facilities at Barnard?

Q. A substation facility at Barnard?

A. I don't believe there is.

Q. And in serving Barnard and Wetonka, stations of that size, the charge would have to be reduced, would it not, to 6900?

A. That depends on where the power supply came from.

Q. You would not serve towns of that size with a load heavier than 6900, would you?

A. I think that is rather questionable.

Q. I am asking you what your opinion is?

A. Depending on where the town was located. If it is located on 6900 volt line, it would be serviced with 6900. If it happened to be on a trunk line we would step down to it, either at that point or some other point.

Q. You would step it down to 6900?

A. Or we would probably be inclined to step it down to 2300. I don't know.

Q. Then you would have to have a substation?

A. What voltage are we coming in at?

Q. At a voltage of 40,000 or 22,000?

A. Oh, yes, then you would.

Q. You would have to have a substation? A. Yes.

Q. You would have to have one at Wetonka and one at Leola?

A. You would have to take care of it at both locations, but one could do for the two.

Defendant's Exhibits 222 through 225 were received in evidence. They are the plant ledger records of Dakota Public Service Company and its predecessors covering transmission facilities from Wishek, North Dakota to the North Dakota-South Dakota state line; from the same state line to Bowdle, South Dakota; from Selby, South Dakota to Bowdle, South Dakota; and from Wishek, North Dakota to Napoleon, North Dakota, respectively. In each case the original entry on said plant ledger records is the appraisal by the North Dakota Railroad Commission made in 1936, which in each case includes overheads at 10.3% of the appraised cost.

Q. I show you Defendant's Exhibits marked 222 to 225, both inclusive, and ask you if those are part of the records which you produced here today for the plaintiff? A. Yes.

Q. And they are part of the records and files of the companies indicated on their face? A. Yes.

Q. Do you still use these plant ledger records as the records of the plaintiff for station ledger records?

A. We transcribed them on our other system of accounts.

Q. In transferring them, down to the dates that are shown here, has there been any changes made?

A. I don't recall.

Q. Can you tell by looking at these?

A. No, except such changes as might have occurred in the three months that the defendant kept our records for us. That is between October 19 and January 31st.

Q. Otherwise they are carried on the plaintiff's books now in the same way they are carried there?

A. Same account numbers.

Q. I mean the amounts and the records as shown there?

A. These amounts have been transcribed on our ledgers here subject to events in the ordinary course of business since that date.

Redirect Examination: by Mr. Benson.

Q. Mr. Elvig, you were asked during your cross examination concerning certain items called incidentals, on work order 404, which you said you had overlooked, and then you said you wanted time to look at your work papers and at Exhibit 88 and 88-A. Last evening you went over those Exhibits 88 and 88-A [against], did you?

A. Yes. I did.

Q. Did you find the item of incidentals, the figures you inserted in 88 and 88-A, with reference to incidentals, in the defendant's account, on work order 404? A. Yes, I did.

Q. Will you explain to counsel where the item of incidentals is handled, and how much you put in there?

A. I will first refer to the third page, which covers the transmission line from Aberdeen to Ipswich and Aberdeen to Barnard.

Q. Will you point out on the page, giving the column so counsel can follow, what items you entered in there from the defendant company's books, which were included in the incidentals concerning which counsel interrogated you?

A. In the first column, entitled "Work Order 404", just above the center of the page, is the figure $9287.58, opposite the caption entitled "Other Costs". The term "Other Costs" is synonymous with the term "Incidentals". It represents the same item.

Q. How much did you enter on the third page of Exhibit 88-A as "Other Costs", which you say were incidentals, or were treated as incidentals by the defendant?

A. $9287.58.

Q. On that page, that entire page or any other page of Exhibit 88-A, did you enter any other items that were in the $15,045.49, incidental items, concerning which Mr. Royhl interrogated you?

A. The balance of that figure would represent Barnard and Aberdeen substation, and to the extent it applied to the Aberdeen, it is included in the figure on Page 1 of 88-A, opposite the line marked Work Order 404, in the amount of $11,179.23.

Q. Of the amount, $15,045.49, will you tell us how much was included in the figures in your Exhibit 88-A?

A. The record is not clear on that. It is just about $5,000.00. The record doesn't bear close investigation. They have lumped their figures so you can't trace it.

Q. Mr. Royhl: He is asking you how much?

The Witness: $5,000.00.

Q. You put in $9,287.58, in the column you described on the third page under 404? A. Yes.

Q. Can you tell how much of the incidentals of $15,045.49 is in that figure of $11,179.23, on page 1 of Exhibit 88-A?

A. $5,000.00.

Q. So you are within how much of the $15,045.49?

A. The remaining item would apply to Barnard substation so it is all covered.

Q. It went with the Barnard substation? A. Yes.

Q. So you say this $15,045.49 was in your figures on that exhibit? A. That is right.

Mr. Royhl: He just said nine thousand dollars was not in there.

Q. They were put in this exhibit? A. Yes.

Q. During your cross examination you started to say that in your analysis of cost of the Aberdeen substation you allowed "no interest". Counsel interrupted and you did not state whether you didn't allow any interest in the construction of the Aberdeen substation?

A. This substation was a rebuild of an old substation, in a new location, and in part was in service at all times. The item entered on the substation work order in the amount of $11,179.23, was marked merely "overhead" and

was not split between supervision and incidentals or overhead, and there was no opportunity for me to spread back the interest or spread back the charges of construction. Ordinarily a substation of that kind of units would go into service quite promptly.

Plaintiff's Exhibits 55-36, 55-37 and 55-38 were received in evidence.

Q. Mr. Elvig, will you see if you can pick out of Exhibit 55, the records of the defendant joint office payroll voucher, which shows anything about whether defendant allocated part of the engineer's salaries to work order 404, by direct apportionment? A. I have one for April 30th.

Q. Will you get the ledger, whether it is work order ledger or property ledger, I don't know which, where that would be entered under the account of this work order 404?

A. That is part of the record.

Q. Do you have a ledger sheet? A. Yes, I have it.

Q. What is the ledger sheet, what exhibit is that in?

A. That is Defendant's Exhibit 55-31.

Q. I show you voucher which you handed me marked Plaintiff's Exhibit 55-36, and ask you if that is a voucher which you produced, which you say is referred to in the ledger sheets which you just produced and described?

A. Yes, it is.

Q. Can you tell from the accounting records in Exhibit 55, what engineers' salaries were dealt with in this Exhibit 55-36, which you say were apportioned to work order 404? A. Yes.

Q. Have you the records before you from which you can tell? A. Yes.

Q. What is it?

A. It is entitled "Joint Office Payroll" I believe. This page I am looking at is payroll distribution.

Q. Now, will you tell us which engineer's salary referring to on payroll distribution sheet, marked Plaintiff's Exhibit 55-37, is also shown on Plaintiff's Exhibit 55-36?

A. I refer to the page for W. H. Frost, entitled joint superintendent.

Mr. Royhl: What is the amount in dollars and cents you refer to?

The Witness: The amount of Mr. Frost's salary for April 30, which was charged to work order 404, is $38.88.

Q. Is that item included in an item on the ledger sheet which is Defendant's Exhibit 55-31?

A. Yes. It first goes to a recap sheet where it is one of three items. $38.88 is the first of four items totalling $102.12, which is the amount which appears on Exhibit 55-31 on the back of the third page, under voucher reference J-41.

Q. Will you see if you can produce records showing what was done with the balance of Mr. Frost's salary during that month?

A. I have made a tabulation.

Q. What record have you produced?

A. I have Plaintiff's Exhibit 55-36, which is a summary of the payroll book, which I believe was 55-37.

Q. Can you tell from the payroll book, 55-36, what was done with the balance of Mr. Frost's salary that month?

A. Yes.

Q. What was done with it?

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial; not proper redirect examination; not within the issues in this case.

The Court: Overruled.

A. It was spread over a number of accounts as indicated on Exhibit 55-37.

Q. In those accounts that it was spread over, do you find more spread to this work order 404? A. No.

A. (Con't) This ledger, the payroll ledger sheets, is spread among various accounts on a recap sheet. Among them are charges to North Dakota Power & Light Co. and Northern Power & Light Co., and other work orders and to Account 920, joint office expense.

Q. Can you produce records showing whether the amount that was spread to Account No. 920, or any portion thereof, was also charged to work order 404? A. Yes.

Q. Will you produce those records?

A. Here is voucher No. 532 from the defendant's records.

Q. I show you Plaintiff's Exhibit 55-38, and ask if that is voucher 5-32, to which you just referred? A. Yes.

Q. Can you tell from that whether the joint office expense was [allocation], or any portion thereof, to those jobs under work order 404? A. Yes.

Q. Plaintiff's Exhibit 55-38 shows the distribution to 404 of a portion of the balance of Mr. Frost's salary, in addition to that shown in Plaintiff's Exhibit 55-36, and for the same period as shown in Plaintiff's Exhibit 55-36?

Mr. Royhl: Objected to as leading and suggestive; hearsay; self serving, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Mr. Frost's salary, in the amount of $136.20, in April, was charged to Account 920, which is joint office salary account for executives. This portion of his salary, together with the salaries of several other engineers, president, vice president, treasurer, and the superintendent of the power plant, and the general auditor, and probably eighteen office clerks.

Mr. Royhl: Are you testifying from a record or are you [testimony] from your own knowledge?

The Witness: From a memo which I made from this payroll record which is a part of defendant's—

Mr. Royhl: You are not testifying to any specific exhibit or the contents of it?

Q. He means any particular exhibit?

A. Exhibit 55-37 is one page of it. But there are pages in there for the month of April, adjacent to this one.

Mr. Royhl: We renew our objection.

The Court: Overruled.

A. (Con't) —were then redistributed on the formula which was in use throughout the year, or, I believe, the entire period of work order 404, and also work order covering other interconnection facilities were under way. This formula was about like this—

Q. Never mind the details of the formula. Just state what happened to the balance of Mr. Frost's salary for the same period. Whether it was in the joint pot that was distributed over this job?

A. Mr. Frost's salary was in the pool to the extent of $136.20, in a pool which totalled $22,000.00, in round numbers, of joint expense. And this $22,000.00 was split in this particular month, 1/2 to construction, including work order 404, and the other half remained as expense.

Mr. Royhl: We move to strike out all of the evidence in the answer of the witness to this question for all of the reasons urged in the objection thereto. And for the further reason it is very apparent now it is wholly conclusion and opinion of the witness, and not based upon any record or records in evidence, and no probative value.

The Court: Motion denied.

Q. Mr. Elvig, in Defendant's Exhibits 55-9 and 55-17, we have a report of Northwestern Public Service Co. to Federal Power Commission, on Form 1, for the various years referred to when the exhibits were offered in evidence. Can you tell us what rate of the cost of construction was charged, according to those reports, for overhead?

A. Yes, I can tell.

Q. Will you refer to the page of the report and tell us what the amount is that is charged for overhead?

A. I refer to page 528. I have made an abstract for several years.

Q. One typical year.

A. This is FPC-1 for the year ending December 31, 1937, in which they say that they used 3%.

Page 528 of Defendant's Exhibit 55-17, which was received in evidence (R. p. 647, supra), sets forth a general description of the construction overhead procedure as called for on page 527 of that exhibit. The following information appears under that heading:

Basis for Percentage of Administrative and General Expense transferred to Construction, year 1937.

Payroll	$ 7200.00
Miscellaneous	500.00
(A) Total Estimated Expenses Assignable to Construction	$ 7700.00
(B) Total 1937 Construction Budget Subject to Administrative & General Expense	$210,400.00
Percentage of Administrative & General Expense A + B	3.65%
Use for year 1937	3.0 %

Page 527 of said Exhibit contains item 561 of the report for 1937, which required information as to overhead accounts for the year 1937. The Exhibit shows the word "none" in Subdivision A of such item, which called for the balances, charges, and clearances in the overhead accounts during the year 1937. Subdivision B called for construction overheads related to cost of construction, including the percentage of overheads to construction costs, and reference is made thereunder to the information set forth on page 528. The same type of information was called for in Defendant's Exhibits 55-9 through 55-16 for the respective calendar years covered by said Exhibits.

Mr. Royhl: We move to strike that out as incompetent, irrelevant and immaterial to any question now in evidence as to what figure they used in 1937, this construction having been made in 1929 and 1930; not within the issues in this case.

Mr. Benson: I would like to call the Court's attention to the fact that overheads don't change in the construction of these lines.

The Court: Regardless of whether they change or not, in the present condition of the record the evidence is compe-

tent. If it has changed, that is up to the other side to show. Objection overruled.

Q. Can you tell the total amount that went onto the company's books, the defendant company's books, for the work in this work order, 404, including the total of $35,591.50, which Mr. Royhl designated as overhead?

A. Yes.

Q. What is the total?

A. $35,591.50 is the total of the overheads to which he has referred.

Q. What is the total charged to these jobs under 404, for overheads, and everything else? A. $182,126.00.

Q. And some cents? A. 60 cents.

Q. Deduct the $35,591.50 from that.

A. I have a figure of $146,535.10.

Q. Can you tell us quickly what percentage of that last amount named $35,591.50 is? A. That is roughly 25%.

Mr. Benson: That is all.

Recross Examination: by Mr. Royhl.

Q. Will you indicate on the records of the defendant where $35,591.50 is charged to overhead?

Mr. Benson: We will admit it is not charged to overhead. It is charged, $15,045.49 to incidentals; $15,506.95 to supervision to which you referred; $5,039.06 to interest, to which you referred. You lumped them all together at one time in your cross examination as overhead.

A. This is in work order 404, which I believe is an exhibit.

Q. You were asked for work order 404, being Defendant's Exhibit 55-19?

A. You asked me to produce this record, yes.

Q. Will you indicate there whether there is any charge to overhead in the amount of $35,591.50?

A. Yes. It is the last typewritten figure in the column entitled "Amount Estimated."

Mr. Benson: What does it show?

A. The column has three figures in it. Over the top of the column is the word "Overheads." The total figure is $35,591.50. Under that is 24 and some per cent.

Q. That refers to the tabulation of the sub account, No. 60, 61 and 62, does it not, on this same exhibit?

A. I assume it does, yes.

Q. And it includes incidentals, supervision and interest, doesn't it? A. That is right.

Q. Now, you have added on the page which is entitled "Reconstructed Book Cost of Line from Aberdeen to Barnard," etc., a part of Exhibit 88-A, in the column "Work Order 404" "Other Costs of Line", an amount of $9287.59. In what way, if at all, does that affect the figure $9729.23, which appears on Sheet 1 of Page 2, under the column "Excessive Overhead"?

A. May I ask my attorney, is this proper cross examination now?

Mr. Benson: Go ahead. He has asked you to explain the whole thing. Go ahead and explain.

A. The figure 9287.58, on page 3, has no bearing on the figure $9729.23 on Page 1.

Q. Does the audit, Exhibits 88 and 88-A, still reflect what you claim are excessive overheads?

A. So far as page 3 is concerned, and page 4, it stands. So far as page 1 and 2 are concerned, if the ledger sheet had supported that item of $11,000.00 between incidentals, supervision and interest, I would have accepted the item of incidentals which I understand would be about $5,000.00. The ledger sheet was not so marked.

Q. Do I understand that when you spoke of incidentals here in the amount that I have given you, $9287.58, and you referred to the line "Other costs" under column "Work Order 404", does that affect the figures in the column in Plaintiff's Exhibit 88, under title "By Elvig as of January 1, 1936"? A. No.

Q. In Plaintiff's Exhibit 88, captioned "Comparison of Values Upon Interconnection Facilities", does your testimony concerning $9287.58, incidentals, as you have testified here, in redirect examination, does that affect any of the values in the column headed "By Elvig as of January 1, 1936"? A. Not based on the defendant's records.

Q. So is that because you haven't checked the items that you say are incidentals in that amount of $9287.58?

A. Because there is no continuity in the defendant's records between that figure and the one of the substation. I don't want to assume the condition other than stated on the ledger sheet.

Q. What disposition have you made then of the incidentals that total that amount of 9 thousand plus?

A. There are no incidentals shown on the ledger sheet.

Q. In the records and files of the company, then?

A. If you will produce the continuity between the work order and the ledger sheet for me.

Q. As I understand you told the Court you had checked these records and files and you had prepared this audit, Exhibit 88? A. Certainly I checked the records.

Q. Do I understand you are entirely throwing out and disregarding all items in work order No. 404, which is designated incidentals, $15,045.49?

A. I testified before that 98 hundred plus dollars of that is in transmission line schedule on Page 3 of 88-A. That a further amount is in Barnard substation by allocation. And that the amount which presumably would apply to the Aberdeen substation is buried in a figure of $11,000.00, which is labelled "Overhead". I don't understand incidentals to mean overheads in my understanding of utility accounting.

Q. Because it is called incidentals you have disregarded it?

A. Because it is called overhead I have disregarded it.

Q. Because incidentals is part of the so-called Overheads?

A. There is nothing about the ledger sheet to indicate what the 11 thousand dollars is except to call it overheads.

Q. You testified that pages 3 and 4 of this audit, Exhibit 88-A, stands on excessive overheads. That as to pages 1 and 2, had the ledger sheet supported the items of incidentals, you would not have included that as an excessive overhead. Is that right?

A. I don't remember my testimony. My thought was that if there had been an amount shown for incidentals I would have recognized it for what it was worth.

Q. Could that have been determined by a review of the

journal vouchers and the work orders and the cash vouchers? A. No, sir, I don't believe so.

Q. The next question is, have you tried, by checking those?

A. Yes. I tried over here last night to tie those in and it was physically impossible to do it.

Q. Did you look at all of the journal vouchers and cash vouchers? A. That is not necessary.

Q. Mr. Elvig, you testified on redirect examination that Defendant's Exhibit 55-17, being report to the Federal Power Commission, for the year 1937, included a schedule showing construction overhead of 3%. Do you know whether or not that classification included interest during construction? A. I assume it did not.

Q. That is, you say that that would be a regular policy and procedure under the Federal Power Commission ruling?

A. I assume interest during construction would be a separate item.

Q. And an item that would be charged to cost of construction? A. Where justified, yes.

Plaintiff's Exhibit 92 was received in evidence consisting of a photostatic copy of the minutes of a special meeting of the Board of Directors of plaintiff duly held October 2, 1945, with a majority of directors present, and is in part as follows:

* * * * * * *

The President referred to the action taken by the Board at its meeting held August 31, 1945 with respect to the purchase of the outstanding securities of Dakota Public Service Company and Knife River Coal Mining Company, the liquidation of Dakota Public Service Company, and the issue of a $6,500,000 promissory note, $4,000,000 of First Mortgage Bonds, 3% Series Due September 1, 1970, and 223,351 4/6 shares of common stock, and presented to the meeting copies of the following documents:

* * * * * * *

He further stated that the Securities and Exchange Commission had set the application of United Public Utilities Corporation for authority to sell the securities of Dakota

Public Service Company and Knife River Coal Mining Company for hearing on October 9, 1945.

• • • • • • •

On motion duly made and seconded, the following resolutions were adopted:

Whereas the Company has by agreement with United Public Utilities Corporation dated July 2, 1945, contracted to purchase all of the outstanding securities of Dakota Public Service Company;

Resolved that the officers of this Company be and they hereby are authorized to take all action necessary to complete said purchase as contemplated by said agreement; and further

Resolved that immediately upon the completion of said purchase the officers of this Company, or any of them, be and they hereby are authorized and instructed to vote all shares of stock so acquired in Dakota Public Service Company for the election of a new Board of Directors to consist of the following five named persons; namely, Messrs. R. M. Heskett, C. W. Smith, F. R. Gamble, W. L. Hayes and H. N. Elvig, and it is recommended that said Board of Directors of Dakota Public Service Company elect the following persons as officers of that Company, namely:

R. M. Heskett—President
C. W. Smith—Vice President
F. R. Gamble—Secretary and Treasurer
W. L. Hayes—Assistant Secretary;

and further

Resolved that it is desirable and advisable that Dakota Public Service Company be completely liquidated on the same date that its securities shall be purchased by this Company, and that on that date all the property of Dakota Public Service Company be transferred and distributed to Montana-Dakota Utilities Co. in complete cancellation of the outstanding securities to be purchased from United Public Utilities Corporation to consist of 8,370 shares of common stock, with-

out par value, $1,000,000 of First and Refunding Mortgage Bonds Due October 1, 1946, $2,500,000 of Notes Payable due July 1, 1949 and a $1,335,794 Income Note Payable due July 1, 1949; and all the property and assets of Dakota Public Service Company shall be so transferred and distributed to Montana-Dakota Utilities Co., subject to and charged with all debts and liabilities of Dakota Public Service Company of every kind and nature, except the securities to be cancelled upon the liquidation of that Company hereinbefore referred to; that the officers of this Company are hereby authorized and instructed to execute all documents and to do all other acts in the name and on behalf of this corporation which may be necessary or advisable fully to complete the liquidation of Dakota Public Service Company and the acquisition of its assets by Montana-Dakota Utilities Co.

On motion duly made and seconded, the following resolutions were adopted:

Whereas this corporation has by agreement with United Public Utilities Corporation dated July 2, 1945, contracted to purchase all of the outstanding securities of Knife River Coal Mining Company;

Resolved that immediately upon the acquisition of said securities the officers of this Company, or any of them, are hereby authorized and instructed to take all action necessary to elect a new Board of Directors of said Knife River Coal Mining Company to consist of the following three persons; namely, Messrs. C. W. Smith, F. R. Gamble and W. L. Hayes; and it is recommended that said first Board of Directors elect the following persons to the following offices in said Knife River Coal Mining Company, namely:

C. W. Smith—President
W. L. Hayes—Vice President and Assistant Secretary
F. R. Gamble—Secretary and Treasurer

DAN S. HELMICK, having heretofore been sworn was recalled by the plaintiff and testified as follows:

Direct Examination: by Mr. Benson.

Plaintiff's Exhibits 55-39 through 55-43, inclusive, were received in evidence over the objection of defendant that the exhibits are immaterial, not within the issues of the case, appearing to be and concerning a year and period remote from the time covered by the complaint. The Exhibits are as follows:

Turn to Card 20 for
Plaintiff's Exhibits 55-39
through 55-43, inclusive
(pp. 863,865, 867, 869, 871)

Q. Now, I show you the map, Plaintiff's Exhibit 15, and ask you in addition to what you were asked before, which portions of this map do you propose to refer to in your testimony?

A. All the portions pertaining to North Dakota Power & Light, shown in red; Northern Power & Light, shown in yellow; and the interconnecting facilities between Northwestern Public Service Co. and the Northern Power & Light Co., between Aberdeen and Barnard, Aberdeen and Ipswich, Highmore and Gettysburg.

Q. I notice that on the colored lines, using them as a base, there are what look like black lines drawn off at angles, which come to a point, and using the colored line as a base, those black lines form a triangle in many instances? A. I notice it also.

Q. Now, at the apex of each of those triangles there are certain figures. Did you check all of those figures against the inventory and appraisal prepared by Mr. Wiley to which reference has been made? A. I did.

Q. And the figures on the map are a correct representation of the figures as found in the appraisal and inventory?

A. To the best of my knowledge.

Q. Will you cite what those figures at the point of the triangle mean? Will you take one of them and explain what it is?

A. The easy one is in the upper left hand corner, from Beulah south to Glen Ullin junction. The top figure, 30.4, which means 30.4 wire miles. Then there is the next figure, 3 #6 C.; that means three #6 standard copper. Then there is a rather indistinct 1/4 assembly. 1/4 steel messenger wire. Then that one is rather indefinite. Then there is 40 ACSR. 40 Aluminum Conductor Steel Reinforced. Then there is the figure, 38 KV, which means 38,000 volts. That is typical of all of the others.

Q. Where the abbreviation "Mi" appears on all of those triangles, it means wire miles? A. Right.

Q. What do you mean by wire miles?

A. I might say, for example, the road miles between Bismarck and Beulah is one thing. The high line or transmission line is what we call wire miles. The actual mileage for transmission line and the wires thereon between those two points.

Q. Are there any other designations as to the kind of wire anywhere on the map that you might want to explain, other than the one which you used here, 6 strand copper. Will you take another one which is not copper?

A. The next line south from Glen Ullin, south, is 3 #8 stranded copper. Coming down from Beulah to Bismarck is 4#0 aluminum conductor.

Q. How is aluminum distinguished from copper?

A. ACSR. There is one other size of wire that is generally used, and that, for example, is on the line we will say from Ipswich to Aberdeen, 00 copper—should say aluminum. They are about the four sizes of transmission wire used on this transmission system.

Q. Is there anything on this map which you have verified against the inventory as to size or capacity of generating station, or did you get that information from other sources?

A. There is nothing shown here on generating stations at all. That comes from other sources, such as Federal Power Commission reports, etc.

Q. You are not using the map for that?

A. No. The map is to show transmission lines and to give a general picture to show statistics.

Q. Where did you get the information that you have on the map concerning the interconnection from Gettysburg down to Highmore, if there is anything on the map concerning that?

A. The information is not complete on the map. I can tell you the information if you care to have it, of anything we have used, the authority for so using it.

Q. I believe you stated at the time of your first appearance on the stand in this case that you had some acquaintance with the system of Northern Power & Light Co.?

A. That is correct.

Q. You stated you acquired that in making inventory and appraisal of that property in 1927? A. 1926.

Q. Did you hear the testimony of Mr. Elvig? A. I did.

Q. Have you examined the exhibits that have come in from his testimony? A. I have.

Q. You have examined various other exhibits in this matter. Have you examined all of the load diagrams that

were heretofore introduced and those introduced this afternoon?

A. I think I have, but if you want me to take the time to check it, I would be glad to be able to. I don't think it is necessary. I am quite positive I have looked at them two or three times.

Q. Do you have a copy of Plaintiff's Exhibit 55-8?

A. Yes.

Q. Do you have a copy of Plaintiff's Exhibit 82-9?

A. Yes.

Q. Do you have a copy of Plaintiff's Exhibit 82-10?

A. Yes.

Q. Do you have a copy of Plaintiff's Exhibit 82-12?

A. Yes.

Q. Have you a copy of Plaintiff's Exhibit 87?

A. I don't seem to have 87.

Q. I will give you a copy. Do you have before you Defendant's Exhibits 82-22-23-24? A. Correct.

Q. Do you have before you Defendant's Exhibits 82-19, 20 and 21? A. Yes.

Q. Do you have before you Plaintiff's Exhibit 82-13?

A. Yes.

Q. Do you have before you Plaintiff's Exhibit 53, being collection of load diagrams put in under that number?

A. Yes.

Q. Will you give the dates of those load diagrams?

A. August 28, 1937. One labelled December 21, 1937. On the reverse side of the face. One dated 12-21-37. One dated July 16, 1938. Another one July 16, 1938. Another one dated December 20, 1938. Another dated December 20, 1938. Another dated December 6, 1938. Another one dated December 29, 1939. Another one dated December 19, 1939. Another one dated July 9, 1940. Another December 18, 1940. Another one on the same date. Another one August 5, 1941. Another one December 22, 1941. Another one December 31, 1942. Another one December 22, 1942. Another one December 21, 1944. Another one December 20, 1944. Another December 14, 1945.

Q. Did you check the location of transformers on Plaintiff's Exhibit 15, the map?

A. No. I did not check, personally check, the transformer

information shown at Bismarck, Beulah, Mobridge, Bowdle, Wishek and Ellendale.

Q. Did you check any of the transformers indicated on the map as to the high or low side?

A. No, sir, not personally.

Q. You have before you Plaintiff's Exhibits 19, 20, 21 and 22?

A. Plaintiff's Exhibits 19, 20, 21 and 22.

Q. You have Plaintiff's Exhibit 32 before you, which is certified copy of the following letters: Letter dated February 2, 1942, to Federal Power Commission by Northwestern Public Service Co., A. B. Sanborn; Dakota Public Service Co., by C. L. Sandstedt. Carbon copy of letter to Leon M. Fuquay. Letter dated February 24, 1942, on Northwestern Public Service Co. stationery, to Federal Power Commission, signed by C. L. Sandstedt, and document entitled—"Reason for making rate schedule effective" dated February 25, 1942, signed by Northwestern Public Service Co., by C. L. Sandstedt. A. I do.

Q. Do you have before you Plaintiff's Exhibit 55-4, A, B and C? A. I do.

Q. Do you have before you Aberdeen generating station log sheets, part of the exhibit designated Exhibit 55?

A. It is on the floor.

Q. You saw some of those once upon a time in Huron?

A. Yes.

Q. And you have examined them here in Sioux Falls?

A. That is correct.

Q. Do you have Plaintiff's Exhibit 52 before you?

A. Yes.

Q. You spoke about some work orders, 404, 397, 420. 397 is Plaintiff's Exhibit 55-6; 404 is Defendant's Exhibit 55-19; 420 is Defendant's Exhibit 55-20. Do you have those before you? A. Yes.

Q. Did you make a trip into South Dakota for the purpose of making an examination of the interconnection facilities referred to in the complaint in this matter?

A. I did.

Q. When did you make that trip?

A. I think about the middle of November, 1946.

Q. Will you give us a statement of what you inspected at that time and what you found?

A. My notes show this. Dated November 12, 1946. I started at Aberdeen and drove north along the transmission lines to Barnard. Then drove back to Aberdeen. The afternoon, my notes show, I drove west along the Aberdeen Ipswich line. The road was not in good condition but we went along a great part of it by car and we ran into a crossing at Lake Mina, and dropped a mile south and then followed it after the high line drops a mile south. That night we drove down to Huron. My recollection is the next day we went in Northwestern Public Service Co. office in Huron. We spent the day there, and left there on the morning of the 14th and went out to Miller and Highmore, and drove along the line going west from Highmore to a point where it turns north, about a mile or two east of Blunt. Drove from that point north to Gettysburg, following the transmission line. We were able to inspect the substation facilities at Barnard, Ipswich and at Gettysburg, but I was refused admission by the officials of Northwestern Public Service Co. at Aberdeen, so I don't know anything about that.

Q. Have you testified about wire size on the line from Aberdeen to Barnard and Barnard to Ipswich?

A. I think I said I got that information off the work orders. It is shown on the map.

Q. You said you have heard Mr. Elvig's testimony?

A. Yes.

Q. And you have examined, to the best of your recollection all of the exhibits that went in during his testimony?

A. That is correct.

Q. You testified the other day, I think, that you had been in the business of consulting engineer in some utilities, [minicipal] and private? A. That is correct.

Q. And you gave your technical training and background? A. That is correct.

Q. Have you an opinion as to how much power from Northwestern Public Service Company which was delivered onto the lines out of Aberdeen, went into North Dakota, from 1936, January 1, on to October 19, 1945?

A. I have.

Q. Will you state the characteristics of the line from Aberdeen to Barnard and Barnard to Ipswich, and the

other characteristics of that transmission line, and any other of its adjuncts such as transformers and meters, or absence of meters, which entered into the making of your opinion?

A. There is transformer capacity at Aberdeen, 5000, 33,000, stepped up to 38,000. From the high side of that transformer, OO ACSR line, 22,000 volts in 1937, now 38,000, goes west to Ipswich, a distance of about 26.6 miles. From Aberdeen north to Barnard, a distance of about 20 miles, there is now 38 KV line, throughout aluminum. These two lines come together at Aberdeen on what is called a bus tie. There is one integrating meter on the connection between the bus tie and the house bus of the Northwestern Public Service Co. The current transformers for the integrating meters are on the 33 KV side. In other words, they are on the supply side so that the current metered by this 1-R meter is fed out of it either north or west, so it is impossible for anyone to see from that meter whether the current going out of that power plant went north to Barnard or west to Ipswich. However, according to the information in those Aberdeen logs there was instantaneous—I think—my memory may be a little bit off, but it can be easily determined—I think about forty some indicating meters were put in that gave the instantaneous output on the high lines out of Aberdeen, and among those high lines being the line to Ipswich and the line to Barnard.

Q. From those characteristics along with the other information you have here—

A. Mr. Royhl objects. I am going to give my opinion from what I found from those meters.

Q. We ask for the witness' opinion now.

A. I am now referring to Plaintiff's Exhibit 55-8, which covers readings from January 4, 1943, through on various dates too numerous to enumerate, through a lot of dates in 1943 and 1944 as representing conditions that existed as regards transmission of power north from the Aberdeen plant of the Northwestern Public Service Co. I note day after day, on the dates given and hours given in this exhibit, that 300, 400, 500, 600, 700, 800, etc. kilowatt are indicated as going out on what is called the north line, be-

tween Aberdeen and the North Dakota state line, some loads to Northwestern Public Service Co., some loads to North Dakota Power & Light Co. Westport, Columbia, Barnard. And the Northern Power & Light out west to Wetonka and Leola. I observe the check back from the load diagrams given in Plaintiff's Exhibit 53. That, for the peak days, which are shown for the various years on these load diagrams, the peak load at the time of the peak hour, between Aberdeen and the state line, and I read you specifically from the ones for summer peak, August 21, 1937, as indicated in green, and I wish Mr. Stokke would check me on this if I misinterpret his explanation of what these mean. 100 that I take, goes to Barnard. 100 for Barnard, Westport, Columbia, etc. 100 going west to Leola and Wetonka, that is north. We will take another one at random here. Here is December 20, 1938. On some of the same lines I just read were, in this case, 320 kilowatts. Let's look for the one 1943 and 1944, which covers the period the excerpts from those logs are taken from. Here is one for December 22, 1943, shows a total of 300 kilowatt maximum demand, peak day, 1943, on the north line between Aberdeen and state line. 1944, peak hour, peak day, December 21, 1944, shows a total of 310 kilowatt. Alright. On the basis of this information, apparently the maximum or peak load that exists north between Aberdeen and Dakota state line is 300 kilowatts. There are numerous records here day after day in excess of 300 kilowatts, on the north high line. So the only conclusion I can come to is the excess goes out of the state into North Dakota.

Q. You were asked for per centage of the power.

A. I also believe that part of the power goes west out of Aberdeen, goes out to Bowdle and goes north out of Bowdle and goes up into North Dakota. I have looked through numerous of the log sheets, I don't remember the days to conform, and I checked these take-offs in 55-8, and I checked a lot of other days. It is my conclusion that approximately 25% of the power that leaves Northwestern Public Service Co. plant at Aberdeen goes up into North Dakota.

Q. You mean going on the north line?

A. Either way. The majority I would say went north,

but some of it going west eventually turns north at Bowdle and goes into North Dakota.

Q. You mean whatever is metered out on the interconnecting facilities, 25% goes into North Dakota?

A. Check.

Q. I think you have described some of the characteristics of North Dakota Power & Light Co. and Northern Power & Light Co. and later Dakota Public Service Co., as you knew from your examination in 1926 of the Northern Power & Light Co. Is that correct?

A. I know the lines as they were.

Q. You made an examination of the Wiley appraisal and inventory of both Northern Power & Light Co. and North Dakota Power & Light Co? A. That is correct.

Q. You are familiar with the transmission characteristics of the lines of North Dakota Power & Light Co. and Northern Power & Light Co., which transmitted energy from January 1, 1936, September 1, 1935, I should say, to October 19, 1945, to the Northwestern Public Service Co.?

A. I have the information on those transmission lines.

Q. Do you have an opinion as to the line loss of energy transmitted from Northern Power & Light Co. and North Dakota Power & Light Co., later the Dakota Public Service Co., to the Northwestern Public Service Co. during the period I have described, namely, September 1, 1935 to October 19, 1945? A. I do.

Q. Will you state what the line losses were, in your opinion, of the power thus transmitted?

A. My opinion is that the number of kilowatt hours lost in the transmission of power from the Dakota companies to Northwestern Public Service Co., which includes the loss, not only of the power transmitted to Northwestern Public Service Co., but the additional loss of the transmission of its own power for its own load, which said additional loss is incurred by the fact that it is already transmitting power for Northwestern Public Service Co., is that, in the earlier days that was probably conservatively 20%. I think in the later days, when the transmission of power increased very materially in quantity, it was 30% to 35%.

Q. Will you state when, in your opinion, in increased over 20%? A. Between 1940 and 1941.

Q. Between January 1, 1940 and January 1, 1941?

A. Specifically as to time when the new turbine at Bismarck went into operation. I will read you the statistics. The companies' sales in 1939, Dakota companies to Northwestern Public Service Co.—I am reading from the map which may be off a little bit—6,600,000. 1940, 7,000,000. 1941, it jumped up to about 11,200,000. 1942 it jumped up to about 12,000,000. During the intervening period for 1940 and 1941, Northern Power & Light Co. increased its transmission facilities from Bowdle to Ipswich, and Bowdle to Selby. Increased the voltage and applied the copper, which tended somewhat to increase the additional loss incurred in practically doubling transmission of power. So everything considered, that period of time between 1940 and 1941 when the transmission about doubled, in my opinion, the per centage went up to 30% to 35%.

Q. I observe in Exhibit 52, Page 6, Sargent & Lundy report, the following paragraph: The operating costs of [Buelah] and Bismarck steam station are much lower than the operating cost of installations on Northwestern Public Service Co. because of difference in fuel costs, and it therefore is uneconomical to transmit any appreciable amount of power from the south to your company. Also the transmission lines are very long and the loss would be prohibitive.—And on Page 9: To summarize this situation it will not pay to bring up the capacity of the [Buelah] plant because this added capacity cannot be made available in that long distance without excessive transmission losses.—In your opinion does it make any difference whether power is going from Aberdeen to the Dakota companies or from the Dakota companies to Aberdeen, as far as the amount of line losses is concerned on the property of power transmitted? A. No difference.

Q. Did you give any consideration to transformer losses on the interconnection facilities from Aberdeen to Barnard? A. Yes.

Q. Will you state whether or not when power goes through a transformer, or when electrical energy goes through a transformer, there is a loss? A. There is.

Q. You could lose it after it has gone through. Is that right? A. That is correct.

Q. You are familiar with the metering at the time you made the inspection trip of the lines from Aberdeen to Barnard?

A. The metering at Aberdeen, all I know is what Mr. Sickel told me. I could not get in and observe that. The metering at Barnard, for example, I saw the meter house and the rest of it. I saw that myself.

Q. What did Sickel tell you about the metering at Aberdeen?

A. Mr. Sickel told me and I have the map here to show where he marked where the CP's were, that the metering out of Aberdeen was done on the 33KV side of the transformer, and therefore the transformer losses in stepping up to 38 was not indicated in any meter reading.

Q. What about the power then metered out at Barnard to Northwestern Public Service Co?

A. The power goes north to Barnard and there is dropped 6900 volts. It is dropped through the transformer there, and then re-metered. That means that power used by Northwestern Public Service Co. in its towns of Barnard, Westport and Columbia is metered to Northern Power & Light on the low side of the transformers at Aberdeen. The transformer loss is then taken going up to 38,000. It goes up to Barnard, approximately 20 miles, and stepped down again. Another transmission loss. Metered again. All they get is what is on the low side of the Barnard transformer. So there is transformer losses. Two sets of transformers, 20 miles of line, no compensation for it.

Q. Do you have an opinion as to what per centage of power transmitted over the line you have just described is lost due to going through the transformers? A. I do.

Q. What per cent?

A. I would think the double transformer loss and loss on the 20 miles of line, for the average load, might be 2½% to 3%.

Q. There was another service supplied by Northwestern Public Service Co. off of the Aberdeen Barnard line also, where it took current that had been previously measured to the northern company? A. That is correct.

Q. What is that?

A. The Aberdeen pumping works. I think designated as Ordway.

Q. There is a step down meter there?

A. Step down transformer and it is metered on the low side.

Q. Which would mean a loss to Northern Power & Light Co? A. That is right.

Q. I call your attention to Plaintiff's Exhibit 22, and the supplement thereto, and call your attention to the time contemplated by the supplement for the amortization by payments from Dakota Public Service Co. and its predecessors of one half of the interconnection facilities.

A. I see it. You mean payment of $1666.66 per month?

Q. Yes? A. I see it.

Q. Are you familiar with the ordinary life of the kind of electric properties that made up the interconnection facilities involved in this contract that you have in your hand? A. Yes.

Q. Are you familiar with the ordinary—Do you know whether or not there is an ordinary, general, engineering conception as to what is an appropriate degree of, or per centage of, depreciation on such property?

A. Well, there is always some argument about the depreciation with the Internal Revenue Department.

Q. Do you have an opinion what the depreciation should be on those facilities? A. Yes.

Q. What rate annually? A. 30 years.

Q. That would be what annual rate? A. 3⅓%.

Q. I would like to call your attention to Article 4, Section 3, of Exhibit C to plaintiff's complaint. The Article is entitled IV-Transmission Lines. Section III says: It is further recognized that if one company has provided capacity between existing points of interchange which is in excess of its own reserve requirements and such excess may be used for the interchange of reserve capacity between the other companies, it shall be entitled to and receive compensation for the use of its transmission facilities from the other companies employing such excess, either for the actual transmission of power or for standby protection as determined and agreed upon

by the operating committee. Section IV says: In determining compensation for excess transmission line capacity, such excess as may exist in terminal facilities, such as transformers, switches and meters, may be included.—I will ask you whether, in your opinion, the transmission lines of the Northern Power & Light Co. were sufficient for all of its service in 1926, when you made your examination of that property? A. They would.

Q. From the testimony and exhibits in this case you are familiar with the fact that in 1936 the size of the line from Bowdle to Wishek was changed from 22,000 volts to 38,000 volts, are you? A. I am.

Q. You are familiar with the other changes that have been testified to and disclosed in the exhibits in this case as to the change in transmission facilities in the lines of what was originally the northern companies from 22,000 to 38,000, aren't you? A. I am.

Q. You are familiar with the evidence that has been introduced as to the demands on the lines of the Northern Power & Light Co., North Dakota Power & Light Co., and Dakota Public Service Co., as shown by the various exhibits in evidence in this case? A. That is right.

Q. Have you an opinion as to whether the 22,000 volts line would have been sufficient for all demands during all of the periods covered by the testimony in this case? I intended to call your attention to the fact when these companies were merged, July 1, 1939, one of the exhibits to the complaint, which is in their interchange capacity contract, was offered, which contains the identical language, and also that when the 1941 contract was executed by the common officers they dropped that out.

Mr. Woods: May we have the further objection that the question assumes 22,000 volts lines were adequate without any showing that there were such at all times involved in the period covered by the question.

Mr. Benson: The testimony shows that originally those lines were 22,000 volt lines and there is no evidence that they were changed until defendant increased them to 38,000 volts.

The Court: Objection overruled.

A. I will answer yes.

Q. I had in mind the testimony of Mr. Strike that he shipped energy by those lines to Steele, North Dakota, before and after 1936?

A. I have either read or heard that.

Q. Have you seen the exhibits to these inter capacity contracts which are in evidence? A. Yes.

Q. I think you know the numbers, don't you? A. Yes.

Q. And they show the generating capacities of Northern Power & Light Co. and North Dakota Power & Light Co. as of January 1, 1938? A. That is correct.

Q. So you know that? A. Yes.

Q. You have examined those? A. Yes.

Q. Have you seen Plaintiff's Exhibit 32, the letter from Mr. Sandstedt to the Federal Power Commission, dated February 24, 1942? A. Yes, I have it here.

Q. I call your attention to the fact that in the exhibits which have been introduced in evidence which are contracts between the parties, the last contract being the contract of July 1, 1941, which is Exhibit 22, the interval for determining demand first appears as one hour, whereas in all of the other exhibits it is one half hour, and I call your attention to the statement of Mr. Sandstedt in Exhibit 32, the letter of February 24, 1942,—We are not equipped to determine the 30 minute instantaneous maximum demand for the interconnected systems of Northwestern Public Service Co. and Dakota Public Service Co., and this is one of the considerations that prompted changing to sixty minute period for the purpose of this rate schedule. In attempting to determine the 30 minute demand it was necessary to locate employees at each point of generation and interchange to take readings. It was not practical to have employees engaged in this work during the entire month at the maximum demand was likely to occur, and we therefore tried to anticipate the day and the hour from previous experience. On the above basis were taken 30 minute demand on December 22, 1941.—I call your attention to the exhibit which is in evidence, which is Plaintiff's Exhibit 55-4, and to Page 55-4-C, and the statement on the

three pages, particularly 55-4-B, to the effect that the demand was taken or determined December 22, 1941, on the half hour basis, which exhibits show that the charge against Dakota Public Service Co. would have been $9,438.00 on that basis. Then I call your attention to the demand exhibit which was attached and sent in to the Federal Power Commission on the one hour basis.

Q. I will ask you, Mr. Helmick, whether in your opinion there being no metering facilities as described by Mr. Sandstedt in Exhibit 32, there was any accurate method of determining the actual day and hour of the demand, under the contracts where they had half hour demand?

A. No.

Q. Mr. Helmick, in addition to the exhibits which were taken out last Friday and placed in front of you for handy reference, I show you today Defendant's Exhibit 221, being the work order on the 22,000 volt line from Ellendale to Wishek. You have that before you now, do you? A. Yes.

Q. Do you have the Lucas & Luick report before you, which is an exhibit in this case, Plaintiff's Exhibit 82-14?

A. Yes.

Q. You have examined that document along with the other evidence in this case? A. Yes.

Q. Did you make an examination of the files contained in the mass Exhibit 82, to ascertain whether there was any work order at any time outstanding for a line from Wetonka to Ipswich? A. I did.

Q. Did you find such an order? A. I did.

Plaintiff's Exhibit 82-41 was received in evidence. It is a work order estimate of Northern Power and Light Company, dated June 6, 1929, relating to construction of a transmission line from Ipswich, S. D., to Wetonka, S. D., a distance of 26 miles, said line to be constructed for 35 K. V.

Q. I show you Plaintiff's Exhibit 82-41, and ask you whether or not that is the work order you have just referred to? A. Yes.

Q. The line contemplated by Plaintiff's Exhibit 82-14 which exhibit has gone into evidence, was not built?

A. That is correct. It was not built.

Q. If the line had been built from Wetonka to Leola to Ipswich, would that line have completed a loop on the property of Northern Power & Light Co.? A. Yes.

Q. Now, will you refer to your copy of the map of this property, I think it is Plaintiff's Exhibit 15, and will you just describe where that loop would have been? Show it on the map.

A. I think the work order itself covers it pretty well. Construction of 3 phase, 3 wire, transmission line from Ipswich, South Dakota to Wetonka, South Dakota, a distance of 26 miles. Both towns are shown on the map.

Q. What you mean to say, the map shows that if that phase was built in, it is apparent from the face of the map there would have been a complete loop?

A. That is correct.

Q. Now, you have testified as to your concern and what you have to do with operating facilities. If you will tell us if there is an operating value to such a loop, what that operating value is?

A. With the completion of the link between Ipswich and Wetonka, and Ipswich and Leola, there would have been a complete loop on the southeast end of the Northern Power & Light Co. In other words, considering Wishek, at which point power from North Dakota Power & Light Co., and from Bismarck and [Buelah], the line would have gone east and southeast to Ellendale; south from Ellendale to Barnard; across to Leola and Wetonka, down to Ipswich and west from Ipswich to Bowdle, at which point power was available from Mobridge, [Buelah] and other plants on the North Dakota Power & Light system, which would have meant a like outage and one portion of the loop would have kept service in two stems which would have been cut in half.

Q. If the loop which you have just referred to, and referred to in Plaintiff's Exhibit 82-41, high line referred to, had been completed, and having in mind the generating capacity then on the North Dakota Power & Light Co. property, and Northern Power & Light Co. property, do

you have an opinion as to what output and capacity in kilowatts of generation units would have been sufficient for reliable service to the Northern Power & Light Co. customers, beginning January 1, 1938? A. I do.

Q. Will you give us your opinion?

A. It is my opinion as of that date and based on the load diagrams admitted in Plaintiff's Exhibit 38—

Q. Are you predicating the answer on all of the testimony you have heard and all of the exhibits you have examined in this case? A. I am.

Q. Now, go ahead.

A. The load diagram as shown in 53 and Plaintiff's Exhibit 55-4—I am not going to take the time to go into them in detail, because they are a matter of record—on he basis of taking care of the southeast end of this property, and on the basis of maximum loads during peak period as shown by the aforementioned exhibit, it is my opinion that a thousand kilowatt Diesel engine installed, 750, at Ellendale, and 250 at Gettysburg, would have given reliable service on the properties in the southeast corner of the system, which were the ones that were dependent on power being available in that territory in case the transmission lines from [Buelah] and Bismarck into Wishek were down or the line from Mobridge into Bowdle was down.

Q. Are you familiar with the cost of construction of high lines and generating utilities in 1937, and subsequent years, to and including 1941? A. Yes.

Q. Will you tell us what would have been the cost of a 22,000 volt line from Wetonka to Leola and Ipswich in 1937?

A. My estimate shows for 23 miles, 22KV line, Leola to Ipswich, $52,900.00.

Q. In your opinion is that the amount that would have had to be spent in 1937 to build that line?

A. I think that amount would have built it.

Q. Can you tell us what, in your opinion, it would have cost to have installed 250 KW Diesel units at Gettysburg, and 750 KW Diesel generating unit at Ellendale?

A. My estimate of the cost of installation of 250 KW Diesel engine at Gettysburg, and 750 kilowatt unit at Ellendale, $125,000.00.

Q. That, in your opinion, is what they could have been installed for? A. Yes.

Q. The evidence in this case shows that a so-called interchange capacity contract was made between North Dakota Power & Light Co., Northern Power & Light Co. and Northwestern Public Service Co., as of January 1, 1938. And that after the merger of North Dakota Power & Light Co. and Northern Power & Light Co., a so-called interchange capacity contract was executed between Northwestern Public Service Co. and Dakota Public Service Co., as of July 1, 1939. And that in 1941 another contract was made between Dakota Public Service Co. and Northwestern Public Service Co., having in this last contract provisions relative to interchange capacity and charges therefor. You are familiar with those contracts that have been discussed and received in this case? A. Yes.

Q. Have you an opinion as to whether or not those interchange contracts were of any value to the North Dakota Power & Light Co., Northern Power & Light Co., and Dakota Public Service Co., in the operation of their property, their electric utility property? I am speaking of the interchange capacity contracts? A. Yes.

Q. It is your opinion they were not of value?

A. The interchange capacity contracts were of no value.

Q. If the line had been built from Wetonka to Ipswich and Leola to Ipswich, and the generating capacity had been installed at Gettysburg and Ellendale to begin operations on January 1, 1938, would the Northern Power & Light Co. have needed any physical interconnection with Northwestern Power & Light Co. after that date? A. No.

Q. Now, Mr. Helmick, I would like to refer to the testimony that we were talking about Friday afternoon, when we were referring to Plaintiff's Exhibit 32. Exhibit 32 contained the letter of Mr. Sandstedt to Federal Power Commission, dated February 24, 1942, and on the first page made references which we discussed Friday concerning thirty minute interval and the sixty minute interval in determining maximum demand. You have studied that letter and you did make a study of that letter prior to coming out here to testify? A. Yes.

Q. And you have already testified to the testimony

which you have listened to and observed in this case. I will ask you whether you prepared a chart showing the relation of the demand on the system of the North Dakota properties, and Dakota Public Service Co. and its predecessors, to the Northwestern Public Service Co.? A. I did.

Plaintiff's Exhibit 94 was received in evidence and is as follows:

Plaintiff's Exhibit 94
(p. 891) is shown on Card 20.

Q. The chart to which you refer has been identified as Plaintiff's Exhibit 94. Is that correct? A. 94, yes.

Q. Now, will you state where, on Exhibit 94, without giving any figures, you have platted the relation of the demands of Northwestern Public Service Co. to the Dakota companies?

A. At the top of the sheet, and as labelled.

Q. In other words, there are two black lines just below the top, and one says "Public Service Co." and one of those lines bears the legend "Northwestern" and the other "Dakota Co.'s"? A. That is right.

Q. Will you state the source of material for those lines, beginning with the December 21, 1937, shown on the chart or graph and ending with the last date?

A. They are taken from Plaintiff's Exhibits 19, 21, 22, 32, and 55-4-A. What is the number of the exhibit I previously had? This letter to the Federal Power Commission?

Q. 32? A. Then I have given it.

Q. Do those two lines and their relation to each other, also show, and are they designed to show, the result of switching from half hour integrated demand to the hour integrated demand? A. They show that.

Q. Now, will you explain the other material on this graph, Plaintiff's Exhibit 94, and the source of it beginning with the line "Total output Dakota Co.'s", and going down the graph?

A. The data platted on this chart came from Plaintiff's Exhibit 82-10, and some of it from 87. I might state that these graphs cover a period 1929 through 1945. The top line, which is black, shows total output in kilowatt hours for the Dakota companies. I would like to say this as preamble, when I mention Dakota companies, there was Northern Power & Light Co. which eventually went into Dakota Public Service Co. There was Hughes Electric Co. from which came North Dakota Power & Light Co., which became Dakota Public Service Co. So I am including all of those companies, whatever their names were, when I call them Dakota companies, and I am calling Northwestern Public Service Co. just Northwestern line, trying to keep these names straight. So the top line shows the total output of the Dakota companies. The second line, colored green, shows the use, total use of the Dakota

companies. The difference between the two lines is the kilowatt hours that went to Northwestern. The next dotted line, marked in yellow is the kilowatt hour output from the [Buelah] station. The next dotted line, marked in blue, is the output from the Bismarck station. The total on the right is the total in all kilowatt hours on both stations. I should have repeated that, but that applies to all of these graphs. The next line, solid, colored red, shows the gross kilowatt hours the Dakota companies sold to Northwestern. The next solid black line, you can pick it up more readily on the right hand side, is the net kilowatt hours to the Northwestern. In other words, the difference between the last two lines represents the kilowatt hours sent by Northwestern o the Dakota companies, and the next to the bottom line, the dot-dash line, is the output of kilowatt hours from the Mobridge station.

Q. Have you stated the source of all of the material on all of the lines? I don't know whether you have stated all of that or not? When you start to take total outputs—

A. I think you will find according to the notes made on my chart, that they were taken from Plaintiff's Exhibit 82-10 and 87.

Q. Is the difference between the top solid black line, "Total output Dakota Co.'s", and the line just below it, colored green, "Total use Dakota Co.'s", is that the net interchange that the Dakota companies furnished to Northwestern?

A. Yes, I may have misspoken when I said it was gross. I can check very rapidly. It is net interchange. I was wrong when I said it was gross.

Q. Now, I wish you would refer to those two black lines at the top of the page, where you show the relation between the demand on the Northwestern Public Service Co. and the Dakota companies, shown in the supplements to the interchange capacity contracts, and explain the movements of those two curves?

A. The top curve is labelled "Maximum yearly demand, Northwestern". The lower graph is the annual maximum demand of the Dakota companies.

Q. Now, will you explain the movements and the curves

and the lines indicating demands to which I last called your attention, before the exhibit was offered in evidence?

A. The curves of both companies are of the same nature or incline for the period shown, except for one year. On December 22nd, in which the maximum demand was [deternined] on the half hour basis—

The Court: December 22nd of what year?

A. (Con't) Pardon me, 1941. That is where the jog is in there. That maximum demand for Northwestern was estimated for that thirty minute basis, by Mr. Stokke's committee, as being 17,217 kilowatts, and that is the top peak in the Dakota saw tooth in there. For the same date the maximum demand for Dakota companies, 12-903. And that is that top peak or saw tooth of the Dakota companies. Later on the demand was changed to the sixty minute calibration or determination.

Q. As of what date?

A. As of December 15, which ante-dated the previous determination of December 22nd. In other words, December 22nd was set up as the agreed upon. When the demand was adjusted to the sixty minute, the Northwestern demand dropped from 17,217 to 15,990, which is the bottom of the two. Dakota Public Service Co. stayed about the same by the switching of method of computation. In other words, December 22nd, thirty minute basis, their maximum demand, 12,903. Switching to sixty minutes, it was 12,850. It is quite apparent if you look at the graph, that that drop in Northwestern's maximum demand estimate is not of the same nature in the year preceding it or any other year following. I just can't explain it to my own satisfaction.

Q. You have examined the supplements to the interchange capacity contracts, as you have stated? A. I have.

Q. Do you know what firm power is? A. I think so.

Q. Generally stated in the industry? A. I think so.

Q. Do you know what surplus power is in the industry?

A. Yes.

Q. Do you have an opinion as to whether Northwestern Public Service Co. had any firm power in 1938 and through to October 19, 1945? A. Yes.

Mr. Royhl: We object to this as incompetent, irrelevant and immaterial; for the further reason there is no place

in this case, in the pleadings or otherwise, where any firm power was sold or intended to be sold, and the contracts which are the basis for this litigation specifically provide that no firm contract is intended or contemplated.

Mr. Benson: You admit you didn't intend in any of the interchange contracts to furnish firm power?

Mr. Royhl: The contracts provide specifically there is no firm power to be provided under those contracts.

Mr. Benson: I am asking about the interchange capacity contracts.

Mr. Royhl: That is right.

Mr. Benson: You admit—

Mr. Royhl: I admit nothing. The contract provides specifically there is no firm power included. They are to furnish power if and when they have it. It might not be wrong to mention now they have always furnished it.

Q. In view of the colloquy between counsel will you state to us what kind of power the Northwestern Public Service Co. did deliver on any of these deliveries under that interchange contract?

Mr. Royhl: We object as an attempt to change or vary the terms of a written instrument which are pleaded by the plaintiff in this action; no foundation; wholly calling for the legal opinion and conclusion of this witness.

The Court: I don't know what the provisions of the contract are in that regard. It is difficult to rule on that question. There seems to be a difference of opinion between counsel as to what the contract really provides.

Mr. Benson: The contracts do not—I did not know counsel was going to admit it—the contracts do not provide for firm power. So I am asking what kind of power was delivered.

Mr. Royhl: Same objection.

The Court: Overruled.

Q. What kind of power was furnished, in view of the record and statement of counsel, and your knowledge of the facts in this case? A. Surplus.

Q. Have you heard the testimony that was offered in this case as to how this charge of $13.20 per K.W. was determined? A. I did.

Q. Do you know whether or not that was the price of demand for firm power, current in the community in the territory served by these companies, during the years of these contracts? A. Yes.

Q. Will you state what?

A. At that period of time 13.20 was a rather commonly used figure for firm power. There were variation. I know of figures that were lower, but it was one of the generally accepted figures.

Q. Do you have any opinion as to whether or not the value of surplus power, which you say was furnished, was anything more than the common charges for energy?

A. That is all it was, was surplus power, and that is all the value it had.

Q. As a man in your field, and in your experience, are the interconnection contracts in evidence here, and the interchange contracts, in your opinion, anything more than charges for energy?

Mr. Royhl: Same objection; attempting to change or vary the terms of a written contract.

The Court: Overruled.

A. That is all they are.

Q. You are familiar with Plaintiff's Exhibit 68. I show you Plaintiff's Exhibit 68. You are familiar with the language in the paragraph of Mr. Strike's statement about minimum or power or energy?

A. I [belive] so. The second paragraph below the tabulation of kilowatt hours, starting "Combined companies".

Q. Did you watch the curve of demand and growth of business of the Dakota companies, as shown in the exhibits in this case? A. I have.

Q. In your opinion would it have been necessary to have installed additional kilowatts in the southeast corner of this property in 1941? A. It would have been.

Q. Where would it have been installed and in what amount and at what costs?

A. It should have been installed at Ellendale, based on the load curve, and the figures obtain on the yearly load diagram. It should have been a unit of about 500 kilowatts, and the unit, with additional substations, etc. would have cost around $70,000.00.

Mr. Royhl: That is the substation?

A. (Con't) The complete installation. Principally a 500 kilowatt Diesel engine.

Q. You heretofore testified the 22,000 volt line was sufficient for the year on the property of the Northern Power & Light Co.? A. I believe I so testified.

Q. In the operation of this business of the Northern Power & Light Co. and the Dakota Public Service Co. and its successors, I presume you have an opinion as to whether the operation of that business, it was necessary to install the voltage, substation, or changing of the voltage from Bowdle to Selby, and building a line from Bowdle to Ipswich. I mean changing of the voltage of the line from Bowdle to Ipswich? A. I have an opinion.

Q. What is that opinion?

Mr. Royhl: Same objection last made in full to this line of testimony; incompetent, irrelevant and immaterial; speculative; calling for the opinion and conclusion of the witness; conjecture; not predicated on any alleged fraud of the interlocking officers as individuals.

The Court: Objection overruled.

A. It was not necessary to increase the capacity at that time at the extreme end of the Northern Power & Light Co., as was done. The 22,000 KV line in that location in the system, with the load that existed there, I speak of Northern Power & Light, was adequate.

Q. And would have been adequate right up to October 19, 1945?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. I think so.

Q. I would like to have you look at Plaintiff's Exhibit 69, a report of Mr. Gazin. You have seen that exhibit? A. I have a copy in my hands.

Q. You have a photographic copy of it before you?

A. That is correct.

Q. Now, will you call attention to the place in that exhibit where there is a statement made that "North Dakota Power & Light Co. will make a net gain of $2700.00 by selling current to Northern Power & Light Co. at 3½ mills."

A. That statement in the exhibit, the net gain to North

Dakota Power & Light Co., the lower center of the page, $2700.00 per year.

Q. Are there any errors in computation or errors in assumption, in this Exhibit 69?

Mr. Royhl: We object to this as calling for the opinion and conclusion of the witness, the exhibit being the best evidence of any errors or mistakes contained therein; wholly speculative; not predicated upon any allegations or matters and things contained in the charges made by the plaintiff in this action.

Mr. Benson: I should have said errors in facts.

The Court: This exhibit is one of the records of the defendant company?

Mr. Benson: It was produced in the examination of Mr. White in Chicago, as Mr. Gazin's report, and Gazin was an officer of the defendant company.

The Court: Objection overruled.

Mr. Royhl: May I add no proper foundation laid; it not appearing that this witness has any knowledge of any of the matters or facts or figures shown therein, which are predicated upon conditions in existence in 1932 and prior thereto.

The Court: He says he has examined this exhibit. If his conclusions are based on insufficient knowledge it can be brought out on cross examination. Overruled.

A. There is a mathematical error in the original premise made on Page 3. By referring back to Page 2, and I quote from the exhibit, "The normal or net kilowatt hours as contemplated in this exhibit to be made at [Buelah] was 860 thousand net kilowatt hours. While, according to my computation, that is about 10 million kilowatt hours a year.

Q. Your computation is made from what?

A. Go back to Page 2. I will read the whole thing, if you want me to, to straighten the thing up. Starting in, Average monthly kilowatt sales, 950,000 KWH. Average per cent loss, system, light load, 18%. Required NKWH 1,160,000. Average monthly NKWH generated by standby and steam heat plant mainly Bismarck, 300,000. Leaving a difference of 860,000 NKWH. Then you drop down to the bottom of that, and by inference, or by direct subtraction, not inference, 860,000 NKWH per month is what it was contem-

plated should be or would be produced at [Buelah]. According to my mathematics, if you multiply 860,000 by 12, it gives around 10,300,000. Yet, you drop down to the last figure you will notice that a figure of 13,920,000 NKWH, which, in fact, is the total net requirement of all of the Dakota Public Service Co. is used as one of the multipliers of that.

Q. 13,920,000?

A. That is the total net requirement of the system, not of the [Buelah] plant that is under discussion here. The figure should have been 13,920,000, which should have been 10,300,000. Alright. So if you correct the mathematics and figure to save $16,704.00, even on the basis it is figured, becomes $12,400.00. If you go over to Page 3 and you use a figure of $12,400.00 instead of $16,700.00, you wind up with a net loss of $1600.00, instead of a profit of $2700.00. That is just a plain mathematical error.

Q. So, instead of being a gain of $2700.00, on his own figures there was a loss of $1600.00?

Mr. Royhl: Same objection.

The Court: Overruled.

A. That is right.

Q. You better explain how that loss occurred.

A. To repeat, the statement on the third page here, in the original is $16,700.00 savings, to North Dakota Power & Light. If the right figure is used there, namely, $12,400, there is a difference at this one particular place of $4300. So that you total $4300 less than shown. You come on down and go through with your additions and your assumptions that are in here, that figure instead of being $32,300, becomes $4300 less. So we wind up with $4300 difference, and subtracting $2700 from the $4300 gives you $1600. Does that straighten that out?

Q. The Lucas & Luick report, Exhibit 82-14, is in evidence and contains the plan for tying into the North Dakota Power & Light Co. and Northern Power & Light Co. You have heard the testimony as to the accomplishment of that fact? A. Yes.

Q. You have heard the testimony, didn't you, concerning the elimination of various plants on the property of the Northern Power & Light Co.? A. I have.

Q. And this morning there was considerable testimony

concerning this loop from Wetonka to Leola to Ipswich. Now, subsequent to the Lucas & Luick report, have you made an examination to ascertain whether there was an addition to the generating capacity at the [Buelah] plant?

A. I have.

Q. And that is based upon the records that are in evidence here?

A. I believe so. I don't remember the exhibit numbers. One that Mr. Elvig had.

Q. The record you are asking about is the record of the inventory and appraisal by the North Dakota Railroad Commission Exhibits 13 and 14?

A. Those are the Wiley reports and they show that the unit was in there of the size designed to go in in the Lucas & Luick report.

Q. And is the 5000 KVA substation shown also in?

A. In the Wiley inventory.

Q. Have you an opinion as to whether or not it would have been a practical operation to transport power from [Buelah] to Aberdeen and Gettysburg, in the amounts which the evidence shows were delivered to Northwestern Public Service Co., without having the Mobridge and Bismarck stations tied into the transportation lines between [Buelah] and Gettysburg and Aberdeen?

A. I have an opinion.

Q. Will you state your opinion?

A. By reference to Exhibit 15 and 13—

Q. Are you referring to the map? A. Yes.

Q. That is Exhibit 15?

A. Plaintiff's Exhibit 15. It will be noted that from [Buelah] to Aberdeen is approximately 292 wire miles. That is, via Mobridge. From [Buelah] to Bismarck to Ellendale to Aberdeen, 298 miles. That is a pretty long transmission line. With the voltage on it, namely, 38,000, some 22,000 KV stuff in there, the size of the wire, it poses, in my opinion, operating difficulty as to regulation, stability and other details, and it is my opinion without having Mobridge in there, approximately half way, or a little more than half way, on the way from [Buelah] to Aberdeen, and also Bismarck the other way in there to operate and maintain voltage and to help regulation and stability, that it would have been quite an operating

headache to try to transmit reliably the amount of Power that were transmitted from the Dakota system to Aberdeen and Ipswich.

Q. Do you mean it would not have been a practical business operation?

A. I think it would have been far from a practical operating transmission system.

Q. Now, will you refer to this chart which has been marked Plaintiff's Exhibit 94. I don't want you to go to all of the exhibits that effect the figures showing the proportion of the total operation of the North Dakota companies, total generation of the North Dakota companies, which went to Northwestern Public Service Co. being in evidence—I believe you stated that this Exhibit 94 is an accurate graph of the relation of these various items to each other, which you discussed? A. I did.

Q. Can you indicate in proportion to how much of the total generation of the Dakota companies during the life of this graph, went to Northwestern Public Service Co.?

A. I think that can be best answered this way. Let's take 1936. The Dakota system output was 39,400,000, and the net kilowatt hours to Dakota companies was about one and a half to two. You divide that by your 39.3 shows about 4%.

Q. Went to Northwestern Public Service Co.?

A. That is to Northwestern, yes. Out of the total generation. You can go up to 1940 and get another figure. You had about 52 million generation, and about 5 million to Northwestern, out of a total production of 52 million, makes a little under 10%. You take another one in between here. Take 1942. You get 63 million production, less net interchange of around 11 million, about 17%. Take the last one, 1945. You have about 69 million.

Q. I think we have the figures on one of the exhibits up to October 19th. Is that what it was?

A. That figure—I am quoting from Exhibit 82-10, there is a total given in here to October 19, 1945, 54,915,000. There is net to Northwestern Public Service Co., 7,582,000. That gives about 13.6%.

Q. The rest of the years can be figured out from the charts or exhibits in evidence?

A. That is right. It is all there.

Q. You have studied all of the evidence to get the relations between the total generation and the net generation of the Dakota companies, and the amount that was furnished to Northwestern Public Service Co., haven't you?

A. I have.

Q. Will you state whether or not, considering the relationship of the amount of power delivered to Northwestern Public Service Co., and the amount produced by the Dakota companies for their own use, furnishing power to Northwestern Public Service Co., reduced the cost per kilowatt hour of power to the Dakota companies during this sale period?

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial; no proper foundation laid; the witness not shown himself qualified to testify; wholly speculative; not within the issues in this case.

The Court: Overruled.

A. It did not.

Q. I believe you have prepared graphs showing the relation in time of the increase in power, or an increase in power delivered to Northwestern Public Service Co., and the expenditures in Bismarck for boilers in 1938, and for 4000 KW turbine in 1940. Is that correct? A. I have.

Q. What exhibit is that, if it is an exhibit?

A. That is Plaintiff's Exhibit 94 previously discussed.

Q. Does that show the output from [Buelah]? A. Yes.

Q. Will you explain from the graph the relationship of the output at [Buelah] and Bismarck to the sales of energy to Northwestern Public Service Co.?

A. The third line from the top, dotted black line, here colored with yellow, is output from the [Buelah] station. You will note that about 1939 it persisted in its output and the top of the graph more or less paralleled the Dakota company's own use. From 1939 and 1940, its output was about the same. 1941 it dropped off about a million kilowatt hours in output. In 1942 it dropped off possible a couple of hundred thousand. In 1943 it went up. In 1944 it went down. Let's refer to the dotted line below marked in blue, which is the Bismarck station. You will notice in 1939 a production or output of something over nine million.

In 1940 a production of around eight and a half million. In 1941 a production of about eighteen million, seven hundred thousand. In 1942 an output of more than twenty-one million. Now, let's look at the gross kilowatt hours to Northwestern as shown by the heavy line in red at the bottom for the same years. In 1939, gross sales to Northwestern, 6,600,000. 1940, about 7,000,000. 1941 about 11,200,000. 1942, up to 12,000,000. The Bismarck turbine, 4000 kilowatt Bismarck turbine went on the line in September or October, 1940, with a resulting very material increase in its output, about 400% in its annual output. The gross to Northwestern increased about 80% to 90%. The output from the [Buelah] plant dropped off. Those facts simply means to me that that additional output that went to Northwestern Public Service Co. was made and produced at the Bismarck plant.

Q. You have heard the testimony in this case as to the prices that were paid for energy by Northwestern Public Service Co. during all of the period from 1936 on, January 1, 1936, on? A. Yes.

Q. And some evidence as to some prior prices. Have you an opinion as to the amount Northwestern Public Service Co. should have paid to the Dakota companies, per kilowatt hour for power delivered at Aberdeen and Gettysburg to avoid raising the Dakota companies' own costs per kilowatt hour?

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial; no proper foundation laid; not within the issues in this case; the witness not shown himself qualified.

The Court: Objection overruled.

A. I have.

Q. Now, in order that it might be more expeditious for counsel to follow your testimony and to assist the Court, have you prepared computations and put them on an exhibit? A. I have had my notes copied.

Plaintiff's Exhibit 95 was marked for identification and is as follows:

P44 & 45
BC

9-1-35 - 7-1-39

AVERAGE PRODUCTION COST - BEULAH - BISMARCK & MOBRIDGE

1935	5.71	37,898,500	216
1936	6.17	38,113,708	235
1937	5.14	43,608,022	221
1938			
1939	4.77	48,068,059	227
	21.79/4 = 5.42	167,688,389	902
		902/168 =	5.37

WEIGHTED AVERAGED PRODUCTION

COST -1935 - 39 = 5.37 mills/K.W.H.

7-1-39 - 7-1-41

1939	4.77	48,068,059	227
1940	4.59	51,734,932	237
1941	4.51	60,730,088	274
	13.87/3 = 4.62	160,533,079	738
		738/160.5 =	4.60

7-1-41 - 10-19-45

1941	4.51	60,730,088	274
1942	4.81	62,833,729	303
1943	4.99	63,316,060	316
1944	5.28	64,808,068	342
1945	5.29	54,547,920	288
	24.88/5 = 4.97	306,235,865	1523/306 = 4.98

Filed Feb 23 1948
Roy D Marker
Clerk

Plaintiff's Exhibit 95.

TRANSMISSION LINE INCREASES Aug. 1, 1936

1935 - Wishek - Bowdle W. O. #366 rebuilt with 2/0 ASCR - from 3-#8/1 #

60 miles

Line	111,871
2 Automatic Switches	15,821
	127,692

DISTRIBUTION

Own Use - 20%	25,692
Joint Use - 80%	102,000

BOWDLE - SELBY - W. O. #655 - Dec. 1 -40

Changed from D to Y	1,900
20 Miles	

BOWDLE - IPSWICH W. O. #653 - Dec. 1 -40

New Line - 1 Mile North - 30 Miles

Changed 3 #8 to 2/0 ACSR	50,850
Distribution	
Own Use 20%	10,350
Joint Use - 80%	41,500

1900
50850
46 47
99 - 3

BOWDLE SUBSTATION Dec. 1-41

W. O. #692 Structure	5120.59	
W. O. #758 - OCB	17086.90	
W. O. #763 - 2000 KVA	7718.33	
W. O. #844 - OCB	16547.30	
	46,473.12	
Own Use 20%		9,473.12
Joint Use 80%		37,000.00

INCREASE VOLTAGE - BOWDLE TO GETTYSBURG * 22D - 33D

INCREASE VOLTAGE - ELLENDALE - FREDERICK - 22D - 38Y -

FIXED CHARGES

	Interest	6.00
	Depreciation 30 yrs.	3.33
	Taxes-Maintenance & Repairs	2.67
		12.00%

TRANSMISSION FACILITIES

As of

Aug.-1-36

Deprec. 1 mo.	Wishek-Bowdle	102000
102000 x 3.33 = 12	5/12 x 12 x 102000	6000
2.83	1 year - FC 12 x 102	12240

Jan-1-41

	Wishek-Bowdle	102000
	Selby-Bowdle	1900
	Bowdle-Ipswich	40500
Deprec. 1 mo =	144400 x 3.33 = 402 / 12	$144,400
	1 year F.C. 12 x 144,400	17,328

Jan. 1-42

	Wishek-Bowdle	102000
	Selby-Bowdle	1900
	Bowdle-Ipswich	40500
	Bowdle Substation	37000
Deprec. 1 mo =	181400 x 3.33 = 504 -	181400
	1 yr F.C. 12 x 181400	$21,768

POWER COSTS

7-1-35 - 7-1-39 4 Yrs.

K W H PRODUCTION NET

	BEULAH	BISMARCK	MOBRIDGE
6 mo -35	14 985 000	2100 000	1664 000
36	29 108 000	4332 000	4674 000
37	35 202 000	3768 000	4637 000
38	37 413 000	4500 000 est	4046 000
6 mo 39	19 861 000	2674 000	1499 000
Total 170663000	136 569 000	17374 000	16720 000
%	80%	10.2%	9.8%
Use	80%	10%	10%

AVERAGE PRODUCTION COST 5.37 Mills
Net KWH (2,850,000 1 yr) 12,550,381

F.C.

7-1-35 to 8-1-36	00.00
8-1-36 to 1-1-37	6000.00
1-1-37 to 1-1-38 = $12240 - \frac{65}{289}(.06)(\frac{1415}{4810} \times 283)$	12,175.00
1-1-38 to 1-1-39 = $12240 - .06 (17 \times 283)$	11,951.00
1-1-39 to 7-1-39 = $\frac{12240}{2} - .06 (\frac{390}{6500} \times \frac{283}{2})$	5,925.00
	36,0 51.00
SPLIT F.C.- 50/50	18025.
Cost per K.W.H = $\frac{18025}{12550381}$ =	1.44 Mills
PRODUCTION COST	5.37
LINE LOSS 20% = $\frac{5.37}{.80}$ = 5.37	1.34
Cost at Aberdeen	8.15 Mills

POWER COSTS

7-1-39 to 7-1-41 2 yrs.

	Beulah	Bismarck	Mobridge
6 mo. 39	19,861,000	2,674,00 0	1,499,000
40	39,711,000	8,676,000	3,348,000
6 mo. 41	19.285.000	9,377,000	1.704.000
Total 106,135,000	78,857,000	20,727,000	6,551,000
%	74.2	19.6	6.2
Use	74%	20%	6%

Average Production Cost 4.60 mills

Net KWH (8935000 4 yr) 11,869,145

F.C.

7-1-39 - 1-1-40 = $\frac{12240}{2} - .06 (\frac{498}{695} \times \frac{8300}{11600} \times 283)$	5871
1-1-40- 1-1-41 = $12240 - .06 (41 \times 283)$	11545
1-1-41- 7-1-41 = $\frac{17328}{2} -$	8244
$\frac{.06 (\frac{797}{1330} \times 47 \times 283)}{2} - \frac{.06 (\frac{43}{719} \times 6 \times [\frac{402}{439} - 283])}{2}$	25660
Split F.C. 50/50	12830
F.C. Cost per KWH $\frac{12830}{11869145}$ =	1.07
Production Cost	4.60
Line loss 30% = $\frac{5.67}{.70}$ + 4.60	1.99
Cost @ Aberdeen	7.66 mills

Plaintiff's Exhibit 95 (pages 915 and 917) shown on Card 20

Q. I show you a document which has been marked Plaintiff's Exhibit 95, and ask you if that is the exhibit which you say you prepared to show your computation?

A. It is a copy of my computations from my notes.

Q. Just before adjournment we were referring to figures in a document marked Exhibit 95. Will you refer to the first page of that document, and explain what the first subject is under the average production cost, and the source of that information?

A. The figures of average production cost, [Buelah], Bismarck and Mobridge, kilowatt hours, etc., come from Plaintiff's Exhibit 82-13. The kilowatt hours—I believe I misspoke myself,—I believe came from the complaint itself. In other words, Exhibit 82-13 does not break down the kilowatt hours for fractional years, so I got the kilowatt hours for these various periods from that record. Both the net kilowatt hours generated and average cost per kilowatt hours in millions, comes from Plaintiff's Exhibit 82-13.

Q. Now, without stating figures, you have placed next on the first page, average production cost for all of these stations, including Bismarck and Mobridge? A. Yes.

Q. And the average production cost per kilowatt hour?

A. Maybe I better explain the fourth column in there.

Q. That is a computation. What are the sources of the other figures? Will you refer to the figures following the dates, 7-1-39 and 7-1-41. Where did you get the average production cost for that period? Was that on 82-13?

A. That is right.

Q. Where did you get the kilowatt hours produced for those years?

A. That is also from 82-13. The year after 1941 is split for or into six months period. So I used three years, 1939, 1940 and 1941 as indicating the average because the figures in 82-13 were not split technically on the date shown.

Q. And the figures or the date, July 1, 1941 to October 19, 1945, they were secured from 82-13, and another exhibit, 82-10, were they?

A. I don't know whether on 82-13. I would have to look at the original. My copy has 55-44 on it.

Q. Did you get all of those figures from 82-13? A. Yes.

Q. Referring to the second page of Exhibit 95. You were here when Mr. Elvig testified as to the cost of the Wetonka Bowdle line, and the two automatic switches installed on that line? A. I was.

Q. And those were the figures you put in on the top of the second page of Exhibit 95? A. That is right.

Q. Now, below the word "Distribution" on the second page, you have a phrase and a per centage, 20%?

A. That is right.

Q. You didn't take that out of any exhibit?

A. That is right.

Q. And that phrase that you inserted in there is "Own Use"? A. Yes.

Q. Will you explain, without using the dollars opposite that, the meaning of that phraseology or per centage?

A. It is my opinion that if this line had not been built that over the ensuing period of years something would have had to be done to the line that was already in there and in use, so that in allocating this cost, I figured future maintenance and repairs, etc. was reduced by the figure given.

Q. That is from your experience? A. That is my opinion.

Q. Then that next figure, that is merely the difference you have produced between the amount with the 20% and the testimony of Mr. Elvig as to cost?

A. That is right.

Q. Now, you use the term "Joint Use". What do you mean by that?

A. I mean by this joint use as transmission line for transmitting power to Northwestern and from Northwestern.

Q. You had in mind at that time, the time you prepared this exhibit, and now have in mind, the opinion I think you made, that the original line was sufficient for the business of the Northern Power & Light Co.? A. Yes.

Q. You had in mind also the sections of the interchange capacity contract with reference to excess transmission facilities that you heard read here in court? A. Yes.

Q. Now, the next item on that page entitled "Bowdle Selby" you have put in there the entire amount of the testimony as to the cost of putting the messenger wire on and changing the voltage from Bowdle to Selby?

A. That is correct.

Q. You have left off a few dollars and used round figures? A. Round figures in all cases, yes.

Q. The next item which is mileage is from the testimony in the case?

A. That is from the map, Plaintiff's Exhibit 15.

Q. Now, the next item entitled "Bowdle to Ipswich, Work Order 653" that is the cost of the change of the line from Bowdle to Ipswich from 22,000 to 38,000 KV. Is that correct? Or the change from copper to 00 aluminum?

A. Both.

Q. Then you use under that set of figures the phrase "Own use" 20%. A. That is right.

Q. And you arrive at that the same way as you did the "Own use" 20% on the Bowdle Wetonka line?

A. That is correct.

Q. So from there on the figures are computations?

A. That is right.

Q. Under the heading "Bowdle substation" you have used the figures that are in evidence here as to the expenditures for the Bowdle substation, under work orders indicated on these pages? A. That is right.

Q. And the phrase "Own use" means the same there as in the other two places where you have used it? A. Yes.

Q. And "Joint use" is the same meaning as in the other two places? A. Yes.

Q. And the figures are merely a matter of computation?

A. Correct.

Q. The next three items are entitled "Increased Voltage (1) Bowdle to Gettysburg, (2) Ellendale to Barnard.

A. That is right.

Q. You have put that in there to show what?

A. Complete the picture of what was done.

Q. In the changing of the carrying capacity of the line?

A. That is right.

Q. You heard the testimony about that? A. That is right.

Q. On the third page you have the title "Fixed Charges". Have you made a study to determine what, in your opinion, the fixed charges would be on carrying this property, or were on carrying this property? A. Yes.

Q. And you figured that on an interest rate of how much? A. 6%.

Q. What life did you give to the property?

A. Thirty years.

Q. What would result in a straight line of depreciation of what rate, 3-1/3%? A. Yes.

Q. Did you use 3-1/3% in figuring fixed charges in carrying this? A. I did.

Q. You are familiar with the cost of maintenance and repairs on this class of property? A. Yes.

Q. You have examined the record and heard the testimony in this case? A. Yes.

Q. Did you compute an item for taxes and maintenance and repairs as a per centage on the cost of the property?

A. I did.

Q. In your opinion what would that per centage be?

A. 2.67%.

Q. And then on this third page you have just added these various items to the fixed charges?

A. That is correct.

Q. You get a total per centage for fixed charges in your own mind of what per centage? A. 12%.

Q. Now, will you explain the base and source of the figures until the title "Transmission Facilities" on Page 3?

A. The value—it is pretty hard to explain this—that transmission line from Wishek to Bowdle, according to the record, went into service about the 1st of August, 1937. Then the next figure is the figure previously seen indicating value in the Wishek Bowdle line which, in my opinion, should be used on "Joint Use". The next figure is the 12% depreciation for five months on the previous figure. The next figure is one year's fixed charges at 12% on the first figure shown. We come on down through January 1, 1941. I put in a value of Wishek-Bowdle-Selby and Bowdle-Ipswich, on per centage, arrived at a figure and then I took the fixed charges on that at so much. I got on down through January 1, 1942. I add in the Bowdle substation. That gives you a total value of the joint use property as of January 1, 1942, and then there is an extended one year fixed charges at so many dollars there.

Q. Now, we go to the fourth page, under the title

"Power Cost July 1, 1935 to July 1, 1939." Will you explain where you got the figures under the word ["Buelah"] and what they represent?

A. Those represent the net kilowatt hours for the period shown produced by the three stations. Their source is 82-10, I believe.

Q. Anyhow it is from records and testimony in this case?

A. That is right.

Q. Where did you get the figures opposite the term "Average production cost"? A. That came from Page 1.

Q. Where did you get the figures 12,550,381, opposite the term "Net KWH"? Did you take that out of the complaint and the answer?

A. Yes. That is net kilowatt hours indicated between the two companies.

Q. Below the line drawn across the middle of the page there are figures "F. C." What does that indicate?

A. That was my shorthand abbreviation for fixed charges.

Q. And then you have stated those fixed charges in one instance from July 1 to August 1, 1936, you stated no figure for that date. Is that correct? A. That is right.

Q. And then you stated from August 1, 1936 to January 1, 1937, a figure which is a result of what?

A. I think you will find the figure if you go back to Page 3.

Q. And these computations of fixed charges are on all of the property that was in and involved in these items of property described in the exhibit and which was in use during the period indicated opposite each figure where the fixed charge figure is set out? A. They were.

Q. I notice below those computation you say "Split fixed charges 50/50". Will you explain why you have used that phraseology?

A. Simply a matter of property that was used for joint use and I just arbitrarily put it 50/50.

Q. Kilowatts were running both ways at various times?

A. That is right.

Q. Then the next computation on that page is a division of half of the fixed charges by the number of kilowatt hours. Is that correct? A. That is right.

Q. The next figure is where you say "Production costs". Does that mean average cost?

A. It is a figure from further up on the page, or you can refer back to Page 1 for it. That is the authority for it.

Q. The next figure is line loss. Did you arrive at an opinion as to line loss of energy flowing over the facilities described in this exhibit from the North Dakota companies to Northwestern Public Service Co.? A. I did.

Q. What, in your opinion, was that line loss?

A. I figured for this period of time that the average net claimed, 2,800,000, the line loss was about 20% on the transmission of this power plus the additional loss on the transmission of their own power.

Q. It was caused by the transmission of the power to Northwestern Public Service Co.? A. That is right.

Q. At the bottom of the page you have set forth the figure which is merely an addition of your fixed charge per kilowatt hour, your average production cost and your line loss? A. That is right.

Q. Will you check the rest of the pages and see whether there are any figures on those other pages that are not derived from figures to which you have heretofore testified?

A. There is one possible figure here, but I think I testified to it. That was my opinion as to the line loss on transmitting this amount of power. I have it in here at 30% and I think I testified previously.

Q. That is on Page 5?

A. That is right. Outside of that the figures are the records of the case, plus figures on previous sheets.

Q. Now, I observe that you say for the period on Page 5, which followed the previous period we discussed, the line loss was 30% instead of 20%? A. That is right.

Q. Why was it greater?

A. The line loss goes up, of course, as you increase the transmission and the amount of power. If you look on Page 4, the average for that period was 2,800,000, and increased use or average for this period was 5,900,000. At the same time it seemed to me that raising the line loss, doubling the transmission raised the line loss from 20%

to 30%, and it is backed up by other figures, and it certainly was a conservative way of doing it.

Q. Is that the explanation of the line loss on the 7th page of the exhibit?

A. That is right. For the period covered on the 7th page, the average net transfer was 10 million which contrasted with the about 6 million, and therefore, in my opinion the line loss went up in per centage to 35% or over.

Q. Perhaps you should explain a little more what is on Page 6 with reference to what is shown as the addition, if any, to these facilities that were increased to 38,000 volts?

A. On that page first is, I think, the depreciated property values of various items previously shown. The property value 7-1-41. Then the depreciated value of the Wishek Bowdle line would be 88,700—

Q. In other words, all you have done is drop from page to page as you have taken off depreciation which the record discloses? A. That is right.

Mr. Benson: We offer in evidence Plaintiff's Exhibit 95.

Mr. Royhl: To Exhibit 95 the defendant objects for the reason that it is incompetent, irrelevant and immaterial; wholly speculative; indefinite and uncertain; no proper foundation laid; incompetent for any purpose; not within the issues in this case; the witness not having shown himself qualified to submit proof as it is set forth in Exhibit 95.

The Court: Objection overruled.

Q. Now, will you refer, please, to Exhibit 95, the fourth page of the exhibit, and tell us what the fixed cost per kilowatt hour was for kilowatt hours delivered to Northwestern Public Service Co. at Aberdeen? I mean fixed charges, as you have explained the term "fixed charges"?

Mr. Royhl: We object to this as the figure or computation is set forth in Exhibit 95; is not the best evidence of what the exhibit contains. It is merely repetition by the witness of a written instrument now offered and received in evidence.

Q. Will you state in your opinion and according to the figures which are in evidence in this case? A. 1.44 mills.

Q. And that is from the period from September 1, 1935 to July 1, 1939, is it? A. I believe I have it from July 1.

Q. But you make no charges for fixed charges until August 1, 1936?

A. That is right, but my heading is on six months basis.

Q. And the average production cost of that power has already gone in at 5.37 mills?

Mr. Royhl: Same objection.

The Court: Overruled.

A. That is right.

Q. And the line loss on that power is how much in mills per kilowatt hour?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. 8.15 mills.

Q. Now, will you refer to the 5th page of Exhibit 95, which covers the period from July 1, 1939 to July 1, 1941. That is correct, is it? A. That is correct.

Q. What are the fixed charges per kilowatt hour of energy delivered to Aberdeen during that period, according to your opinion and the evidence in this case?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. 1.07 mills.

Q. What is the production cost which the evidence shows? The average production cost?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. 4.60 mills.

Q. What is the line loss, in your opinion, in mills?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. 1.99.

Q. So that the combination of those figures added together is the cost at Aberdeen of energy delivered to Northwestern Public Service Co. by the Dakota companies, during the period July 1, 1939 to July 1, 1941?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. I think that is not stated quite correctly to this extent, it is net kilowatt hours.

Q. Will you state what the combination of those figures represent? A. 7.66 mills.

Q. Will you state what that is?

A. Per net kilowatt hours delivered. The cost per net kilowatt hour delivered at Aberdeen.

Q. Now, will you refer to the period shown on the 7th page of Exhibit 95 and state what the figures totalling 8.61 at the bottom of that page are? What are those figures which total that?

A. The first item is .95 mills, fixed charges per net kilowatt hour delivered. The next figure, production cost, 4.98 per net kilowatt hour delivered. The next one 2.68, line loss. Giving a total of net kilowatt hour delivered, total 8.61 mills.

Q. This symbol a little ways up from the bottom of that page FC/KWH, that is your opinion as to what the evidence in this case shows as the fixed charges per kilowatt hour delivered during the period disclosed on that page? A. That is correct.

Q. So that the cost per net kilowatt hour delivered to Aberdeen from July 1, 1941 to October, 1945, by the Dakota Public Service Co. which energy was delivered to Northwestern Public Service Co., you said was 8.61 mills per kilowatt hour?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. That is correct.

Q. Do you have a chart or graph showing the comparative costs of interchange energy to Northwestern Public Service Co. and to the North Dakota Power & Light Co. and Northern Power & Light Co. and Dakota Public Service Co., which we call the Dakota companies, during the period of these contracts which are in litigation here?

A. I do.

Plaintiff's Exhibit 96 was marked for identification and is as follows:

Plaintiff's Exhibit 96
Page 929) is shown on
Card 20

Blank Page

930

Q. Is that graph now marked Plaintiff's Exhibit 96?

A. That is right.

Q. Will you refer to Exhibit 96, and will you explain the blue line on that exhibit, and the figures and source of the figures that go into the blue line?

A. All of these lines cover the period from 1930 to 1945 and they show the cost per kilowatt hour in mills. The black line with the greenish blue line superimposed upon it, is the cost per kilowatt hour in mills of the power purchased by the Dakota companies from the Northwestern.

The Court: Cost to the Dakota companies?

The Witness: That is correct.

Q. That is the yellowish line?

A. No. The greenish blue line is the cost to Dakota companies of the power purchased by them from Northwestern.

Q. What is the next line down? Is that a yellowish line?

A. That is a solid black line that has been covered over by yellow and it doesn't show up [to] well, but it is the production cost of Dakota companies. That is from the records of average production cost at the Dakota companies' various stations, per net kilowatt hour put into the transmission line system.

Q. What is the line which has been colored reddish?

A. That is the cost per kilowatt hour to the Northwestern of the power purchased from the Dakota companies by it.

Q. So when you say under that line "Cost of power purchased by Northwestern from Dakota companies" you mean the cost to Northwestern Public Service Co.?

A. That is what I mean.

Q. Now, do I understand you to say that this graph and the lines on it are based upon the evidence in this case?

A. That is correct.

Q. And in the cost of power purchased by the Dakota companies from Northwestern there is the five mills, plus the amount spent from period to period indicated by the chart and the testimony for interconnection charges and interchange capacity charges?

A. The three are included in that unit price.

Q. Will you explain what you include in production costs as to inclusion or elimination of fixed charges, as used in this graph, Exhibit 96?

A. In my use of the word or figures, "production costs" I have used nothing in them for interest, depreciation, taxes and insurance.

Q. What have you used?

A. I used the cost of the labor, cost of fuel, cost of repairs, miscellaneous supplies consumed from time to time.

Q. Is the same average production cost used in Exhibit 95? A. That is it, the same thing.

Mr. Benson: We offer in evidence Plaintiff's Exhibit 96.

Mr. Royhl: To which the defendant objects for all of the reasons and all of the grounds urged to Exhibit 95.

The Court: Overruled.

Q. Will you refer to the fourth page of Exhibit 95?

A. Yes, I have it here.

Q. Mr. Helmick, will you refer to the 4th page of Exhibit 95; will you have in mind the pleadings in this case show that the Northwestern Public Service Co. paid five mills for the energy delivered to it. Will you compute the difference in dollars on 12,550,381 kilowatt hours delivered to Northwestern Public Service Co., the difference between 8.15 mills and 5 mills?

A. The difference is 3.15 mills on kilowatt hours just mentioned. My slide rule extension on that shows a net product of about $39,500.00 for that period.

Q. Now, will you turn to the fifth page, and taking the number of kilowatt hours delivered to Northwestern Public Service Co. during the period shown on that page, and compute the difference between that 7.66 mills and 5 mills, in dollars?

A. The difference in mills is 2.66. 11,869,145, gives slide rule answer of $31,600.00.

Q. Will you turn to the 7th page and give the difference between 5 mills and 8.61 mills shown on that page and the number of kilowatts delivered to Northwestern Public Service Co., according to the figures on that page?

A. The difference is 3.61 mills, multiplied by the total in kilowatt hours, 44,798,846, gives a slide rule figure of $161,800.00.

Q. And the aggregate of all three of those figures is how much? A. $232,900.00.

Q. That is the aggregate difference between the 5 mills and the costs at Aberdeen that you have set forth in your exhibit? A. That is correct.

Plaintiff's Exhibit 97 was received in evidence.

Exhibit 97 is an order of the Board of Railroad Commissioners of the State of North Dakota dated the 8th day of August, 1939. It contains findings of fact, conclusions and order of said Board of Railroad Commissioners in a case before said Board entitled "In the matter of the valuation upon the Commission's own motion of the properties of the Northern Power and Light Company actually used or useful for the convenience of its customers within the State of North Dakota, for the purpose of ascertaining the reasonableness and justice of rates and charges for service."

The order recites the date of the hearing in said proceedings, the appearances on behalf of the Commission and on behalf of the Northern Power and Light Company, including the appearance of C. L. Sandstedt, Vice President and Treasurer, Huron, South Dakota, and contains, among other things, the following:

Valuation.

The Chief Engineer for the Commission introduced in evidence Exhibit No. 1, which is an historical and a cost of reproduction appraisal of the physical property devoted to public use of the Northern Power and Light Company, as of December 31, 1937. Exhibit No. 2 is a statement showing the net construction additions from December 31, 1937 to June 1, 1938. These were taken from the records of the Company. Exhibit No. 6 shows the property located in North and South Dakota. Exhibit No. 7 portrays the allocations between the Electric and Steam Heat Departments.

For the sake of convenience, the summaries of Exhibits Nos. 1 and 2, taking into consideration the allocations of Exhibit No. 7, are shown in tabular form.

	Historical Cost as of Dec. 31, 1937	Net Additions to June 1, 1938	Total Historical Cost
Electric Dept.	$2,582,390	$ 44,483	$2,626,873
Steam Heat Dept.	103,426	.....	103,426
Totals	$2,685,816	$ 44,483	$2,730,299

	Reproduction Cost as of Dec. 31, 1937	Net Additions to June 1, 1938	Total Reprod. Cost
Electric Dept.	$2,725,065	$ 44,483	$2,769,548
Steam Heat Dept.	114,705	.....	114,705
Totals	$2,839,770	$ 44,483	$2,884,253

Commissioners' Exhibit No. 3 consists of reproduction cost less depreciation, as of December 31, 1937. Below is a tabulation showing the summary, properly allocated, together with net additions to June 1, 1938.

	Electric	Steam Heat	Totals
Reproduction Cost	$2,725,065	$ 114,705	$2,839,770
Depreciated Value	2,268,351	88,746	2,357,097
Net Additions to June 1, 1938	44,483	.....	44,483
Net Depreciated Value	2,312,834	88,746	2,401,580

The present condition of the property as a whole is derived from the above tabular statement, but in order to establish the per cent condition of the depreciable property, it is necessary to deduct real estate values.

	Per Cent Condition	
	Total Property	Depreciable Property
Electric	83.2	83.1
Steam Heat Dept.	77.4	77.4

Commissioners' Exhibit No. 4 consists of accrued depreciation based on historical cost, as of December 31, 1937; the tabulation below shows the summary with allocations, together with the net additions to June 1, 1938. The depreciated value is the historical cost less the accrued depreciation.

	Electric	Steam Heat	Totals
Historical Cost	$2,582,390	$ 103,426	$2,685,816
Depreciated Value	2,149,338	80,117	2,229,455
Net Additions to June 1, 1938	44,483	.....	44,483
Net Depreciated Value	2,193,821	80,117	2,273,938

Section 4609c37 of the Compiled Laws of North Dakota specified certain items that must be found by the Commission before determining the fair value of the property under consideration. They are as follows:

Subsection (a) Land $23,371

Subsections (b) and (c) (See Transcript, Page 5, Lines 8-13.)

Subsection (d) (Exhibit No. 3.)

	Electric	Steam Heat	Totals
Reproduction Cost	$2,725,065	$ 114,705	$2,839,770
Land	22,812	559	23,371
Reproduction Cost Less Land	2,702,253	114,146	2,816,399

Subsections (e) and (f)

Depreciation	456,714	25,959	482,673
Deprec. Reprod. Cost Less Land	2,245,539	88,187	2,333,726

Depreciation.

Commissioners' Exhibit No. 5 shows the annual accrual for retirement reserves by departments. From a study of this exhibit and other pertinent material contained in the testimony and exhibits offered in this case, the Board finds that an annual depreciation expense allowance of 4 per cent for the Electric property and 3 per cent for the Steam Heat property will compensate the utility for all factors of depreciation existing in its property. This depreciation is to be computed on the straight line basis. The total annual depreciation expense allowance will be computed on the historical cost basis of the depreciable property.

Going Concern Value.

It is a contention of the utility here under consideration that an allowance for going concern value must be made. This amount they contend to be $250,000. As composing this amount, the utility lists the following items: establishment of transmission systems, lowering of rates, organization development and personnel relationship between employee and employer, satisfactory public relations, growth of business, and its connection with an integrated system. No breakdown was made of the total sum contended for into these various component parts.

The Commission, while recognizing that there is a difference between a "bare bones" plant and one with business attached and functioning, is not disposed to make a lump sum separate allowance to compensate for such difference. The utility places a value upon its going concern of $250,000. No probative evidence was offered to substantiate that figure or any other figure. No attempt was made to show what weight was given to any one item. The proof does not support a claim for such value in a lump sum.

The Board is not impressed by the contention of the utility that going concern value must be recognized because of the change from isolated plants to transmission systems. It appears obvious that such was a natural and necessary trend of the industry. Any failure or neglect to so do would brand the management of this utility as inefficient.

Mr. Royhl: The defendant objects to Exhibit 97 as incompetent, irrelevant and immaterial for any purpose; self serving and hearsay so far as the defendant is concerned; not within the issues in this case.

Mr. Benson: These common officers were officers of these companies at the time the exhibit was made.

The Court: It will be received.

Cross Examination: by Mr. Royhl.

Q. How old did you say you were, Mr. Helmick? A. 55.

Q. You are a graduate engineer. A. That is correct.

Q. With what degree?

A. B. S. in Engineering, University of Minnesota, 1915.

Q. Is that electrical or just civil engineering?

A. That is all. You do not get civil engineer's degree or electrical engineer's degree until you take your fifth year.

Q. Did you take the fifth? A. I did not.

Q. Since that time I think you said you had been with the government?

A. I was with the government for a period of about a year from the time of my graduation from college until I went into service in 1917. I went into service. I think it was March. Whenever war was declared in 1917.

Q. How long were you in that service?

A. I was in that service, I got back from France, in I think, April or May, 1919.

Q. You did some municipal work then, or did you go back with the government?

A. I went back with the government then for about two months.

Q. Then what was your experience after that?

A. I think it was about the middle of the year, the first of July, I went with St. Anthony Falls Water Co. Minneapolis Mills Co., Minneapolis.

Q. What was your work there?

A. I was engineer of maintenance and laying out minor improvements. It was largely operational problem and Minneapolis Mills Co. and St. Anthony Falls Water Co. owned all of the power rights. In some cases they owned the water rights, and in other cases they owned the power plants. They sold water and kilowatt hours.

Q. Well. what were you duties?

A. I was engineer and worked on maintenance, and design of such new structures as were put in.

Q. How long were you there?

A. I was there until about March or April, 1922.

Q. Then did you set up an office of your own?

A. No. Mr. Ralph Thomas who was senior engineer to

me in St. Anthony Falls Water [Falls] Co. and Minneapolis Mill Co. and with whom I had been working left the St. Anthony Falls Water Power Co. in the spring, I think January or February, 1922, and asked me if I would come with him. He set up a business in his own name and I was his associate.

Q. Was your work during that time largely water power? A. It was water power, some.

Mr. Benson: Which time?

The Court: That probably refers to the time when he went—

Q. With Mr. Thomas, in 1922? What was your answer when you were interrupted?

A. Do you mean specifically April, 1922, or some other date?

Q. Yes, and thereafter?

A. For the first four or five years, I would think that would be from 1922 to 1926 or 1927, I think the majority of our work was water power. It then shifted and became largely, in the '30's at least, steam power with some Diesel and practically no water power. Water power in the '30's was not very popular.

Q. Were you with Mr. Thomas when you made your first visit to the Northern Power & Light Co. property?

A. That is right.

Q. And that, if I understand you correctly, was in 1926? A. That is my recollection.

Q. In what capacity did you go there?

A. I went out to Mobridge in charge of the field parties we had taking inventory. I lived at Mobridge.

Q. For whom were you working?

A. Northern Power & Light.

Q. The company had been organized at that time, had it?

A. That was the corporate name of the company in 1926. May I get a copy of that appraisal?

Q. Yes?

A. This is a report of the appraisal that was made, if you want to look at it.

Q. Was this just a straight appraisal?

A. Will you tell me what you mean by straight appraisal?

Q. Just a tabulation of the property?

A. It was a take-off of the quantities and price and extension of the units found, adding up in certain sizes. If I recall there are also notes in there of the condition of the various pieces of property as of January 1, 1927.

Q. Is there anything in this that shows the life of the properties of the Northern Power & Light Co. at that time?

A. I think there is a present condition in there of all of this, varying from 100% down, which will give you an indication of what our opinion was at that time.

Q. When, with regard to the period that you made the survey, did you make the installation of this property?

A. The turbine and boiler that was put in at Mobridge, that is quite a long while ago and I didn't keep a diary, but my guess would be approximately 1927. If you can tell me the date at which this property was transferred to United Public Utilities, I can tell you, because I remember we were just getting that turbine on the line at the time that transfer took place.

Q. Was that installed at the time of the Lucas & Luick study? A. No. We antedated that.

Q. You think you installed this equipment prior to the Lucas & Luick—

A. At Mobridge, that is correct.

Q. If that Lucas & Luick study was made approximately early spring of 1928, it would be before that time, would it?

A. That is right. I think it was in 1927, sometime. It is a long time ago.

Q. Did you or your firm make the specifications of the installation that were made there in 1927?

A. Yes. We drew the plans and specifications, for the boilers and specified use of Westinghouse turbine.

Q. Did you personally have charge of that?

A. It was in our office. I spent half of my time on it.

Q. How long were you there? A. In Mobridge?

Q. Yes?

A. I was there in Mobridge spasmodically at the time it was put in. I was not there permanently. We were not con-

tractors. All we did was draw plans and specifications and go out to check it occasionally and see it was put in according to plans and specifications.

Q. After you completed this survey that you have mentioned sometime in 1926, and also the designing of some improvement at Mobridge, after the completion of that, were you back on this property any more? A. No sir.

Q. At any time? A. Not until in the fall of 1946.

Q. Was that after this litigation was instituted or about the time it was instituted?

A. I don't remember when it was instituted. I know when I was out there. If you know when it was ins ituted, I can answer that.

Q. You say in the fall of 1946. Now, when you were out on the property, you told us about one trip that you took from Aberdeen to Barnard and back to Aberdeen?

A. That is right.

Q. And then you went west to Ipswich and went around a lake to Gettysburg? A. No.

Q. To where, Bowdle? A. To Ipswich.

Q. Where did you go from Ipswich?

A. From Ipswich we came back to Aberdeen and then went south of Huron.

Q. Other than that were you on these systems personally to make any observations? A. No.

Q. Then since 1927, or thereabouts, the only time you have visited the properties was as you have now related?

A. That is correct.

Q. From there you went south to Huron?

A. From Aberdeen we went south to Huron.

Q. Were your various opinions based upon any information or knowledge that you got from the Day & Zimmerman study?

A. I didn't actually ever see or read the Day & Zimmerman study.

Q. You haven't? A. No.

Q. Were your studies which you have submitted here and various opinions you have given, were they in whole or in part predicated upon the Sargent & Lundy study of this property?

A. Well, now, if you would be a little more specific in your question as to what study you are talking about. That is sort of a shotgun question as far as I am concerned.

Q. Have you seen the Sargent & Lundy reports?

A. Yes, I have seen the Sargent & Lundy report.

Q. I am referring now to Exhibit 52. You are familiar with that? A. I have read that.

Q. I think you said you based your opinions and your studies in part upon this Sargent & Lundy report, which is marked Exhibit 55?

A. I believe I agreed to one or two particular paragraphs in that report in direct examination.

Q. Did you testify that Exhibit 52 was one of the documents on which you gave your opinion?

A. I believe I testified that a part of the exhibit, whatever that number is, I believe part of that exhibit was read to me and I was asked whether I agreed with that. I said that I concurred. I don't know of any other reference made to it.

Q. You understood that Exhibit 52, was prepared by Sargent & Lundy in June, 1936, didn't you?

A. I could not have told you what date it was. I knew it was about that time. In the early or middle period. If you had asked me I could not have told the date exactly.

Q. Do you agree with the Sargent & Lundy report, Exhibit 52, wherein it says "From the above it is evident that additional capacity must be provided as soon as possible"? A. May I look at it?

Q. Sure.

Mr. Benson: Is that in the portion that I read to you?

The Witness: It is not in the portion you read to me. It is the sentence which follows what you read to me. "From the above it is very evident that additional capacity must be provided as soon as possible."

A. I agree that additional capacity was needed.

Q. Now, in view of the fact that you had not been upon the property since 1927 until 1946, and in preparation of your testimony in this case, did the plaintiff give you a copy of the Sargent & Lundy report for your education and enlightenment concerning the system?

A. I think I read the Sargent & Lundy report.

Q. You were, of course, familiar with the Lucas & Luick report of 1928? A. I have read that.

Q. Do you agree with the recommendations made in that report as to the necessity and requirement of additional generating capacity? A. Yes.

Q. And for improvement and reconstruction of certain of its transmission lines?

A. Would you be more specific in your question. There is a lot of recommendations in there.

Q. Referring to Page 29 of the Lucas & Luick engineering study, dated March, 1928, and I am reading from Page 29: "In any event the following factors appear paramount. One 22KV line should be remodelled to 40 KV. The main line should not be less than No. 1 00 conductor. Since 3-strand No. 6, equivalent to No. 1 or 3 has been used extensively in the Hughes Electric Co. system, this size has been assumed in most calculations." Do you agree that was a paramount matter in 1928 on the Dakota companies' lines?

Mr. Benson: Can you express an opinion without seeing the rest of it? A. This also very general.

Mr. Fellows: Objected to as improper cross examination; because he has not stated that portion as a basis of any opinion he has rendered. Further it is always improper to measure his opinion as against a report of that kind, which must be of substantive evidence. That was in for the purpose of showing some figures.

The Court: I think the objection is well taken.

Mr. Royhl: There wasn't any restrictions. They put this in evidence.

The Court: I don't know as his opinion, compared with that opinion is cross examination.

Mr. Fellows: It had to go into evidence in order for him to draw some opinion from certain portions of it.

Mr. Woods: It is a part of the document. It is not fair to say only part of it can be considered.

Mr. Fellows: You are cross examining a man within the scope of his direct examination. The Court has sustained it.

Mr. Royhl: I am trying to find out what he bases his opinion on.

The Court: Your question does not indicate that. You are asking whether he agrees with the opinion of someone else.

Q. As I understand it, this Plaintiff's Exhibit 82-14, the engineering study of Lucas & Luick, Engineers, under date of March 19th, 1928, was one of the matters that you had and considered, and one of the exhibits that you had and considered at the time you rendered the opinions and studies that you have made here today. Is that right?

A. I don't believe I included anything from that.

Q. You don't know that you included anything from that particular document, but as I understood you, this was one of the documents upon which you based your opinions?

A. It is one of the documents from which I took one figure that I had no personal knowledge of.

Q. Then did you consider the Lucas & Luick study for any purpose? A. Yes.

Q. Then do you agree with this study, and particularly Page 29 of it, in which it is stated, "In any event the following factors appear paramount. One 22 KV line should be remodelled to 40 KV. The main line should not be less than No. 1 or 00 conductor. Since 3-strand No. 6, equivalent to No. 1 or 3 has been used extensively in the Hughes Electric Co. system, this size has been assumed in most of the calculations"?

Mr. Benson: We object again, Your Honor, that was asked a few minutes ago, for all of the same reasons.

The Court: He was not questioned as to a particular statement in the report. Sustained.

Q. You have stated that certain transmission lines were rebuilt. Is that right? New lines were built from Wishek to Bowdle and Bowdle to Ipswich. Is that right?

A. That is what the record shows.

Q. You have stated that before being rebuilt they were 22,000 volt. Is that right? A. I believe so.

Q. And you have stated that it was sufficient?

A. That is correct.

Q. Then do I understand you disagree with the recommendation made by Lucas & Luick wherein they say that the 22,000 volt transmission lines are inadequate?

Mr. Benson: We make the same objection.

The Court: Same ruling.

Q. In 1928, when Lucas & Luick prepared this survey, Exhibit 82-14, which you had before you here in court, and in part based your opinions upon that exhibit, you understand, don't you, that when this was prepared there were no interconnecting facilities between the defendant and the Dakota companies? You understand that, don't you?

Mr. Fellows: We object to that as improper cross examination, this witness having said he based no opinion on any part of the Lucas & Luick report, but he had taken off one set of figures he didn't testify to.

The Court: Sustained.

Q. Will you indicate what part of the Lucas & Luick report, Exhibit 82-14, you used in the preparation of your opinion and as a foundation for your opinion expressed here in court in this case?

Mr. Fellows: We object to that, Your Honor, because that states facts not in evidence; improper cross examination. He said on his direct examination he based no opinion and conclusion on any part of the Lucas & Luick report.

The Court: Sustained.

Mr. Royhl: May I refresh the Court to this testimony taken shortly following the opening of court here today, wherein this witness testified that Lucas & Luick report, Exhibit 82-14, contains plans for tying North Dakota Power & Light and Northern Power & Light together; that he heard the testimony of Mr. Elvig concerning the accomplishment of the interconnection, and also his own testimony today concerning the loop Wishek to Wetonka.

Mr. Morrison: There certainly isn't anything in that.

The Court: The objection is sustained.

Q. As I understand, in arriving at your opinion, and in your examination by Mr. Benson as a foundation for your various opinions, that you testified not only once but repeatedly that you had considered all of the so-called 82 evidence, Exhibit 82 evidence. Is that correct?

Mr. Fellows: That is also objected to as misstatement of the testimony of this witness.

The Court: I think he testified to that effect, that he had examined all of the exhibits now designated as Exhibit 82. I think he said that. But I don't see that that is material. The fact he looked at them is not any proof he based his opinion on all of them. I don't think the basis for the objection is well taken. I think he did testify that he had examined all of the record 82. For that reason the objection is overruled. I don't think it is material because the fact he examined them does not controvert his statement that he did not use this particular report that you are referring to as a basis for any part of his expert opinion.

Mr. Benson: We interpose the further objection it is immaterial.

The Court: I don't know whether it is material or not. Counsel is trying that side of the case. Objection overruled.

Q. (Read) As I understand, in arriving at your opinion, and in your examination by Mr. Benson as a foundation for your various opinion, that you testified not only once but repeatedly that you had considered all of the so-called 82 evidence, Exhibit 82 evidence. Is that correct?

Mr. Benson: Just a minute. I think the witness should have the opportunity to be advised as to whether counsel means all of this mass of material that is marked Exhibit 82. Is that what you mean, counsel:

Mr. Robinson: That is what the question was.

Mr. Royhl: The Court has overruled the objection and I am waiting for an answer.

A. I have not gone through each page in all of those various books over there called general Exhibit 82.

Q. You have not? A. Not through every page.

Q. You have said on direct examination that it was necessary that 750 additional generating capacity be put into Ellendale, haven't you? A. I have so stated.

Q. And that additional 250 be put into Gettysburg. Is that right? A. I have so stated.

Q. And that those added power facilities, generating capacity, were necessary if the interconnections were closed. Isn't that right?

A. If the interconnections were closed?

Q. Or not closed, whichever you engineers use it. Were desired.

A. You mean if the interconnection facilities had never been made that these would be necessary? Is that the question?

Q. Yes. A. Yes.

Q. After they were in and they were no longer used, the same situation would arise?

A. I wish you would take out the "no longer".

Q. Do I understand, without the interconnection and the power and energy that were obtained by the Dakota companies from the defendant, if those were not available to the Dakota companies, that they would have to have these additional generating capacities? A. That is correct.

Q. I believe you said those generating capacities would cost approximately a quarter of a million dollars?

A. No, I did not so state.

Q. As of what date did you fix the necessity of additional generating capacity to the Dakota companies to the extent of 1000 KW? A. January, 1938.

Q. The load was about the same then as it was in 1936, wasn't it? A. Well, I got the figures here.

Q. Will you look?

A. I don't have the figures here. It is in this exhibit. We can look at it if you want to. There was very little change throughout those years, 1936, 1937 and 1938.

Q. Do I understand that as of January, 1936, if the Dakota companies had not had the advantages that they had coming from the interconnecting facilities, they would have had to have additional generating capacities?

A. They should have had them.

Q. And approximately to the extent that you have stated? A. That is correct.

Q. Now, with those additional generating capacities, would they have required that the transmission lines be strengthened?

A. That would have required some additional transmission lines—

Q. In addition to the 22,000—

Mr. Benson: Let him finish his answer.

Q. Go ahead.

A. Oh, I don't believe the lines would have had to have been rebuilt had those generators been put in.

Q. Are you sure about that? A. That is my opinion.

Q. Do you think the 22,000—Is that a KV line?

A. I don't know what ones you are talking about.

Q. Transmission lines from Bowdle to Ipswich. They would have been adequate, would they?

A. In 1937 and 1938 they were.

Q. What power did they have in Ellendale in 1936, if any?

A. They had around 300 or 400 kilowatts and engines.

Q. What was the load in that area as of that period?

A. Let's take the load diagram that shows the maximum load, the peak load for 1938. Here is 1939. Is that acceptable or do you want me to get 1938?

Q. 1939 is alright.

A. The green figure, as I interpret Mr. Stokke's interpretation, is the 15 minute maximum coincidence peak, here is December 31, 1937. The load at Ellendale, the green figure, which is 15 minute coincidence peak, is shown on the load diagram for December 21, 1937, was 260 kilowatts.

Q. Was that just for the town of Ellendale?

A. I would so take it.

Q. Wouldn't there be some area that would have to be served if you put additional capacity in there?

A. I thought you asked me for Ellendale.

Q. What area would have to be served by the station at Ellendale?

A. Here is load diagram for December 21, 1937. That shows 210 kilowatts at Ellendale. 50 on the Leola Wetonka line. 150 on the line from Ellendale to Wishek. 50 Wetonka. I wish Mr. Stokke would look at these as I quote them to be sure I am taking them off as he means them to be taken off. 100 from Wishek to Bowdle. 100 from Bowdle to Ipswich. 100 from Bowdle down on the Gettysburg line. 215 in the town of Gettysburg.

Q. In the town of Gettysburg? A. Right.

Q. Do you think that if you had not received on that

system, at the time that you have given here, any generation from the defendant, any energy from the defendant, that the transmission lines would have been adequate to have forced the energy around from Ellendale out to the 22,000 KV lines?

A. Mind you, there is also stations at Gettysburg, contemplated in this report. That station at Gettysburg with what was in there, had capacity to take care of not only Gettysburg but the load between Gettysburg and Bowdle, so that the distance, if you are talking about Ellendale, would have had to come down from Barnard, to Wetonka to Ipswich to Bowdle. I can get the distances and we can figure it out here.

Q. That considers, of course, a transmission line from Wetonka to Ipswich? A. That was in my estimate, yes.

Q. And I think you estimated it would cost some $52,000?

A. I have the exact figure here.

Q. $52,900.00 I think were your figures.

A. That is right. $52,900.00.

Mr. Morrison: That is from Leola to Ipswich.

The Witness: That is from Leola to Ipswich.

Q. I think you estimated that the thousand additional generating capacity would have cost $125,000.00?

A. That is right.

Q. Approximately, I mean? A. That is right.

Q. And this transmission line, Leola to Ipswich, would have been $52,900.00? A. Yes.

Q. Didn't you say they would have to have some more power at Ellendale? A. Later on. In 1941.

Q. I think you said they would have to have 500 more in capacity there? A. In 1941, that is right.

Q. And that, I think you estimated would cost some $70,000.00? A. That is right.

Q. Those would total approximately a quarter of a million dollars, would they?

A. Those figures, I haven't added them that way, but I have the figures, I will add them up. $248,000.00 was the total.

Q. Now, let me see if I get you right. At least in 1941 you considered they could not safely divorce this from the

interconnection facilities unless they would have that added expenditure, the Dakota companies could not safely divorce themselves from the interconnecting facilities without that additional investment?

A. They would have had to have had additional capacity.

Q. And I think you also stated that on your capital investment of that sort, a return of 12% was a proper and legitimate return? A. That is right.

Q. What would that amount to on the $248,000.00?

A. 12%?

Q. Yes.

A. It would have been about $30,000.00 a year.

Q. That would be $30,000.00 a year, wouldn't it?

A. Yes.

Q. Do you have among the exhibits before you and which you say you examined and upon which you based the opinions you have given here today, do you have before you a tabulation of the interconnecting facilities rental charge and the reserve capacity charge? A. Yes.

Q. From 1938 to 1941?

A. Yes, but I don't remember just what number it was.

Q. Do you have before you Plaintiff's Exhibit 82-9?

A. I believe so.

Q. Now, that covers 1930 to 1945, both inclusive, doesn't it? A. Yes, that is the way it looks to me.

Q. I believe you testified that during those years, 1930 to 1945, both inclusive, the interconnection facilities were connected up and operating? A. Yes.

Q. Now, will you indicate what amount was paid by the plaintiff or its predecessors for those years, 1930 to 1945, both inclusive, for rental of the interconnecting facilities?

A. I will have to add those up. Ten years at $20,000.00. $200,000.00.

Q. And that would be for a period of sixteen years, wouldn't it?

A. The total for those years for rental, $200,000.00, taken from 82-9.

Q. Now, you have before you Exhibit 82-9. What amount was paid for the years 1938 to 1945, both inclusive, for reserve capacity.

A. I will have to take time to add that up. It was about $116,239.20. I haven't checked the figure.

Q. Do I understand, Mr. Helmick, that these interconnection facilities were in force and working during the years 1930 to 1945, both inclusive?

A. That, I believe, is true.

Q. Now, you have said that Exhibit 82-9, which is the basis for your expert testimony, shows for those years the payment of $200,000.00 rental for the interconnection facilities, and an amount of approximately $116,000.00 for reserve capacity?

A. What is reserve capacity? Will you answer me?

Q. This is Mr. Elvig's exhibit. I am merely referring to that exhibit. You understand what I am talking about?

A. I understand the exhibit. But you asked about reserve capacity. I want to know your definition of reserve capacity.

Q. Do I understand, Mr. Helmick, from this Exhibit 82-9, that no payments were made by the Dakota companies for that claimed reserve capacity service for the year 1930 to 1937, both inclusive?

A. I should think the record would stand for itself.

Q. Is that the way you understand it? A. Yes.

Q. And that is the way you are basing your testimony here, is it?

A. I am basing it on this Exhibit 82-9 for what it shows.

Q. Now, will you say, Mr. Helmick, that these interconnection facilities and the so-called reserve capacity, were of no value to the plaintiff's predecessor companies?

A. It is my recollection, with the question kicked around quite a bit by the time I got it, I thought I was answering a question, that this so-called reserve capacity, as such, had no value.

Q. You didn't mean to tell the Court then, that the interconnection facilities had no value?

A. You mean this rental?

Q. Yes.

A. I simply say this, that it had value after the interconnection facilities were made instead of something else being done.

Q. And there wasn't anything else done, was there?

A. No.

Q. If there had been something else done you figure it would have cost the Dakota companies, meaning North-

ern Power & Light Co. and North Dakota Power & Light Co., $248,000.00 with a carrying charge of $30,000.00 a year? A. That is the way it seems to be.

Q. Will you show us in any of your studies, and in particular, your study 95 and your study 96, where you have given credit to the defendant for this $30,000.00 a year?

Mr. Benson: We object to that as improper cross examination because under the issues that are formed in this case, under our pleadings, we claim that we are entitled to it all because it was fraudulently and unlawfully charged. It was entered into fraudulently by the dual directors. It was put in for their own benefit a number of years before.

Mr. Robinson: I hardly think counsel means to imply that the plaintiff's allegations in its complaint constitute the proof in the case. I thought the purpose of our being here was to establish or disprove as the case might be, the allegations set forth in the complaint.

The Court: Counsel admits that he has not given you any credit for it because he claims you are not entitled to it. What is the use of asking this witness the question where counsel admits it.

Mr. Royhl: I would like to have it in the record.

The Court: It was a statement made by counsel in open court to that effect.

Q. Will you refer to Plaintiff's Exhibit 96? Do you have Exhibit 96 before you? A. Yes.

Q. As I understand it you prepared this personally?

A. Yes, on the basis of figures given in 82-9 and 10, and some of the others. On the basis of figures given to me.

Q. We are talking about the red line which appears to be the bottom graph line of the exhibit? A. Yes.

Q. Have you got that? A. Yes.

Q. You have printed in here with an arrow pointing to this red line,—Cost of power purchased by Northwestern—As I understand it, that means 5 mills?

A. No, not necessarily. If you will look over here on the left it is more than that.

Q. To make it so we will take it from the year 1933 to 1945. Those are the years involved in this litigation. Rather from 1936 to 1945.

A. They paid 5 mills per kilowatt hour for it.

Q. From 1933 to 1945? A. That is right.

Q. From 1930 I think you show 7-1/2 for part of 1930—

A. 1930, 7-1/2. 1931 is 7, 7, 7-1/2. 1932 is 6.6.

Q. What do you figure 1933? A. 1933 is 5 mills.

Q. Does that figure contain anything for the carrying charge on the interconnection facilities? A. No.

Q. That is, it contained no fixed charges of any kind?

A. That is correct.

Q. With reference to the line which you have indicated as the green blue line? A. Yes.

Q. Which runs pretty much above the other graph line?

A. Yes.

Q. Is there any name that indicates?

A. I believe there is a total cost of power purchased by Dakota companies from Northwestern. That line is the dollars they paid divided by the kilowatt hours they received. That is what that line represents.

Q. That starts in the year 1930, doesn't it? I presume perhaps January 1, 1930? A. Yes.

Q. Would that be on the basis of 11 months?

A. That is the way I read it.

Q. And it drops down from January 1, 1930, through 1932, to January 1, 1933, doesn't it? A. That is right.

Q. And for two years, that would be 1933 and 1934, I take it, as shown by Exhibit 96—

A. I think it would be three years. It would be 1933, 1934 and 1935, are the same. 1933—'34 and '35. These three years are the same.

Q. That is, the Dakota companies paid the defendant for the years 1933, 1934 and 1935, the amount of 5 mills per kilowatt hour for the energy received by the Dakota company from the defendant company? A. That is correct.

Q. That then included no fixed charges, did it, for those years? A. No.

Q. In fact, the Dakota companies had paid no fixed charges up to January 1, 1936, had they?

A. I believe that is correct.

Q. Then the spiral on Exhibit 96, where it goes diag-

onally across the year 1935, is not intended as the price spiral? I mean so far as the Dakota companies' spiral is concerned?

A. The price paid. In other words, the total dollars paid by the Dakota companies to Northwestern divided by the number of kilowatt hours received, at 10.6 mills. That is platted. It might have been better had I platted this on plat lines instead of this way.

Q. I don't find anything upon this Exhibit 96 to show that the Dakota companies, during the year 1935, paid other than just 5 mills for energy received.

A. That is correct.

Q. Then during the year 1935 there was no fixed charges included? A. Not that I know of.

Q. I think that is correct. Now, beginning in 1936, did you then start including fixed charges?

A. Yes, I think you can put it that way. To save a lot of time I would like to make one explanation. In this top line the green blue line, are the dollars that total three items. What they paid per kilowatt hour, what they paid for rent, and after 1938, what they paid for interchange capacity. It is the sum of those three figures divided by the kilowatt hours they used that gives this point. That is what they are. You can call them anything you want to call them, but that is exactly what is in there.

Q. Do I understand then, in an engineering way, that you have considered the rental charge on interconnecting facilities as a fixed charge or of that nature?

A. I simply considered it part of the cost of that purchased power. You can call it anything you wish.

Q. Was it also true that after 1938 in building up this Exhibit 96, the so-called reserve capacity was included in the nature of a fixed charge in arriving at your mill cost?

A. It is part of the total.

Q. And as I understand, you have included nothing of that same nature, fixed charges, in the line which you designate cost of power purchased by defendant from the Dakota companies?

A. There were no amounts paid for such items, and they were not included.

Q. At that time, or during the years covered by your Exhibit 96, as shown by the various exhibits that you

have had before you, they had built and paid for, the defendant had built and paid for the interconnection facilities, had they not? A. That is my understanding.

Q. They also had built and paid for a certain generating capacity, hadn't they, during that period, on their own system, company system?

A. Exhibit 96 does not show in any way, shape or manner the installation of any generating equipment by Northwestern.

Q. The various exhibits, however, from which you say you platted this chart, Exhibit 96, do show the installation of generating capacities by the defendant company, don't they?

The Court: Your last answer was not responsive to the question. He asked you whether or not they constructed certain facilities as part of their own system?

A. I believe they did.

Q. There is no fixed charges on the red line on Exhibit 96 covering those installed generating capacities?

A. No sir.

Q. Now, if you were to eliminate from the so-called blue green line, representing cost of power to the Dakota companies, if you were to eliminate from the charges included therein the fixed charges for rental and the so-called reserve capacity charges, the blue green line would parallel exactly the red line, would it not?

A. It would.

Q. I think I remember this correctly. You testified, I believe, that the socalled line or wire or transmission loss increased in relation to the load that was being carried on those lines. Is that right? A. Yes.

Q. That is, with a heavy load, losses would be greater than with a light load. Is that right?

A. Yes, of kilowatts. I explained it this way. The kilowatts actually lost would increase.

Q. In proportion to the load that the line was carrying. Is that right?

A. As the load goes up the losses increase.

Q. I presume you have examined the logs, say, of the Aberdeen station? A. I have looked at some of them.

Q. You recall, do you, that among the exhibits which

you mentioned as being foundation for your testimony, you had Exhibit 55-8? A. May I look at that? Yes.

Q. That is one of the exhibits which you used in the preparation of your testimony here on direct examination?

A. That is correct.

Q. And I believe it was the testimony of Mr. Elvig that these were representative days?

A. I think the record will show that. I think these were days that he took off, just as shown. Here is list of days, here is hours. He presented them as such.

Q. By reference to the Aberdeen log could you determine the flow of energy during the hours of those days out of the Aberdeen station and into the Aberdeen station?

A. I think so.

Q. Will you refer to the Aberdeen log which is a part of the so-called General Exhibit 55, and give the flow in and out of the Aberdeen station as between the Dakota companies, and the defendant, of energy?

A. For any particular date?

Q. We will start with the first day here that Mr. Elvig has. January 4, 1943. Now, will you show what hours on January 4, 1943, energy flowed from the Dakota companies to the defendant company?

A. The first column is the west line. The second column is north line. 10:00 a. m. the west line shows 0. The line with the letter "N" at the top shows—500.

Q. Would the bus tie be representative of in-flow and out-flow of energy between those two companies? Is there a column designated bus-tie?

A. There is transmission line with two columns, in and out.

Q. Will you indicate from this log what hours of the day over that bus-tie, energy flowed from the Dakota companies to the defendant?

A. Well, apparently, from 12 midnight up to and including 9:00 a. m.

Q. Then will you indicate during what hours of the day the energy flowed from the defendant company into the Dakota company?

A. On the basis of those columns, they show 6:10, 4:11, 1:00 at noon.

Q. Does that show flow in and out between noon and midnight? A. Yes.

Q. What does that show?

A. Well, 1:00 p. m. shows 100 kilowatt hours out.

Q. Going to Dakota?

A. Going to Dakota. From 2:00 p. m. to 6:00 p. m. it shows 200, 600, 300, 300, 200 from Dakota. This 7:00 o'clock seems to be split, there is 100 in "in" column and 300 in "out" column, 8, 9 and 10, show 0 kilowatts in, 400, 100 and 200 kilowatt hours out.

Q. Going which way?

A. Out to Dakota. 11:00 o'clock shows 400 in. 12:00 midnight shows 1200.

Q. Came into the defendant company from Dakota?

A. Yes.

Q. Will you look at the next day, January 5, which is set forth in this exhibit 55-8. Is that approximately the same? That is, that the energy is coming into the defendant company from the Dakota company after midnight until about eight or nine o'clock in the morning?

A. This shows kilowatts from midnight up to noon coming in.

Q. Up to when?

A. Midnight up to 9:00 o'clock, varying from 700 up to 1600 or 1700 kilowatts. From 10:00 a. m. to 10:00 p. m., going out in quantity from 0 to 700. Maybe some of these are 500.

Q. That is from ten o'clock in the morning until ten at night, the exchange of energy flowed from the defendant company into the Dakota company?

A. That is correct according to this log.

Q. Then after, beginning at eleven o'clock at night, the flow was coming from the Dakota companies to the defendant company?

A. That is right. That is what the log shows.

Q. Is that approximately the picture that appears on the 6th of January, which is the next day, as shown by Exhibit 55-8?

A. No. It varies here, in that Dakota from 1:00 p. m. to 6:00 p. m. put power into Aberdeen. That is where it varied contrasted with the day before.

Q. How much and in what quantity?

A. From 100 up to 500 kilowatt. Some of these are carbons and are pretty badly blurred, but that is the way I read them.

Q. Now, will you look at the 8th? The big inflow of power from Dakota to the defendant was between midnight and 9:00 o'clock in the morning, wasn't it?

A. It came in then in the largest volume. Here is January 4, 5, 6 and 8th.

Q. You have already told us about the 6th. What about the 8th?

A. You want it just briefly? From 12:00 midnight to 8:00 a. m. the power came from Dakota to Northwestern. From 9:00 a. m. to 3:00 p. m. the power went from Northwestern to Dakota.

Q. In pretty good sized chunks there, did it not?

A. There is a reading here of 1100. The next figure is blurred and I can't read it. 5, 6 and 7, it went out from Aberdeen station to Dakota companies. And then starting at 8:00 o'clock at night, reversed and started to come in.

Q. That is, the defendant, after 8:00 o'clock at night, started getting energy from the Dakota company?

A. That is what the record shows as I interpret it.

Q. From the examination you have now made, and your own knowledge of these logs in the preparation of this case, would you say that is representative of the flow between the Dakota companies and the defendant company?

A. No, I don't think it is. Bear in mind that this is January. I don't know what I am going to find. Let's look at it in the summer.

Q. Here is May 13th. Let's look at that. What time did the power flow into the defendant company?

A. On May 13, 1943, the power flowed from the Dakota company to Northwestern for all of the hours on that date except the hour of 1:00 p. m.

Q. Was there any power flowing out during that time?

A. 300 kilowatts at 1:00 p. m.

Q. Outside of that it was all coming in.

A. That is right. For the other 23 hours. Shall we look at another one?

Q. O. K. Would you look at May 13, 1943 again and see if there is any repair? Is it indicated that there was any emergency or repair?

A. I am not conversant with all of the details, I don't see anything that to my knowledge—there is no particular note that anything was wrong. Here is Saturday, the 21st.

Q. Of what?

A. August, 1943. It shows power in from midnight to nine.

Q. That is, the defendant was getting power from North Dakota?

A. Midnight to 9:00 a. m. shows power into the defendant. From 9 until 7 it shows power out to the plaintiff. And from 10 to 11 o'clock that night it shows power out to the plaintiff. And the sum of the column is for the day that the defendant received 57 kilowatt hours and sent out 42 kilowatt hours.

Q. Now, have you any way of determining in the exhibits which are before you, the periods of the system peaks on the Dakota companies?

A. I believe those are shown on our load diagrams. That is the only way I know of determining.

Q. And you had those before you, I think you said, in preparation for this testimony?

A. I looked at them since they were brought down here, yes.

Q. And these logs will show, on the Dakota companies, their day peak hours? A. I believe so.

Q. Do you refer to the exhibit marked 53? A. Yes.

Q. Can you tell us from Exhibit 53 approximately the hours of the day peaks of the Dakota companies?

A. All I can tell you from Exhibit 53 is what the peak was at this particular day on this particular hour. Whether it was anything else, I don't know.

Q. You say you used this in arriving at your line loss or transmission loss?

A. No. I used those books for determining the situation as regards the peak loads in the southeastern end of the system. I also used the figures for the hour in checking those supplements to Exhibits 19, 21 and 22, which is hourly computations of the coincidence peak demand.

Q. Did you examine the daily log curves for the maximum day's peak, the days of coincidence peak demand, when you was at Huron in the fall of 1946, and you had

blue prints made from them? Will those determine the so-called peak hours of the Dakota systems?

A. Let me look at them. No, I would not say that these would show the peak load of the Dakota systems. They show the total load of both systems.

Q. But they don't show the hours the Dakota companies are carrying their peak load?

A. I will tell you what they do show. They do not show that. They show just this, as I interpret it. They show the total generation by all of the plants on both systems for each hour. There is a curve at the top that is the addition, I presume, of the individual station log sheets, and this cumulative curve on all those sheets is the output each hour from each station that operated in both systems, and this superimposed curve which is the addition of those individual stations.

Q. The superimposed curve you speak of, that indicates the peak hours of the interconnected companies, you say?

A. It indicates the load each day, and indicates the total load of both companies at that particular day and hour.

Q. The time of the greatest load would be the peak demand?

A. The hour of the day of each particular year that was the largest would be the peak demand.

Q. In your examination would you say those peaks came at or about noon and at or about 5, or 6, or 7 o'clock in the afternoon of each day?

A. My study of the record showed that for the year, the various years, that the maximum coincidence peak generally occurred from 5 to maybe 6 or 6:30 in the evening, and that this curve I am looking at in particular shows that on Wednesday, October 16, 1946, the load at noon—I am reading figures from here—was 18,660 kilowatts. The load at 7:00 p. m. is 22,520 kilowatts. In between those places there are valleys.

Q. That is, the load was down? A. That is right.

Q. Now, in fixing your loss, so-called transmission loss, is that what you call it?

A. You can call it transmission line loss.

Q. You have to take into consideration in fixing that,

don't you, the time of the load on the wires of the Dakota companies? A. That is right.

Q. Have you prepared any tabulation or study which establishes that beginning in 1940 or 1941, that was stepped up to 30%? A. Yes.

Q. Will you present that? I mean outside of your estimate. Have you got any figures showing that? A. Yes.

Q. Will you let me see that?

A. Before I show it to you I would like to make this general explanation, if I may. The matter of determining transmission line losses when you are transmitting from one station a number of miles to another station, we will say from Bismarck to Aberdeen, or from [Buelah] to Aberdeen, which may be 250 or 300 miles. Now, you are transmitting over those lines power that goes into Aberdeen or Gettysburg. You are also transmitting on your own line for your own use power that is used in your own system at some place between the point of generation and the point of ultimate use in your own system. Alright. Now, if you consider, I mean with all those complications as come together, to determine mathematically, down to the last per cent, just how many kilowatts were lost, and where, I defy anybody to do and prove his answer. I am trying to give you—You asked me if I had figured transmission line losses—I am simply trying to show you that any figure I make, or anybody else sits down and makes, is only accurate insofar as the accuracy of his premises are concerned.

Q. Do you know whether or not energy which goes out on the so-called transmission line of the Dakota companies, is metered onto the lines? A. I believe it is.

Q. And, of course, it is a fact, isn't it, that except as energy got out on the transmission line of the Dakota companies, it could not be delivered to the defendant company, could it? A. That would be my interpretation.

Q. In determining so-called transmission losses, did you examine the logs for Bismarck, [Buelah], Mobridge and Aberdeen for a fixed hour or period of time as a coincident time upon all of those logs?

A. I didn't take any one specific hour of any one day.

Q. You didn't think that was necessary, I take it, to determine transmission losses?

A. That represented just one hour of that one day and only insofar as that was an average, was it worth anything.

Q. Could you have taken a period of a week or a month or a year and determine that by such method?

A. I believe so.

Q. You did not do that, I take it? A. Life is too short.

Q. Have you examined enough logs of the Aberdeen station or of all or any of the stations of the interconnected systems to have an opinion as to whether or not the bulk of the energy or power moving to the defendant from the Dakota companies was transferred at off peak times?

A. I have examined the logs.

Q. What is your opinion as to whether or not the bulk of that power was transferred to the defendant from the Dakota companies on off peak hours?

A. I think that is correct.

Q. Now, from your examination of these logs of the power station, have you formed an opinion as to whether or not the bulk of the power that was transferred by the defendant to the Dakota companies was transferred during the peak hours of the day?

A. What do you define as peak hours?

Q. I am asking you.

A. I want a definition of peak hours?

Q. We will say from 9:00 a. m. to 8:00 p. m.

A. Now, may I have the question again?

Q. (Read) Now, from your examination of these logs of the power station, have you formed an opinion as to whether or not the bulk of the power that was [gransferred] by the defendant to the Dakota companies was transferred during the peak hours of the day?

Q. 9:00 a. m. to 9:00 p. m.?

A. That would be my opinion.

Q. You have testified both on direct and on cross concerning your opinion that if the Dakota companies had added 750 new generating capacity at Ellendale and 250 new capacity at Gettysburg, or was that at Mobridge?

A. Gettysburg.

Q. And in 1941, I think you said, had added additional 500 of new capacity at Ellendale, that they could have

gotten along without any interconnection facilities with the defendant?

A. I testified, I believe, that if that had been done, that those stations would have taken care of the southeastern corner. By that I mean the loop, starting at Wishek, around through Ellendale, Ipswich, Bowdle, down to Gettysburg and back. That is what they would be required to handle if the high line from Bowdle west to Wishek were down.

Q. Would that have eliminated any requirement for interconnecting facilities with the defendant?

A. I think it would have.

Q. Now, with the thousand capacity so added in 1938, can you give us an estimate or have you an opinion, as to the probable cost, at least the average cost, of generating energy with that equipment so installed?

A. Yes, I have that cost. I am speaking of Diesels, for fuel oil, repairs, etc., would have been from 3/4¢ to 9 to 9-1/2 mills.

Q. From .75 mills to 9.5 mills?

A. No. 7.5 mills to 9.5 mills.

Q. Don't you have an exhibit before you, which you used in your testimony, showing the average cost of generations? A. For what station?

Q. For the Dakota companies' stations.

A. I will see. I have 82-11 showing production cost of generation in the principal plants.

Q. That would be of the Dakota companies?

A. That is right.

Q. Show you Exhibit 82-13, plaintiff's, and ask you if that was built up on the average cost?

A. This exhibit was presented by Mr. Elvig, entitled, 4th column, "Average cost per kilowatt hour in mills."

Q. The cost you have just given was 7.5 mills to 9.5 mills. Is that on the same basis as this average cost per kilowatt hours which has been built up by Mr. Elvig in 82-13? A. No, I don't think it is.

Q. Then I will ask you what the cost of generating energy on this new power that you would install to eliminate the necessity of interconnecting facilities would cost if it were computed on the same basis that Mr. Elvig has computed on Exhibit 82-13, the average cost per kilowatt hour?

A. I can't answer that without taking some time to do it. If you will give me a couple of days to go back to the record and figure it I will do so.

Q. In addition to 7.5 to 9.5 mill price, which was fuel cost?

A. No, it was cost per kilowatt hours of fuel oil, repairments, etc.

Q. It did not include labor?

A. No labor, no operating labor.

Q. That is what I mean. And that would be included, would it not, in average cost per KWH?

A. Average production cost per kilowatt hour would include that.

Q. That is a big factor in a small station, isn't it?

A. Well, it depends.

Q. You say you studied Lucas & Luick. Did you study Lucas & Luick on the cost of operating Diesel plants, utility Diesel plants? A. I don't remember that I did.

Q. Do you agree or disagree with this statement as contained in the Lucas & Luick exhibit, 82-14, that the average cost overall of generating energy by Diesel plant would be approximately 40 mills?

A. I can't agree or disagree without reading the whole text because you just can't take a part out of there and ask me to agree or disagree with any part of it.

Q. I refer particularly to Page 4 of the Lucas & Luick engineering survey, which is Plaintiff's Exhibit 82-14, which reads as follows: Dated March 28, which reads as follows: The operating costs of the oil engine plants was over $50,000 in 1927, but they produced less than about a million and a quarter kilowatt hours.—Based upon that would you say that the cost of operating a Diesel plant that you contemplated in the elimination of the interconnecting facilities, would cost approximately 40 mills to generate a kilowatt hour? A. I know it would not.

Q. You know it would not? A. I do.

Q. Can you state what it would cost, in your opinion?

A. I can tell you what the fuel costs, lubrication and maintenance would cost. I can't give you average production cost—what you want is this—

Q. Can you give us the cost?

A. I can't give it right now.

Q. Have you anything before you which you used in your testimony to show what the kilowatt hour cost was in the Gettysburg station, which was a Diesel plant on the Dakota property? A. I don't remember.

Q. Will you look and see?

A. Is there any exhibit with that information in it?

Q. You can't now give us the generating cost over the production of the Diesel plants that you were going to [instal] with this thousand additional?

A. I cannot give you average production cost at this minute.

Q. Did I understand you correctly on your direct examination that increasing the load factor on the [Buelah] station would not decrease the cost of the energy produced at that station for the use of the Dakota system?

A. I don't believe I testified about the [Buelah] station production other than to quote from this at any time, shape or manner. That is my recollection. The record would show.

Q. From your study of the records that have been submitted to you for your consideration in this testimony, can you say whether or not the [Buelah] station was the low cost station on the North Dakota companies?

Mr. Benson: You mean average production cost?

A. My recollection of the records is that the average production cost at [Buelah] was the lowest of any company on the system. Bismarck was second.

Q. I believe the question was asked you as follows: On direct examination: State whether or not, considering the relationship between companies, the furnishing of power to the defendant reduced costs per kilowatt hour of power used by the Dakota companies on their own system or systems.—To which you answered: It did not.—That is now your opinion, is it? A. I think so.

Q. And when you made that statement did you consider the effect of the increased load factor of the so-called [Buelah] plant on the major plants of the Dakota company?

A. When I made that statement I considered all of the Dakota plants I did not say this, that or the other.

Q. Then go back to my question, will you?

Q. (Read) And when you made that statement did you consider the effect of the increased load factor of the so-called [Buelah] plant on the major plants of the Dakota company?

Q. Which would include Bismarck and Mobridge?

A. I would say I did consider the load factor and averaged it on all of the systems, for your load, or load, that went to you and the load that went to our own companies.

Q. Your own system? A. Yes.

Q. Meaning plaintiff's predecessor companies?

A. The Dakota companies.

Q. Well, in arriving at this opinion which you gave, would it change your opinion if the load factor, the off peak power, off peak times, was increased on the major generating plants of the Dakota companies by virtue of the sales to the defendant company on off peak times?

A. Provided the load factor on other stations was not decreased.

Q. Will you produce the survey that was made by Thomas and your firm in 1926? A. May I have that?

Q. I show you Defendant's Exhibit 226, and ask you if that is the study you made or assisted in making, designated "Appraisal" during the year 1926 or 1927, and to which you have heretofore referred in this cross examination? A. I think it is.

Q. So far as the typewritten portions, are they in the same condition now as when made?

A. As far as I can see, yes.

Q. And did you refer to this Exhibit 226 at any time in the preparation of your testimony in this case?

A. I don't remember whether I did or not. I don't remember it.

Q. You did think to bring it along with you and you are producing it here in this case?

A. Yes. I didn't bring it along, as a matter of fact.

Q. You furnished it to counsel for the plaintiff, did you?

Mr. Benson: It was in these records you turned over and it came out here.

A. I haven't seen that since 1927 until it showed up here.

Q. Anyway, it is something you assisted in preparing back in 1926 and 1927? A. That is right.

Q. Do you have any knowledge or any record that you can refer to to show the age of the 22,000 KV transmission line from Wishek to Bowdle and from Bowdle to Ipswich?

A. As of what time?

Q. The original 22,000 volt transmission lines which you say were adequate to operate these companies?

A. I think you will find in that appraisal when it was made in 1926, of these transmission lines—may I delete that—you will find a per cent column.

Q. What I want is the age. Have you anything to show the age?

A. No, not the exact year that it was put in. All there is in here is a per cent column, meaning present condition. I do know that this whole Northern Power & Light Co. was integrated and put together with transmission lines within a period of two or three years antedating the date of this report, which would have made it probably 1924 or 1925, or something like that, and that transmission line, to all intents and purposes was new in 1926.

Q. Do you mean by that, that they were built, referring to the transmission lines you have identified, sometime between 1922 and 1926?

A. May I have the question as to which lines I identified?

Q. Bowdle to Wishek and Bowdle to Ipswich?

A. That would be my opinion that they were built some time in that period.

Q. The work orders would show when they were built, wouldn't they? A. They should.

Q. Did you examine those in making your survey?

A. I don't remember. It was a long time ago.

Q. Do you know when they were retired?

A. Do you mean retired on the books or physically retired?

Q. Both.

A. I would judge that the Bowdle Ipswich line was retired physically and from the books subsequent to the new line that was built between those towns. I think that would probably be about 1940.

Q. Do you have before you the work orders showing the retirement of the 22,000 volt transmission line identified?

A. It is not before me here. Whether it is in evidence I don't remember.

Q. I refer you to exhibit marked 82-21, and ask you if you have considered that in your testimony concerning the original transmission lines and the rebuilding of them, or the building of new lines?

A. I don't remember that I did. I don't think I looked at this until it was presented here and I have not read it in detail until just now. That is my recollection. I have seen so many papers I would not swear one way or the other.

Q. Does that Exhibit 82-21, show the retirement of the transmission line Bowdle to Ipswich?

A. All I can see here, I don't know, if this is what you mean, Retirement cost $3800.00. Is that what you refer to? I will have to run through it. Do you know the figure you are looking for in here? Point it out to me.

Q. My question is, does it show the retirement of that line?

A. If you will show me the place it shows it I will answer yes or no, but I don't see anything one way or the other.

Q. Does that show the fact that it was retired?

A. It says at the top to retire the present 22,000, volt, 3 phase transmission line, beginning one mile east of Bowdle substation and extending east to Ipswich, South Dakota, a distance of approximately 30 miles. Line 419. 29 miles actually retired. 510 miles remains in service. That is what it says on the work order.

Q. Do you observe also on this same work order, which is a part of 82-21, and which is also a part of the same sheet from which you have just read, the following: This transmission line is in bad condition. Some of the poles are becoming rotted. The ground clearance is poor. The line is under-insulated for use as 38,000 volt line. The conductor is 3 simple 8 copper stranded and is badly worn at insulator ties.—Do you notice that?

A. I just read it when you handed it to me.

Q. Did you consider it in reaching your opinion concerning the transmission lines identified?

A. In reaching my opinion? What opinion?

Q. Your opinion concerning the necessity and require-

ment and adequacy of the 22,000 volt transmission line that was so retired.

A. All I can say is this, in 1925 or 1926, the transmission lines from Gettysburg to Bowdle and Bowdle to Ipswich, etc. were built all about the same time. They were built with the same construction, same voltage, same wire, and I know personally that the line from Gettysburg to Bowdle, which was built practically at the same time, had the same construction as the Bowdle to Ipswich line was put in. I know that line is still in service.

Mr. Benson: Bowdle to Ipswich?

A. No. Bowdle to Gettysburg, which was built at the same time. That is twenty odd years since that line was built. It was built at the same time the Bowdle to Ipswich line. It is still in operation. Well, it could still be serviceable and why the Bowdle to Ipswich line was no good back in 1940, doesn't make sense.

Q. Speaking of the Gettysburg comparison, do you know whether or not the poles on the Gettysburg transmission line were treated?

A. I believe all of those poles were brush treated.

Q. Do you mean all of the poles on the Gettysburg transmission line?

A. That is my recollection, that the poles were the same.

Q. Do you mean to say that the poles were treated on the Bowdle to Ipswich line and Bowdle to Wishek line, were treated?

A. I think if you will look at the Wiley report, you will find on that report, made in 1937, that it shows the Bowdle to Ipswich lines were treated.

Q. I am asking you if you have any personal recollection of it, when you made your survey?

A. My recollection is that they were treated.

Q. They were all treated? A. That is my recollection.

Q. Now, you have predicated certain fixed charges in making computations which are a basis for some of your testimony upon the cost new, of new transmission lines from the points indicated, Wishek to Bowdle and Bowdle to Ipswich. Is that right?

A. I have taken figures given in the work orders and

substantiated by other figures as representing what was put into those facilities.

Q. And in those figures and on Page 2 of your Exhibit 95 you include in distribution, and entry, 2 automatic switches, $15,821.00, and you include WO 844, oil circuit breakers, indicated by initials OCB, $16,547.30?

A. That is under the Bowdle substation?

Q. Yes. A. Yes.

Q. And you also under the Bowdle station, you say, Work Order No. 758, OCB, meaning oil circuit breakers, $17,086.90? A. That is right.

Q. You include that. And you used those figures in arriving at a distribution and fixed charge in this case, didn't you?

A. I saw that these work orders show that that amount of money was spent for those facilities.

Q. And you include that in fixing your kilowatt hour costs, didn't you, by mills? A. I include part of it.

Q. As fixed charges?

A. I include fixed charges a part of it.

Q. Mr. Helmick, the OCB are one and the same thing with this other classification, automatic switches, are they not? A. I think they would be considered so.

Q. You have used both terms?

A. Oil circuit breaker might be manual or automatic. It is a method of disconnecting the circuit.

Q. You also include on Page 2 of Exhibit 95, the item under work order 692, Structure, $5120.59. You include that, don't you? A. That is correct.

Q. That, as I understand it, is the structure that carries these so-called automatic switches or oil circuit breakers?

A. I took it to be the structure that carried the breakers, and that the transformer was set [it], and all of these other items. That is the structure.

Q. Now, will you explain what the purpose of these automatic switches might be?

A. I would judge they was put in there to switch loads and isolate sections of the transmission lines.

Q. That is, so that if there is a fault, so-called line fault, it would not put all lights out over the entire system, isn't it? Is that right?

A. That would be my interpretation.

Q. That would isolate the line fault, wouldn't it?

A. It should.

Q. If there is a fault on one side of that automatic switch, you then cut, if you have generating power, the other side of it off from the other side, couldn't you?

A. If the automatic switch operated.

Q. Do they have any other purpose?

A. Oh, yes, the oil circuit breaker, if you want to kill a part of the line to work on it, or anything like that.

Q. That is not the fundamental use?

A. The fundamental use is to disconnect the line if there is a fault on it.

Q. So that is a matter entirely within the operation of the system itself, isn't it?

A. It is a part of a complete system, certainly.

Q. Whether or not there was an interconnecting facility between the Dakota companies and the defendant company, that line should have automatic switches?

A. I won't agree to that.

Q. You think then, regardless of the interconnecting facilities, that you could operate the two Dakota systems without automatic switches?

A. I think it could be done. Might I say a word there. You are bringing up the matter of automatic switches. I don't know whether they are automatic fuses there or whether they are circuit breakers. Take the one on the leg going down to Gettysburg, to Highmore and at Huron. Let's consider the necessity of this one switch just as an example. Here is the switch at Bowdle, go down through Gettysburg, we go over the interconnection to Highmore, and we go in over Northwestern to Huron. At the Huron end of that couple of hundred miles of transmission line is another switch, so that any fault between those two switches is isolated, substantially, to keep the rest of the system from being kicked out. My point is, for that set-up this type of equipment is needed, positively, but my further comment is that if, instead of tying Bowdle through to Huron, we had only the line Bowdle to Gettysburg, a matter of forty miles, on a stub line, that the same class of equipment was not needed at all.

Q. So is it your idea that in computing the value of the interconnecting facilities that the automatic breaker be-

tween Gettysburg and Huron should be used as a part of the cost of those interconnected facilities, on the defendant line? By the same analysis, do you still contend those automatic breakers that I have just called your attention to as appearing on Page 2, should be a part of any cost of transmission lines on the Dakota system?

A. I don't think they belonged to the Dakota system. I don't think, if you had had the Dakota system and its need, you would have had to put in that type of breaker. It was necessitated due to the fact it was piped through to Huron.

Q. You are now disconnected from the defendant company, aren't you? The Dakota companies are?

A. I don't actually know whether those switches are closed or open.

Q. Assuming now that there is no further interconnections between the plaintiff and the defendant, have they removed these automatic switches? A. I don't know.

Q. You say they could just as well remove them as not?

A. I don't think switches of that calibre are required for that service. Now that they are in there, I don't think they should move them.

Q. Let's carry this a bit further. Say from Bismarck and from Mobridge, would you say there was approximately 398 miles of transmission lines interconnected in the system of the Dakota companies?

A. I would not want to quote any approximate figure. That can be taken off the map quite readily.

Q. I think you said 298 miles from [Buelah] to Aberdeen.

A. I think the figures from [Buelah] to Aberdeen, via Mobridge, is 292 wire miles. From [Buelah] to Aberdeen via Bismarck and Ellendale is 298 miles. From [Buelah] to Bismarck to Wishek to Bowdle to Aberdeen is 300 miles, some of which are overlapping. Those are the distances.

Q. Would you say that there is at least 400 miles of line on the Dakota systems east of Mobridge and east of Bismarck?

A. I will read off the figures. You say east of Mobridge and east of Bismarck?

Q. Yes. That includes everything south.

A. You are talking about the main arteries, not the side lines?

Q. Everything. They are all interconnected.

A. It is going to take longer then.

Q. Apparently that adds up to 380 miles, approximately?

A. I think so.

Q. That doesn't include the stub lines? A. No.

Q. And they are substantial mileage?

A. What do you mean substantial?

Q. They are all interconnected?

A. They are all part of the system.

Q. Let's assume you had a line fault east of Bismarck and you had no automatic breaker, would the lights go out all over those 380 miles?

Mr. Benson: Objected to as improper cross examination. So far as the record shows there are automatic breakers at Bismarck and elsewhere.

Mr. Royhl: I am trying to find out if they are an element in the operation of the system, or element in the operation of the interconnecting facilities.

Mr. Robinson: He has included them as a part of the cost. We want to ascertain the purpose—

The Court: He has told you what automatic switches are for. I don't see how further questioning would add anything to it.

Mr. Royhl: For the purpose of the record we offer to prove as part of the cross examination of this witness or by this witness, that a line fault at a point east of Bismarck, if there were no automatic switches installed, would put the entire mileage in darkness, and the line fault could not be isolated in the operation of the Dakota system.

Mr. Fellows: We object to the offer as immaterial; assumes matters not in evidence; speculative; it is not competent; improper cross examination.

The Court: I don't see the materiality. Objection sustained.

Q. As I understand, and I am referring now, Mr. Helmick, to Page 2 of Exhibit 95. A. I have it.

Q. That is a computation of capital charges on transmission line increases?

A. That is a tabulation of investment and expenditures for transmission line increases.

Q. I observe that in a distribution of those amounts which include the oil circuit breakers that we have discussed here this morning, that you have allocated to the Dakota companies own use the amount of 20%. Is that right? A. That is right.

Q. Which, in this case, amounts to $25,692.00?

A. You are talking about the Wishek Bowdle line?

Q. The Wishek to Bowdle transmission line.

A. Yes. Approximately $25,000.00.

Q. And you have allocated to the joint use, 80% of that Bowdle Wishek line, or $102,000.00? A. That is right.

Q. Now, you say that that old 22,000 volt transmission line was adequate. Is that right? A. That is my opinion.

Q. How much was that carried for on the Dakota company's books? A. I don't know.

Q. Will you look, Mr. Helmick? I am now handing you Exhibit marked 82-23?

A. Opposite the caption, "Original Cost of Property Retired" $76,780.00. Then it says "How computed" and it says "Appraisal $239,460.00." I don't know what that refers to. "Cost to remove property retired" $8,000.00. Total $84,780.00. Then it says "Salvage material" $23,376.00. Total $23,376.00. Net retirement charge $61,403.32.

Q. And the only amount that you have charged to your own use of the rebuilt line is $25,692.00. Is that correct?

A. That is the figure on Page 2.

Q. I am speaking of your exhibit or study, Exhibit 95?

A. Yes.

Q. Do you show anywheres here where you have retired the amount of $61,403.00?

A. No, sir, I don't think it should be retired.

Q. I am asking you if you showed the retirement?

A. I said I did not show it was retired.

Q. What would have been the fixed charges on the original cost of the property retired, which you stated was $76,780.03, if it had not been so retired?

A. There is one misstatement in there. I didn't state what it was worth, Mr. Royhl, I read the figure from the

record, but if you want to use that figure, I would say 12%, which would be around $9200.00.

Q. When you prepared Exhibit 95, did you refer to your 1926 appraisal, which is Exhibit 226?

A. I don't remember that I did. In fact, I worked these figures up before I saw that copy. That showed up when these boxes were opened. I hadn't seen it for 20 years.

Q. I call your attention to Exhibit 226, which you say you prepared, or assisted in preparing, and ask you if it is not a fact that you priced this line at a total of $58,169.42 and $28,300.16, together with a 20% overhead?

Mr. Morrison: Objected to as improper cross examination. A matter he said he did not have before him when he gave his opinion, and hadn't seen for twenty years and didn't consider in this opinion at all.

The Court: I think the objection is well taken, if that document was not one of the documents he used in preparation of his evidence.

Q. Can you definitely state that this document, Exhibit 226, was not used by you in arriving at Exhibit 95, and the computations shown therein? A. I certainly can.

Q. And that you didn't use the material and knowledge that you had of this appraisal in Exhibit 226?

A. No sir. I didn't use anything in there at the time I made up my figures on this.

Mr. Royhl: At this time and for the purpose of making an offer of proof, the defendant offers to prove by this witness that this witness prepared in the years 1926 and 1927, an appraisement of the property involved in these transmission lines, to-wit: Bowdle to Eureka, Eureka to Wishek, as shown by Pages 239 and 240 of Exhibit 226, in which there was a total appraised valuation of the transmission line involved of over 88 thousand dollars, and which includes 20% overhead, as shown by the appraisement, page 233, all of which was prepared in part and approved by this witness.

Mr. Benson: Mr. Royhl, when you say these lines, you don't mean the lines he is talking about in Exhibit 95, do you?

Mr. Royhl: Yes, I am talking about Bowdle to Wishek which was alleged, one of the transmission lines which he challenges, on your theory that it was fraudulently conceived and carried out by the defendant interlocking officers and agents.

Mr. Benson: When you said "these lines" you meant the old lines, not the lines he was talking about in Exhibit 95.

Mr. Morrison: The offer is objected to for the reason it is immaterial. It appears from the testimony of this witness that the last exhibit was not used by him as a base upon which he based his opinion in this case, and that he had not seen or used or knew of this report for twenty years.

Mr. Fellows: For the further reason they are asking for an appraisal of a line which is no longer in existence, as the figures on Exhibit 95 refer to a line that was rebuilt years later.

Mr. Robinson: This witness has previously testified, Your Honor, the construction of these particular lines was unnecessary. That the old lines they are now objecting to here and speaking about having been retired, should not have been retired, and that they were ample to furnish the needs of plaintiff's predecessor, the Northern Power & Light Co. Now at this time, when we wish to have this witness tell the Court whether or not he took into consideration the value of those properties that were retired, when he was considering the cost of the new properties which took their place, they are objecting to having that part of the story told to the Court.

Mr. Morrison: That is not the situation at all. He has not used this record and he has testified he has not used it. The premise upon which Mr. Robinson works is not the one involved in the offer at all.

The Court: The objection to the offer is sustained.

Q. Now, Mr. Helmick, on Page 2 of Exhibit 95, and under the Bowdle Ipswich line, you insert a valuation of $50,850.00. Where did you get that figure?

A. That has been presented by Mr. Elvig in previous testimony.

Q. Did you verify it in any way except on Mr. Elvig's testimony?

A. I looked at the figures he had off the record. He showed it to me.

Q. Did you go to the records themselves?

A. I looked at the records that he showed me. There is some discrepancy in the record. I don't know whether it is 55 thousand or 50 thousand, and when he presented it he took the lower figure. The record is in court and was presented if you want to check out the details.

Q. Did you take into consideration the retirement of the old line? A. No.

Q. You do not show that then as an offset of any kind against the cost of the new?

A. I didn't figure the old line had to be retired. Why should I take it?

Q. I am asking you if you did? A. I said no.

Q. What exhibit do you now hold in your hand?

A. Defendant's Exhibit 82-21.

Q. And that was one of the exhibits which you used in verifying Elvig's figures, was it? A. I looked at it.

Q. It says here, total cost $37,871.29. Did you use that figure in any manner as retirement in creating the computation which you show on Page 2 of Exhibit 95? A. No sir.

Q. You did not? A. I did not.

Q. Referring again to Exhibit 82-21. In the preparation of your compilation, Exhibit 95, on Page 2, did you use the figure, original cost of property removed, $34,071.29?

A. I did not.

Q. Did you take into consideration the statement contained on the work order, Exhibit 82-21, as to reasons why work should be done, to-wit: "This transmission line is in bad condition. Some of its poles are becoming rotted. The grading and ground clearance is poor. The line is under-insulated for use as 38,000 volt line. The conductor is three-eighths copper stranded and is badly worn at insulator ties." Did you give that statement any consideration in the preparation of your Exhibit 95?

A. I will just repeat my testimony of this morning.

Q. Did you take that into consideration when you prepared your Exhibit 95?

A. I did not, because I didn't figure it was true.

Q. Well, is your Exhibit 95 predicated upon the intimate knowledge you have of the physical properties that were retired, as shown by your testimony?

A. My knowledge is this. The lines that are under discussion, Bowdle to Wishek, Bowdle to Ipswich, Bowdle to Gettysburg, were all made at one and the same time and the same construction. The line from Bowdle to Gettysburg is still in, still operating, 22 odd years after it was put in. For some reason that line is still good, but if for some other reason, apparently, the line put in at the same time from Bowdle to Wishek and Bowdle to Ipswich, all went to pieces all of a sudden and had to be pulled out according to someone's opinion, and replaced with an entirely new line, to me that doesn't make sense.

Q. When did you see the so-called Gettysburg line last?

A. Last fall.

Q. Did you travel the entire length of it?

A. Not the entire length of it.

Q. How much did you travel of it?

A. I went north out of Gettysburg, and I can't tell you exactly.

Q. Did you travel a mile on it? A. I don't remember.

Q. As I understand it, you have not seen any of these transmission lines except a minor part of the Gettysburg line since 1926?

Mr. Morrison: Objected to as repetition. He has answered four or five times and said he hadn't.

The Court: I think the objection is well taken. I think he has answered the question.

Q. In the preparation of your Exhibit 95, and in connection with your examination of the work orders which are Exhibits 82-21 and 82-20, concerning these transmission lines, you observed did you not that the retirement work order was signed by E. L. Bayles, on April 9, 1940?

A. I took cognizance of no signatures at the bottom, Bayles or otherwise.

Q. You didn't inquire of any of those men who signed this work order retirement? A. I didn't.

Q. I think that in your direct examination, Mr. Helmick, you said that the system loads could not be supplied

without the operation of the Mobridge and Bismarck plants. Is that right?

A. That is not the wording I remember as having made the answer "yes" to.

Q. What did you say?

A. I can give you my idea on it. I think I said that this 2 hundred and some odd miles of transmission line between [Buelah] and Aberdeen are materially helped and needed for the matter of stability and several other features of operation by either the Bismarck or Mobridge plants. I didn't mention it at the time, their putting kilowatts or kilovolts or amperes onto the line. I still think so.

Q. Would you say along with that, that the Dakota companies' systems were also stabilized by the interconnection at Gettysburg and interconnection at Aberdeen, by and through the defendant company?

A. I don't think there is any question but the end of their system was helped by that.

Q. Now, in discussing the Mobridge and Bismarck power plant installation and utilization, did you have in mind that Mobridge, in conjunction with generating energy, was also a central heating plant for the town of Mobridge?

A. I know that it was.

Q. And that same thing applied to the Bismarck generating plant? A. Yes.

Q. In operating those two plants, the Mobridge and Bismarck plants, to the point where they were furnishing sufficient spent steam with which to heat through their central heating units at those two points, they would generate some energy, wouldn't they?

A. That is involved, certainly.

Q. Have you any compilation showing what part of the energy generated at those two power plants, actually got on to the transmission line?

A. Not in kilowatt hours for the periods discussed.

Q. I am referring again to Exhibit 95. I am talking about Page 7, about the entry towards the bottom of that page which reads, 42,508 over 44,798,846, equals 0.95 mills. You have that in mind? A. Yes.

Q. I am also referring to Page 5, towards the bottom of the page, where you say, F. C. Cost per KWH, 12,830 over 11,869,145, equals 1.07 mills. A. Yes.

Q. And similar entry on Page 4, which reads, Cost per KWH, 18,025 over 12,550,381, equals 1.44 mills?

A. I see those figures.

Q. Now, where did you get the under figure of 12,550,381 on Page 4?

A. On Page 4, you see the dotted line across there at the middle of the page?

Q. Yes. A. Then you see "Net Kilowatt hours"?

Q. Yes. A. Then in brackets, 2,850,000 a year?

Q. Yes. A. Then you see 12,550,381?

Q. Yes.

A. Isn't that the same figure you just asked me about?

Q. What is that figure?

A. The net kilowatt hours for that period of time.

Q. In what? A. Kilowatt hours.

Q. As between the two systems? A. Yes.

Q. Then your total generation would be the sum of 12,550,381 and 2 million—where did you get your net figure from? A. From the record.

Q. What record?

A. I think it is in the complaint. I think it has been admitted.

Mr. Fellows: I suggest to the Court the figures are in the pleadings and are admitted in the answer as the correct number.

A. They were given to me by Mr. Benson from the pleadings.

Q. Do those pleadings also show what energy flowed the other way?

A. I don't think they do. Not to my recollection. The same remark will explain the other two pages you asked about.

Q. Have you got a copy of Exhibit 87, Plaintiff's Exhibit 87, being one of the documents you said you predicated your study and testimony on, was it not?

A. I think I said in talking about Plaintiff's Exhibit 94, I have a note on here that part of this came from Plaintiff's Exhibit 87.

Q. Now, you had Plaintiff's Exhibit 87 before you when you prepared your testimony in this case, didn't you?

A. Yes.

Q. Now, will you refer to Exhibit 95 again and also to the defendant's answer, Paragraph II, and the second cause of action, on Page 19 of the answer? A. Yes.

Q. I will ask you if that is where you got the figure that is shown on Page 4 of Exhibit 95, concerning cost per KWH, 12,550,381? Is that where you got that figure?

A. That is the same figure. That was the net kilowatt hours.

Q. Now, that as shown by the pleadings is the difference between what the Dakota companies sold to the defendant, 23,049,842 and what the defendant company sold to North Dakota companies, 10,499,461? A. I presume so.

Q. Will you verify that?

A. I will verify the arithmetic.

Q. Have you verified it?

A. The difference between 23,049,842 kilowatt hours of energy and 10,499,461 is 12,550,381.

Q. Now, in your Exhibit 95, Page 4, you arrive at a cost per KWH of 1.44 mills? A. That is fixed charges.

Q. Your fixed charges are just above that, a total of $3,051.00? A. The total.

Q. That is the total? A. Yes.

Q. And then you have an entry on this audit or compilation or tabulation, Exhibit 95, following that total fixed charge, you split that 50/50, and make $18,025.00?

A. That is right.

Q. Then you divide that $18,025.00 by the net kilowatts 12,550,381, don't you? A. Yes.

Q. That is the way you arrived at the figure, cost per kilowatt hour, 1.44? A. That is the mathematics of it.

Q. Now, if those fixed overhead and if those other instrumentalities upon which fixed charges are based for the transmission of energy both ways to arrive at your split 50/50, why didn't you make your division based upon the gross figure of 23,049,842?

A. For this simple reason. When all is said and done there was a net flow of kilowatts from Dakota Public Service Co. to Northwestern Public Service Co., and that excess was what amounted to anything as far as we was concerned. In other words we sent you 23 million and we got back 10 million and the difference is 12-1/2 million.

Q. We are still talking about fixed charges? A. Yes.

Q. That you, in your audit, Exhibit 95, charged to the defendant, 50%. Is that right? A. That is right.

Q. We can assume that the energy was not flowing both ways simultaneously? A. In kilowatts.

Q. For certain hours it flows one way and certain times it flows the other way. Is that right? A. That is right.

Q. Just assume, I am talking about your system of computing, let's assume instead of the defendant having furnished you 10 million kilowatt hours, that it furnished the Dakota companies 22 million kilowatt hours. A. Yes.

Q. That would leave a net difference of 1 million, wouldn't it, approximately? A. Yes.

Q. Then would you still have divided, as you have divided here, to arrive at the cost of kilowatt hours?

A. Let me get that straight.

Q. Let us assume for the purpose of your method of arriving at that figure, 1.44 cost per KWH, that the Dakota companies had furnished for the times covered by your Exhibit 95, on that page, 23 million kilowatt hours, and that the defendant had furnished to the Dakota companies 22 million kilowatt hours, would you have proceeded then to determine the cost of kilowatt hours by dividing fixed charge cost of 18,025.00 by 1 million?

A. Yes, I think I would have, for this reason.

Q. What would that answer have been?

Mr. Fellows: Let him give his answer.

A. In dividing this there, to carry these fixed charges, I don't care how you use it, all I am trying to get in on the basis of the facts that actually exist for the period are the facts that there was 18 thousand dollars of fixed charges that was, in my opinion, Northwestern's proper proportion of the additional interconnection facilities. To me it is a system of means attained to get that end. In making up my opinion I simply worked that in to convert it to the cost per kilowatt hour. If you wanted to just put it in there at so much, O. K. in other words, if you wanted to charge whether they got any kilowatts or not over. In other words, if you take the same hypothetical set-up here that has been made on the other interconnection contract, so much was paid there, $20,000, whether there was a kilowatt hour transferred or not. That was

the fixed charge. I am simply saying that these 18 thousand dollars on [thse] facilities is the same type of figuring. I don't care what number of kilowatt hours you divide it by it is an item of expense.

Q. You use that 1.44 on Page 4 in arriving at a cost at Aberdeen, figure of 8.15 mills, don't you?

A. That is right for the facts for that period.

Q. Now, we will go back to my problem. Supposing instead of being 12 million, there was 1 million, net. What would that have been, cost per KWH then?

A. I suppose it would have been about ten times this, 14.4.

Q. That is, it would have been 14.4 mills. Is that right?

A. That is right, approximately that.

Q. Then what would have been the cost at Aberdeen?

A. Well, you take the figure if you want to. I will divide it out.

Q. That would be something like 21 mills?

A. You are talking about the hypothetical cost of net interchange of 1 million. Is that right?

Q. Alright.

A. You divide 1 million into your 1802, I think that would give you 18 mills. Then you would have to add 5.37 and 1.34 would be 24.71.

Q. 24.71 mills. Then you would have added that on Page 4 to the production cost of 5.37 mills. Is that right?

A. That is what my figure included. I added the 5.37 and I added the line loss.

Q. And it made overall, what? A. 24.71 mills.

Q. That would have been in lieu of the figure you show on Page 4, Cost at Aberdeen, 8.15?

A. Figured that way, sure.

Q. I just want to demonstrate your way of figuring. You still think that is a correct way of figuring that, and have the Court use it as the mill cost of production, or cost at Aberdeen? A. I am not saying that.

Q. What is the purpose of this exhibit?

A. This exhibit, as I mentioned before, 18 thousand dollars--If you want to split up this fixed charge and put an entry of 18 thousand, that is one entry on the ledger. Then if you want to use for this period of time a cost of 5.37, plus 1.34, you are welcome to do it that way. You will get the same answer.

Q. You say you split that fixed charge—

A. You get the same answer in dollars for the power delivered.

Q. You say you split that cost of fixed charges 50%. Is that right? A. That is right.

Q. Who was carrying the other fixed charges, the other 50%. A. North Dakota.

Q. That would be the Dakota company? A. Yes.

Q. But there was still another 50%. Who was carrying that? A. We were, but you should have.

Q. Where do you show that you have used that fixed charge in determining the value of kilowatt hours that we sold to the Dakota company?

A. I don't show it because I am working on net kilowatt hours. That is the object of avoiding a lot of confusion.

Q. Is that same thing true of your computations on 5 and 7? A. That is right.

Q. Now, you say there was a gross for the period covered by Page 4 of the audit, Exhibit 95, of 23,049,842. The 23 million comes out of the answer that you saw here a minute ago? A. Yes.

Q. Now, then, did you figure the 23,049,842, at a cost of 1.15 mills at Aberdeen?

A. No. I took the net difference as I have said a thousand times in all of these.

Q. Then you don't want to have the Court understand that the energy was costing the Dakota company 8.15 mills at Aberdeen?

A. I want the Court to understand that the net kilowatt hours delivered at Aberdeen cost that figure, figure it any way you want to.

Q. But you arrived at that by this method?

A. That is right.

Q. Now, just to clear up the record and then I am through with that phase, you actually delivered at Aberdeen 23,049,842 kilowatt hours for the time covered by Page 4 of Exhibit 95?

A. I don't know whether it was all at Aberdeen. We delivered to the Northwestern.

Q. 23,049,842 at a fixed charge cost of $18,205.00. Is that right, according to your exhibit here?

A. That is right.

Q. And yet you say, to determine the kilowatt hour cost you would not divide the $18,025, that it cost you, by the 23 million plus which you actually delivered to the defendant? A. I say I didn't divide it.

Q. You say you shouldn't have, in order to arrive at a fair basis for the kilowatt hour cost under that fixed charge?

A. I talked about net kilowatt hours. I haven't used those figures at all. I say on the basis of net kilowatt hours delivered. They are my figures and I am standing on them. If you want to rearrange the figures, go to it, and suit yourself.

Q. Does the net figure mean anything in this law suit, the 8.15 mills? A. To me it does.

Q. What does it mean?

A. It means that on the net kilowatt hours that was the cost to the Dakota companies of delivering power, including mills per kilowatt. So many dollars for the whole bunch, including line losses, etc., delivering into your lines at Aberdeen and Gettysburg. That is my opinion.

Q. To make it extreme and as a matter of demonstration, assuming there had been a differential between deliveries from the Dakota company to the defendant company of a net one single KWH. Then would it be your idea that that net kilowatt hour cost $18,025.00?

A. Put it anyway you want to, as long as power flowed over these lines there was a fixed charge to be borne by both sides of approximately 18 thousand dollars, and whether you put x kilowatt hours or x million kilowatt hours, or 1/10 kilowatt hours, that money was there and it had to be paid for, and if you want to revert it to cost per KWH, that is your privilege.

Q. But you say on Page 4, Exhibit 95, kilowatt hour mill cost? A. That is right.

Q. Have you answered my hypothetical question as to what the cost of a net one kilowatt hour would have been?

A. I think I have.

Q. What did you say?

A. I said in your hypothetical case, $18,025.00, if it had been 1/10 kilowatt it would have been 180,000.00.

Q. Just following out the matter we have been discussing on Exhibit 95, I am now referring to Exhibit 96. Do you have that? A. I have it here.

Q. Did you figure the line, Cost of Power Purchased by Dakota Companies, from the defendant, on the basis of net kilowatt hours like you computed on Page 4, of Exhibit 95, as we have just reviewed it?

A. No. This is the cost of the energy purchased by the Northwestern from Dakota. This would be per kilowatt hour.

Q. That was figured on gross, wasn't it? Gross kilowatt hours sold by the Dakota companies to the defendant?

A. Yes.

Q. And sold by the defendant to the Dakota companies?

A. Yes.

Q. Calling your attention to Exhibit 69. You spoke of an error in computation? A. Yes.

Q. On what page is that? A. Page 3.

Q. Of Exhibit 69? A. Yes.

Q. That computation has to do with the interconnections between Northern Power & Light Co. and North Dakota Power & Light Co., does it not? A. Yes.

Q. And those companies were both part of the Dakota companies, weren't they?

A. That is right. It sets up a false figure of the whole structure.

Q. But that deals with the northern or Dakota companies, doesn't it? A. Oh, yes, that is right.

Mr. Royhl: That is all.

Redirect Examination: by Mr. Benson.

Q. On that exhibit you just had in your hand. I think Mr. Gazin made an omission of some figures, didn't he, in arriving at his statement that there was a profit of $2700, on energy at 3.5 mills?

Mr. Woods: Objected to as being immaterial; relating only to North Dakota Power & Light Co. and Northern Power & Light Co.; not proper redirect examination.

Mr. Benson: There is another error in there.

The Court: If there is any error material to the issues and you want to show it on redirect examination, go ahead. If it is not material, we don't want to waste the time.

A. It was not my opinion. There was an error of judgment in this report. This report contemplating that power, generated at [Buelah], could be delivered at Keldron and Driscoll, without sustaining any line loss.

Q. That is all between the Northern Power & Light Co. and North Dakota Power & Light Co.? A. Yes.

The Court: I don't think that is material here.

Mr. Benson: That is all.

Mr. Fellows: Plaintiff rests.

Mr. Stafford At the conclusion of plaintiff's case, the plaintiff having rested, the defendant now moves for judgment in its favor, dismissing the action, on each of the following grounds:

(1) The plaintiff has failed to prove the essential allegations contained in each of its several causes of action, which I will take up in a series.

As to the first cause of action it is an issue and the plaintiff must prove under Paragraph 13, that the $1666.66 monthly charge, provided in the 1936 contract was fixed by the common officers and directors, and that the defendant, unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully, caused Northern Power & Light Co. to pay these sums. There is no proof at all in this record of any one of these charges. There is no proof that the defendant company did anything in connection with this contract or the charges therein contained. On the contrary the proof does show this to be the record: the 1936 contract was approved by the directors of Northern Power & Light Co. on October 7, 1936, at a meeting of that board, at which they rescinded a resolution adopted April 22, 1936, which approved a prior form of contract. That is Plaintiff's Exhibit 61. The minutes of April 22 are also put in evidence as Plaintiff's Exhibit 61-A. They show, as a part of that exhibit, the original consent and waiver to holding of

that meeting, and which was still in his file and possession. The plaintiff has offered parts from Mr. White's deposition, but from the other witnesses in Chicago, I submit there is enough in the parts offered, that shows Mr. White was with United Public Utilities; that these Dakota companies at all times from 1935 were subsidiaries of that UPU. The plaintiff also put in another exhibit, No. 92, the minutes of the Montana Dakota board of directors, held October 2, 1945, that show that the plaintiff acquired from the UPU all of the stock of Dakota Public Service Co. Therefore, they are the successor to the stock interest of UPU and White. There is enough in those proofs to show full knowledge in this case and ratification by UPU as to these matters, all of which is, of course, binding on the plaintiff.

(2) The minutes of April 23, the minute book which is offered in Plaintiff's Exhibit 82, shows that the consent, photostatic copy of which is in Plaintiff's Exhibit 61-A, is missing from that book. Of course it is missing, because it was not put there. At all times it reposed in Mr. White's files in Chicago. It was never returned. Thus there was no meeting on April 22, at all, because S. W. White, the fifth director, would not agree. Now, there was also put in, when the witness, Elvig, was being examined in connection with these two minutes, the minutes of the annual meeting of the stockholders of the Northern Power & Light Co. held April 21, 1936, and that is Defendant's Exhibit 219. I want to call the Court's attention to that meeting. In the first place it was held in Delaware, not out there where these properties are located. The minutes show that all of the stock was held, of the Northern Power & Light Co., was held by the Provident Trust Co., as trustee, for the outstanding securities of UPU, under its bond indenture. The stock of Northern Power & Light Co. was pledged by UPU to secure those bonds. Those minutes show the stock was voted by one of the proxies named by the Provident Trust Co. No connection with that gentleman with any of the matters here in this case or with any of these companies or with any of these individuals. No connection with the defendant company. No connection with any joint office or joint management which we have heard so much about. The

minutes further show that the Provident Trust Co. named in its proxy the Northern Power & Light Co. directors to be elected at that meeting, and, of course, the proxy cast the vote as directed by the Provident Trust Co. He had no discretion. There is no proof in this record at all of any connection between the Provident Trust Co. and the defendant company. It is obvious, therefore, there is no domination at all by the defendant, improper or otherwise. The Northern Power & Light Co. directors answer to another, namely, the stockholder which held all of the stock of that company, and that stockholder, I submit, is a total stranger to these proceedings. Therefore, under all of the circumstances, there being no domination by the defendant of any kind shown, there being no proof at all of any cause of action by the plaintiff as alleged in the complaint, the plaintiff has not made out any case.

There is also a charge in the first cause of action, and plaintiff must prove, under Paragraph 13, that the monthly charge of 1666.66 was without consideration. There is certainly no proof of this. On the contrary, the plaintiff's own witness, Mr. Helmick, who has just left the stand, testified Northern Power & Light Co. required these connections if they had not built additional capacity which would cost a quarter of a million dollars, and which, at 12%. would amount to $30,000.00 charges per year. There was certainly ample consideration for the charges in that contract. The testimony of this witness shows absolute necessity existed, in the figures for additional generating capacity and transmission facilities.

Now, in the first cause there is also an issue plaintiff must prove, under Paragraph 13, that the charges are unjust, unreasonable and unlawful in their entirety. There is no proof submitted of any of these allegations. Again the same witness, Mr. Helmick, testified. His testimony shows that the interconnections were vital to Northern Power & Light Co., and all that proves is the parties made a contract and the rates agreed therein were paid. That is all this record shows, and plaintiff's own evidence shows that these charges were fair.

Also that first cause of action puts in issue and the plaintiff must prove under Paragraph 10, that the interconnection facilities were built for the sole benefit of the

defendant. There is not a bit of proof of that allegation. There is only the pure inference which they seek to draw from the fact that the defendant, early in 1929, was interested in Pierre. But the plaintiff's own proof shows the defendant never went to Pierre, and on the original work order, they built around the corner at Blunt, away up north to Gettysburg, which certainly was solely for Northern Power & Light Co., which was short of generating capacity. Furthermore, there is nothing, even of this phantom character with reference to Gettysburg substation, Aberdeen substation, Aberdeen Barnard line, Aberdeen Ipswich line, and it is around these parts of the interconnection, and particularly the last three, that all of the plaintiff's expert testimony has been centered. The witness, Helmick, on the contrary, shows that the interconnection was absolutely essential to protect Northern Power & Light Co., which was weak, and if it were not maintained, Northern Power & Light Co. would have to invest a quarter of a million dollars and incur annual expense of 12% or $30,000 a year. It is perfectly apparent the interconnections [benefitted] the Northern Power & Light Co. and not the defendant.

Also in the first cause of action that have been put in issue and the plaintiff must prove, also under Paragraph 13, that the defendant did not comply with Section 205-D of the Federal Power Act in filing the 1936 contract with the Federal Power Commission. The plaintiff's proof, however, is exactly to the contrary. First there is no change in any rate provided in that contract over any rate previously filed with the Federal Power Commission. Section 205-D, on its face, applies only where there is such a change. The witness, Elvig, went on the stand and testified that the 5 mill charge, which is one of the two charges in the 1936 contract, he testified that 5 mill rate continued unchanged from January 1, 1933, all of the way down to October 19, 1945. There is no change there on the plaintiff's own proof. The $20,000 charge, $1666.66 per month, was established by this contract for the first time. So there could not be any change in that. I fail to see how Section 205-D could possibly have any application. 205-C is the section requiring filing in the first instance. And there is no charge or any proof of any violation of that section, and I don't under-

stand plaintiff so contends. Even if there were any change, plaintiff's proof again shows that the Federal Power Commission, as permitted under Section 205-D of the Federal Power Act, entered an order permitting that contract to take effect after other than thirty days after its filing date, namely, retroactively to January 1, 1936. That order is in Plaintiff's Exhibit 49, and that exhibit is a copy, among other things, of the order as embodied in the minutes themselves, of the Federal Power Commission.

So much for the first cause of action.

Now, the second cause of action. There is an issue under that cause of action and plaintiff must prove under Paragraph 2 that the defendant caused the North Dakota Power & Light Co. to generate energy during the period of September 1, 1935 to July 1, 1939, and transmit that energy to Northern Power & Light Co. And further that the defendant company caused the Northern Power & Light Co. to transmit that same energy to itself. It is also put in issue and plaintiff must prove under that same paragraph that the same defendant company, Northwestern Public Service Co., caused the Northern Power & Light Co. to pay to North Dakota Power & Light Co. for the energy between North Dakota Power & Light Co. and Northern Power & Light Co., at 5 mills. It is also put in issue in the same cause of action in Paragraph 3, that the officers and directors of the defendant company, who were also officers and directors of Northern Power & Light Co., caused the Northern Power & Light Co. to deliver that same energy to defendant. There is no proof of any of those in this record. There is no proof that the defendant company caused anybody to do anything. There is no proof that the officers and directors of the defendant company caused these things to be done. The minute books show that these directors and officers were elected by the same Provident Trust Co., as trustee; that UPU to be the beneficial owner in 1936, 1937, 1938 and 1939, each of the years for that entire period. They are completely separate from the defendant company. The UPU corporation and also Provident Trust Co. There is no proof in this record of any connection between either of those companies, who were sole stockholders, and the defendant company. The directors were elected by them and they reported to them, and if there was

any fiduciary duty owing, it obviously was due and owing to the sole stockholder which owned this company.

There is also an issue plaintiff must prove under that same paragraph, that the just and reasonable value of the energy referred to in this contract, to-wit: $94,184.86, computed at 7.5 mills per kilowatt hour. There is no proof of any such value in this record at all.

It is also in issue and plaintiff must prove this $2751.90 paid by Northern Power & Light Co. to North Dakota Power & Light Co. was unjust, unreasonable and unlawfully low. There is no proof of any of this in the record, and therefore, what Northern Power & Light Co. paid to North Dakota Power & Light Co., it seems to us, was entirely immaterial. It would only be money taken from the left pocket and put in the right pocket, for both of these companies are wholly owned by UPU through the entire period.

The third cause of action. This is with reference to the 1938 contract. It is an issue that plaintiff must prove under Paragraph 3, that the defendant caused this 1938 contract to be executed by both North Dakota Power & Light Co. and Northern Power & Light Co. There is no proof here again of anything done by defendant's officers and directors, except the bare signing of the contract. We repeat here each of the reasons stated in the first cause of action to show a total failure of proof of any of these allegations that the defendant or its officers or directors caused these things to be done. In addition we refer the Court to the fact that the minute books, which are all over there in Plaintiff's Exhibit 82, show that there were no meetings by any of these board of directors, either North Dakota Power & Light Co., Northern Power & Light Co. or Dakota Public Service Co., regarding this 1938 contract, or, for that matter, either on the 1939 contract or the 1941 contract, or the 1943 amendment. There being no meetings, it is difficult to see what those directors had to do with those contracts. There is only the bare fact the officers held office in each of these companies which were parties to the contract, and signed them. Certainly this falls far short of any domination or control of these companies by the defendant company.

Again the directors were chosen through 1936 down through to 1945, by the Provident Trust Co. What we have

said under the first cause of action in that connection applies equally here.

There is also an issue in the third cause of action and plaintiff must prove that the 1938 contract was entered into for the defendant's benefit, and to the detriment of Northern Power & Light Co. and North Dakota Power & Light Co. In that connection the witness, Helmick, again testified Northern Power & Light Co. was short at least a thousand KW in 1938, and another 500 KW in 1941, and required some 250 thousand dollars to protect the southeast end of the system. Thus plaintiff's own witness refutes this charge.

It is also in issue and plaintiff must prove in this cause of action, Paragraph 4, that the directors and officers fixed the $13.20 charge and that the defendant fraudulently, unreasonably, unfairly and unlawfully caused the Northern Power & Light Co. to pay that amount. Again there is no proof at all of this. The directors didn't even act on that contract, and there is nothing at all in this record as to either the defendant or the officers or directors requiring or causing payment of this sum of money. There is also an issue under that same paragraph 4, and plaintiff must prove thereunder that the rate of $13.20 was unjust, unreasonable and unlawful. I submit there has been no proof offered on that point in this record.

Again they charge the 1938 contract, just like the 1936 contract, was filed with the Federal Power Commission, and contrary to the requirements and provisions of Section 205-D. That is the same part and relates only to changes. The 1938 contract is what they are talking about. That contract established for the first time this rate of $13.20, and it is the only rate contained in that contract. How it can possibly be said to be a change in a pre-existing rate on file with the Federal Power Commission is beyond me. There being no change, of course Section 205-D had no application. It was initial rate filed for the first time and was filed under 205-C. But here again, plaintiff's own case shows that the Commission did enter an order permitting it to take retroactive effect, January 1, 1938, which the commission had a right to do under Section 205-D, and that order is embodied in the minutes of the Commission,

which also are contained in that same Plaintiff's Exhibit 49.

There is also an issue in this same third cause of action and under Paragraph 6. The plaintiff must prove thereunder a charge that this contract was a scheme, plan or device by the defendant and its officers for offsetting charges for energy sold to defendant. There is no proof at all of any conspiracy, any scheme, any plan, any coercion, any correspondence, anything that would go to show any intent or design of that character on the part of the defendant. This in addition to all of the other shortcomings in the proof to support the charges that the defendant caused these things to be done. We only have the bare allegations supported by statements of counsel from time to time during the presentation of the case.

The fourth and fifth causes of action. These involve the two 1939 contracts. So far as they repeat the charges as to the 1936 and 1938 contracts, and the same allegations are repeated in part, we repeat as to this charge all of the grounds which I have stated in support of this motion with reference to the first and third causes of action. These contracts are the same as the 1936 and 1938 contracts except for the changes necessary to reflect the merger, July 1, 1939, of Northern Power & Light Co. into North Dakota Power & Light Co., and resultant change of name of the survivor corporation to Dakota Public Service Co.

Therefore, we repeat as to all of the charges in the fourth and fifth causes of action concerning the two 1939 contracts and the payments made thereunder, the value of energy delivered thereon, which is similar to the allegations made in the first and third cause of action, the 1936 and 1938 contracts respectively, each of the grounds and reasons stated in this motion to the first and third causes of action.

Now, there is separately in issue under Paragraph 6 of the fourth cause of action and again in paragraph 5 of the fifth cause of action, and plaintiff must prove these allegations, that without complying with Section 205-D our contracts were filed with the Federal Power Commission. It suffices to say that Mr. Elvig and Mr. Helmick each show by their testimony, the 5 mill rate, and the $13.20 and $20,000, charge were not changed throughout this entire period. There being no change in those rates it is

difficult to perceive how Section 205-D, which relates only to changes in existing rates, as previously filed, can have any application. Mr. Benson himself insisted in argument there was no change in the 1939 contract.

That brings us to the sixth cause of action. As to that cause of action, again there are repetitious allegations as to the 1936, 1938 contracts and 1939 contract, and the operations thereunder. So far as those charges are repeated with reference to those prior contracts we again repeat as a part of the motion addressed to the allegations as contained in the sixth cause of action, each of the grounds and reasons stated as to the first, second, third, fourth and fifth causes of action so far as those allegations relate to those prior contracts or make similar charges as to the 1941 contract and the 1943 amendment thereto. For the same reasons we submit there has been no proof of any such allegations with reference to that contract or the 1943 amendment.

In addition there is no proof that defendant did any thing at all concerning this contract. That is, the defendant company. Or that the defendant company caused anything to be done, in either the execution of that contract, negotiations of that contract, performance of that contract, or in the generation or transmission of energy thereunder during the period embraced in the sixth cause of action, being July 1, 1941 through October 19, 1945. There isn't a shred of evidence to support any of those allegations.

In the sixth cause of action there is also an issue that plaintiff must prove under Paragraph 5 of that cause of action, that this 1941 contract was also filed with the Federal Power Commission and again without complying with Section 205-D. Once more I call the Court's attention to the testimony of Mr. Elvig and Mr. Helmick, plaintiff's wtinesses, that these charges continued uninterruptedly, without change at any point. Their own exhibits show it. Therefore, there being no change in the rates or charges provided in the contracts, again Section 205-D, which relates only to changes, has no application. And here again we have in the evidence, this time Plaintiff's Exhibit 50, an order of the Federal Power Commission, ordered in the minutes of the Commission, which permitted the filing of

the 1941 contract, and its taking effect retroactively as of July 1, 194[illegible].

As to the 1943 amendment, I don't understand there is any such charge in the complaint and, of course, on its face, the amendment is a two page document which is attached to the final part of Exhibit F. It was April, 1943, to take effect thirty days thereafter.

That brings us to the new causes of action which were added at the beginning of this trial, 7, 8, 9 and 10. 7 and 8, the 1936 contract and 9 and 10, the 1939 contract. Both I think are identical and relate to allocation of joint management expenses. Of course, in this cause of action the same pattern is followed, that the defendant caused the North Dakota Power & Light Co. and Northern Power & Light Co., in 1936, and the Dakota Public Service Co. in 1939, to enter into these contracts, and again that the defendant caused those two companies to make payments thereunder. There is no proof in this record of that. There is no proof that the defendant caused the contracts to be executed or caused any payments to be made thereunder or caused any of the other things alleged in this cause of action to be done. They stand exactly on the same plane, and so far as the allegations that the defendant caused these things to be done, as do all of the other allegations in the complaint. The only proof is two contracts were executed by the companies named. It is admitted in the answer, and that the amounts were paid as shown in the answer to the interrogatories. This, we submit, falls far short of sustaining the essential allegations in these four causes of action.

Now, as a separate ground in support of this motion, so far as any proof offered by the plaintiff relates to or bears upon allegations in any of the ten causes of action, relating to reasonableness or unreasonableness, justice or injustice, fairness or unfairness, of any of the rates and charges provided for in all these contracts, the proof is in itself outside of the province of the case for the reason that such matters are legislative only. They go to determine the rates and charges for utility matters and they cannot be inquired into or determined by the Court.

I respectfully urge in this connection and in support of this motion all of the reasons which were assigned and in

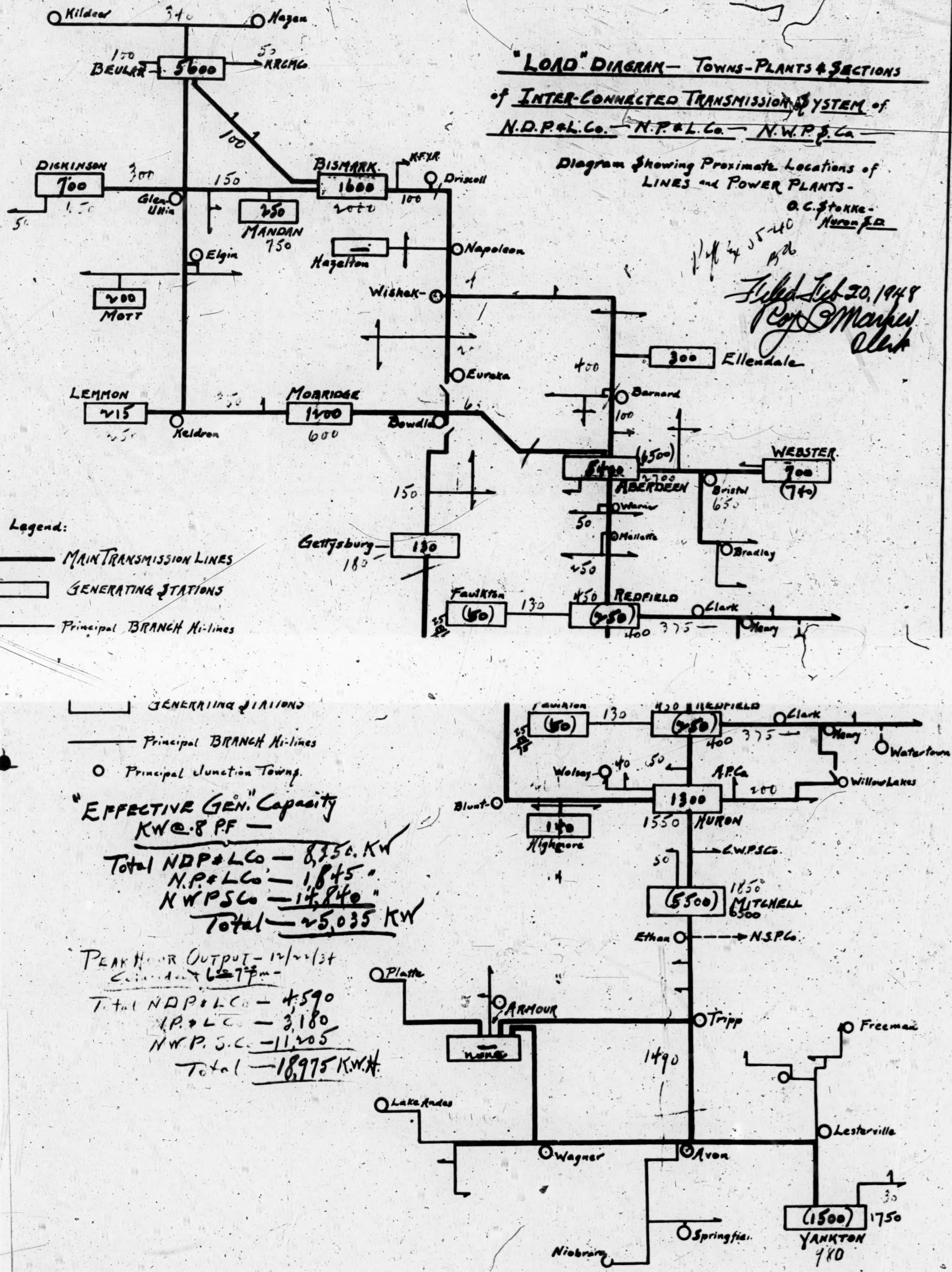
865

"LOAD" DIAGRAM — TOWNS-PLANTS & SECTIONS of INTER-CONNECTED TRANSMISSION SYSTEM of N.D.P.&L.Co. — N.P.&L.Co. — N.W.P.S.Co —

Diagram Showing Proximate Locations of LINES and POWER PLANTS -

O.C. Stokke - Huron S.D.

Filed Feb 20, 1948
Roy D. Marker
Clerk



Legend:

- MAIN TRANSMISSION LINES
- GENERATING STATIONS
- Principal BRANCH Hi-lines
- Principal Junction Towns.

"EFFECTIVE GEN." Capacity KW @ .8 P.F. —

Total NDP&LCo — 8,350. KW
N.P.&L.Co — 1,845 "
N.W.P.S.Co — 14,840 "
Total — 25,035 KW

PEAK HOUR OUTPUT — 12/22/34
Central 6 — 7 pm —

Total NDP&LCo — 4,590
N.P.&L.Co — 3,180
N.W.P.S.Co — 11,205
Total — 18,975 K.W.H.

727C

869

Plaintiff's Exhibit 55-42 869

May-23-1936

"LOAD" DIAGRAM— TOWNS-PLANTS & SECTIONS

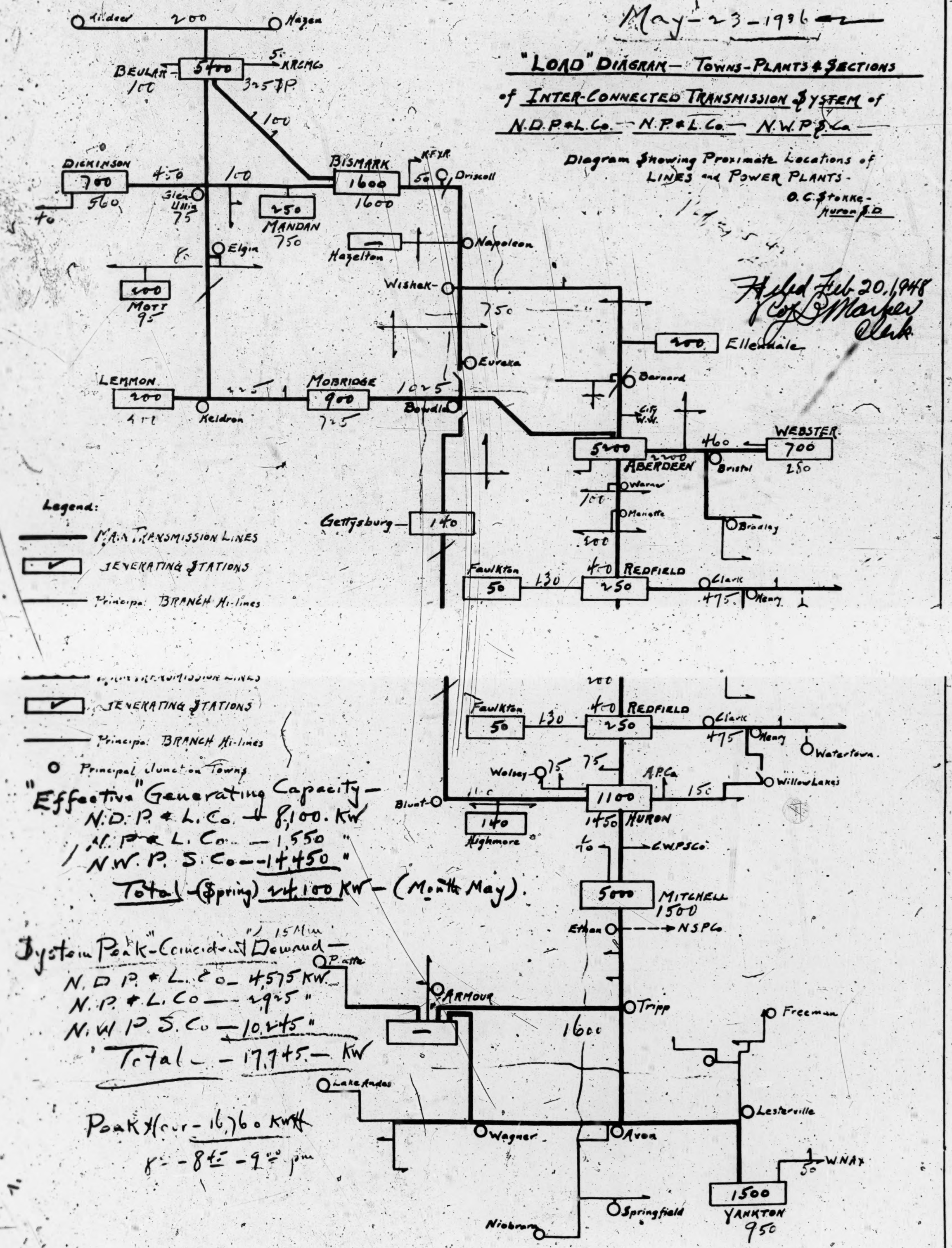
of INTER-CONNECTED TRANSMISSION SYSTEM of

N.D.P.&L.Co.— N.P.&L.Co.— N.W.P.S.Co.—

Diagram Showing Proximate Locations of LINES and POWER PLANTS-

O.C. Stokke- Huron S.D.

Filed Feb 20, 1948
Cora B. Marker
Clerk.



"Effective" Generating Capacity—
N.D.P.&L.Co. — 8,100. KW
M.P.&L.Co. — 1,550 "
N.W.P.S.Co. — 14,450 "
Total (Spring) 24,100 KW — (Months May).

"System Peak"-Coincident Demand— (15 Min.)
N.D.P.&L.Co— 4,575 KW.
N.P.&L.Co — 2,925 "
N.W.P.S.Co — 10,245 "
Total — 17,745 — KW

Peak Hour - 16,160 KWH
8:- 8:45 - 9:00 pm

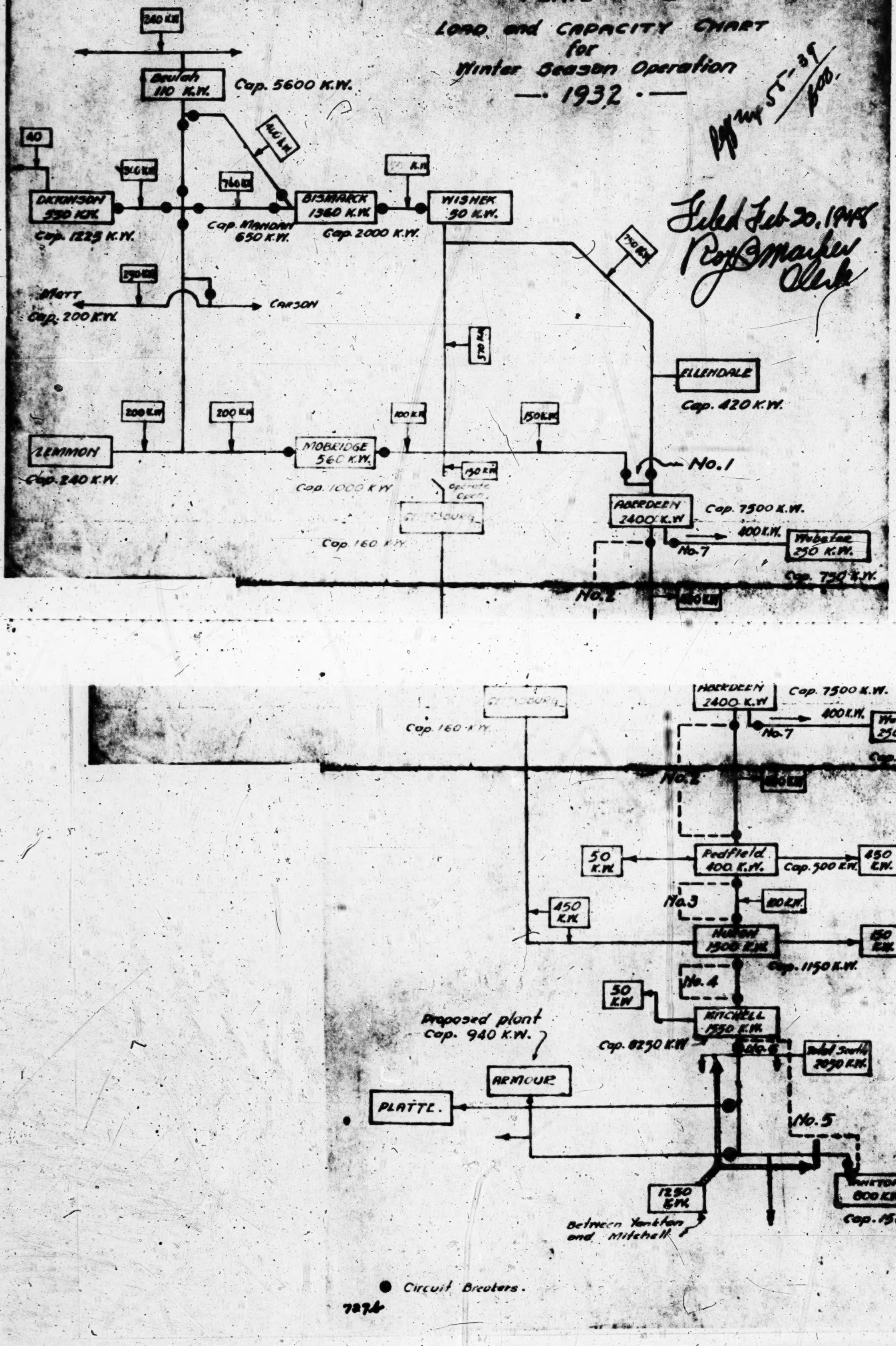
7272

863

PLATE NO. 1

LOAD and CAPACITY CHART for Winter Season Operation — 1932 —

Filed Feb 20, 1933
Roy D. Marker
Clerk



● Circuit Breakers.

7274

Plaintiff's Exhibit 55-39.

871

Plaintiff's Exhibit 55-43. 871

Sandstead

Actual Distibution of Load
Dec 21, 1936
5 45 p to 6 00 p

"LOAD" DIAGRAM — TOWNS - PLANTS & SECTIONS

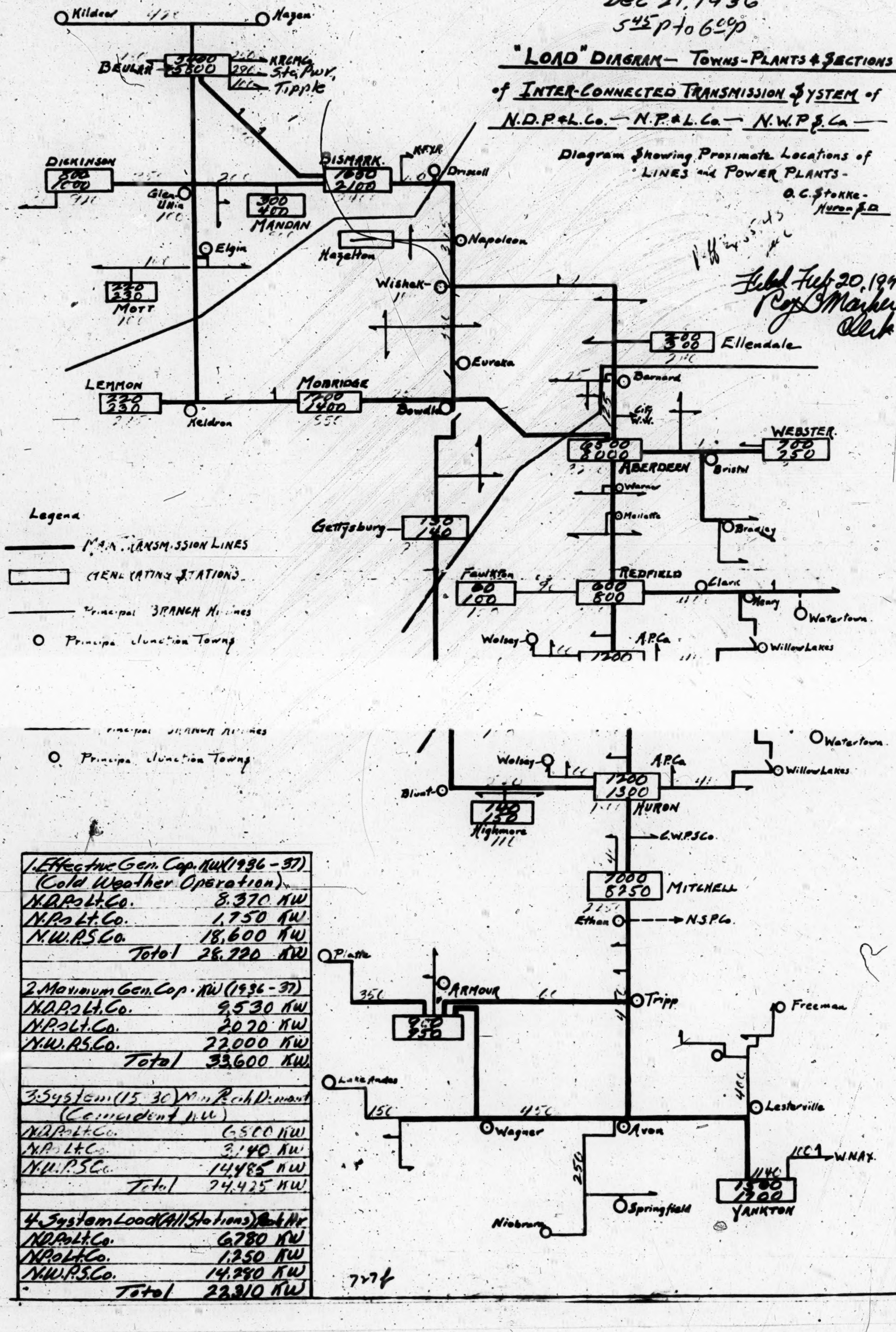
of INTER-CONNECTED TRANSMISSION SYSTEM of

N.D.P.&L.Co. — N.P.&L.Co. — N.W.P.S.Co.

Diagram Showing Proximate Locations of LINES and POWER PLANTS -

O.C. Stokke - Huron S.D.

Filed Feb 20, 1948
Roy D. Marker
Clerk



1. Effective Gen. Cap. KW (1936-37) (Cold Weather Operation)	
N.D.P.&L.Co.	8,370 KW
N.P.&L.Co.	1,750 KW
N.W.P.S.Co.	18,600 KW
Total	28,720 KW
2. Maximum Gen. Cap. KW (1936-37)	
N.D.P.&L.Co.	9,530 KW
N.P.&L.Co.	2,070 KW
N.W.P.S.Co.	22,000 KW
Total	33,600 KW
3. System (15 30) Min. Peak Demand (Coincident KW)	
N.D.P.&L.Co.	6,500 KW
N.P.&L.Co.	3,140 KW
N.W.P.S.Co.	14,485 KW
Total	24,425 KW
4. System Load (All Stations) Peak Hr.	
N.D.P.&L.Co.	6780 KW
N.P.&L.Co.	1,250 KW
N.W.P.S.Co.	14,280 KW
Total	22,310 KW

777

865 (PART)

12/22/34

1934 Peak Hour Output
Inter-System
N & S. Dak

(1934) & "EFFECTIVE" Cap.
all Stations

867

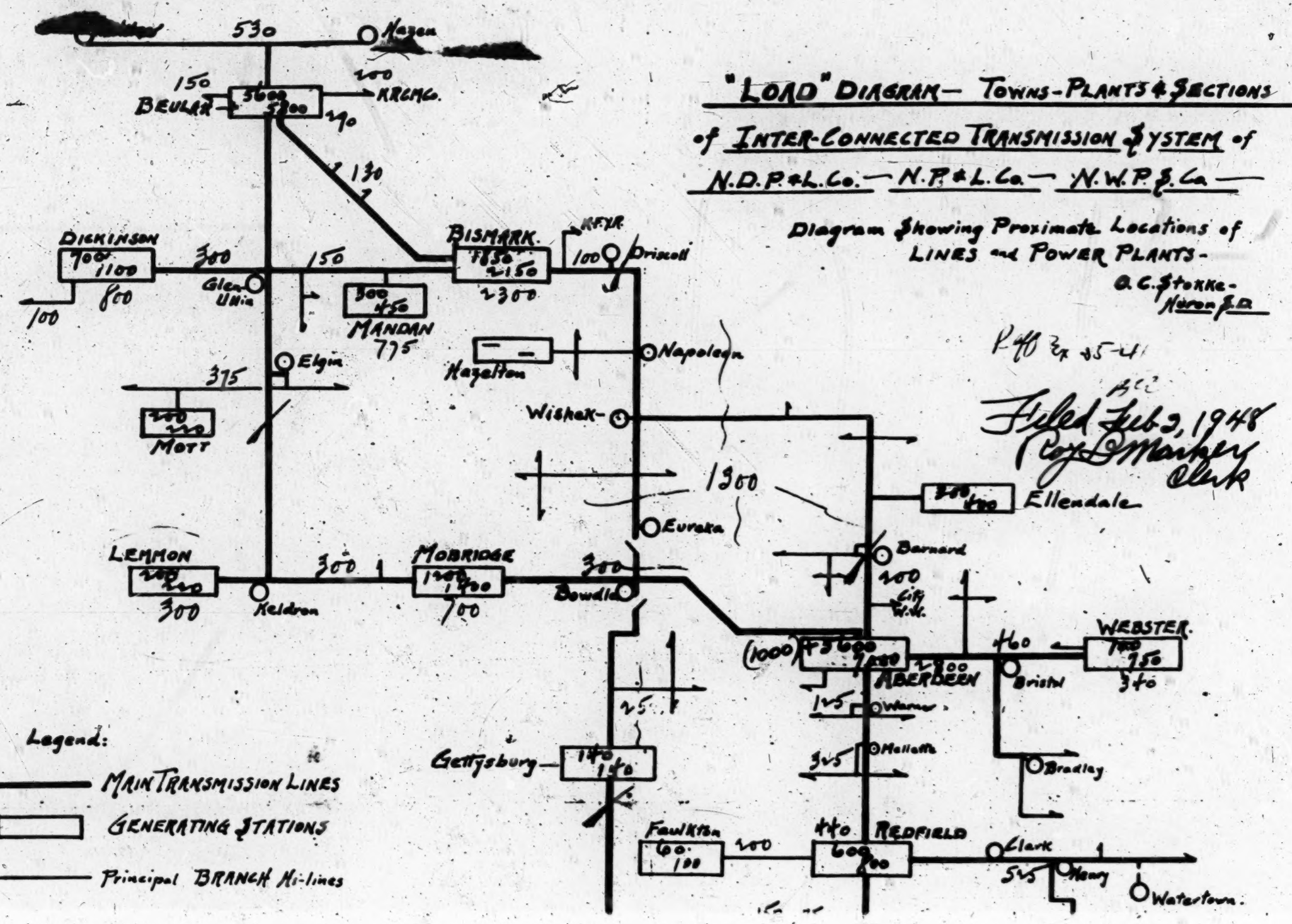
"LOAD" DIAGRAM — TOWNS - PLANTS & SECTIONS of INTER-CONNECTED TRANSMISSION SYSTEM of N.D.P.&L.Co. — N.P.&L.Co. — N.W.P.S.Co.

Diagram Showing Proximate Locations of LINES and POWER PLANTS -

O.C. Stokke - Huron S.D.

P-40 Ex 55-41

Filed Feb 2, 1948
Roy L. Markey
Clerk



Principal BRANCH Hi-lines

Principal Junction Towns

(1) "EFFECTIVE" Generating Capacity - KW - Cold Weather Operation - 1936

N.D.P.&L.Co.	8650. KW	10,790 KW
N.P.&L.Co.	1840 "	
N.W.P.S.Co.	17100 "	
TOTAL	27,590 KW	

(2) "MAXIMUM" Gen. Capac. - KW - 1936

N.D.P.&L.Co.	9720. KW	
N.P.&L.Co.	2160 "	11,880 KW
N.W.P.S.Co.	20200 "	
TOTAL	32,080 KW.	

* Cannot maintain or operate this load on the interconnected system.

(3) SYSTEM, 15 30 Min PEAK DEMAND Coincident

	1935 actual	1936 Est
N.D.P.&L.Co.	6285. KW	6600 KW
N.P.&L.Co.	3150 "	3800 "
N.W.P.S.Co.	12950 "	14000 "
TOTAL	22285 KW	24400 KW

(4) SYSTEM PEAK HOUR - KWH OUTPUT Demand - Total All Stations — 21,150 KWH — 1935

by U.P.U. Plants - 8940. KWH. by NWPSCo. - 12,210. KWH

727d

915-917

Property Value as of 7-1-41

Wishek-Bowdle

$$102{,}000 - 3.91\ (3.33 \times {}^{13300}_{10200}) = 88{,}700$$

Selby-Bowdle-Ipswich

$$42{,}400 - .5\ (3.33 \times {}^{700}_{42{,}400}) \qquad 41{,}700$$

130,400

as of Jan. 1-42

Wishek-Bowdle

$$102{,}000 - 4.41\ (3.33 \times {}^{15000}_{102{,}000}) = 87{,}000$$

Selby-Bowdle-Ipswich

$$42{,}400 - 1.0\ (3.33 \times {}^{1400}_{42{,}400}) = 41{,}000$$

Bowdel Substation

$$37{,}000 - 0.5\ (3.33 \times {}^{600}_{37{,}000}) = 36{,}400$$

164,400

Jan. 1-43

$$164{,}000 - (3.33 \times {}^{6050}_{181{,}400}) = 158{,}350$$

Jan. 1-44

$$158{,}350 - 6050 = 152{,}300$$

Jan. 1-45

$$152{,}300 - 6050 = 146{,}250$$

915

Plaintiff's Exhibit 95.

867 (PART)

Inter Command System
1935
O.C. Stokke

POWER COSTS

7-1-41 to 10-19-45 = 4.30 years

	Beulah	Bismarck	Mobridge
6 mo.-41	19,684,000	9,376,000	1,704,000
42	38,315,000	21,073,000	3,447,000
43	41,247,000	18,485,000	3,584,000
44	39,290,000	20,113,000	4,905,000
to 10-1-45	33,925,000	16,598,000	5,121,000
277,367,000	172,961,000	85,645,000	18,761,000
%	62.2	30.9	6.9
Use	62	31	7

Average Production Cost 4.98 mills

Net KWH (10,400,000 1 yr) 44,798,846

F.C.

Int. .03 x 130,400		3,910
Dep KH .03 x 144,400		4,220
7-1-41	.06 x 164,400	9,864
1-1-42	.06 x 181,400	10,884
1-1-42	.06 x 158,350	9,500
1-1-43	.06 x 181,400	10,884
43	.06 x 152,300	9,150
44	.06 x 181,400	10,884
.8	292/365 x .06 x 146,250	7,020
.8	292/365 x .06 x 181,400	8,700
		85,016
SPLIT F.C.	50/50	42,508

F.C. ∫ KWH

$$\frac{42,508}{44,798,846} = 0.95 \text{ mills}$$

Production Cost = 4.98 Mills

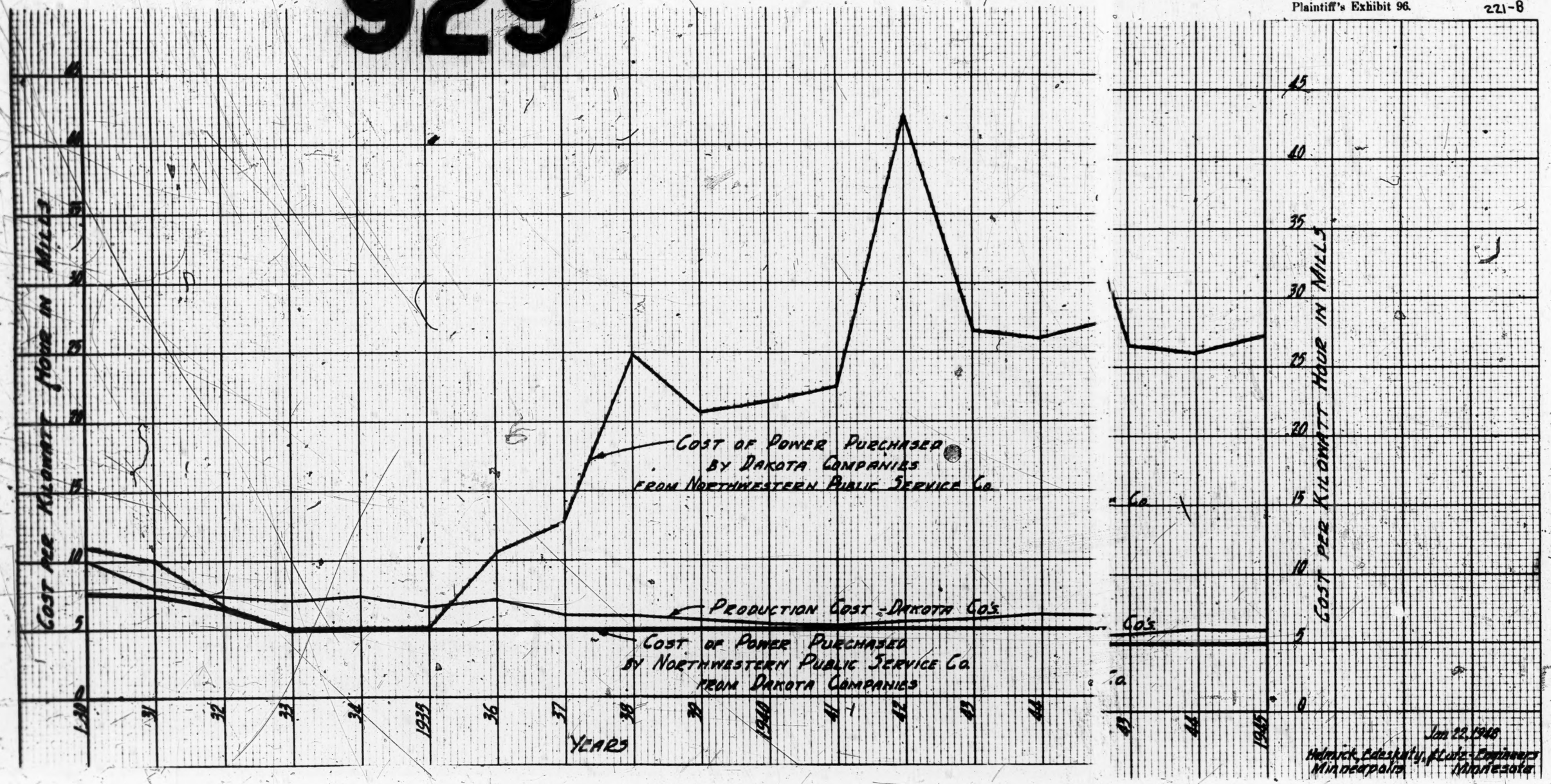
Line Loss 33% = $\frac{4.98}{65} - 4.98$ = 2.68 Mills

Cost @ Aberdeen 8.61

917

Plaintiff's Exhibit 95.

Plaintiff's Exhibit 96. 221-8



869 (PART)

869

May-23-1936

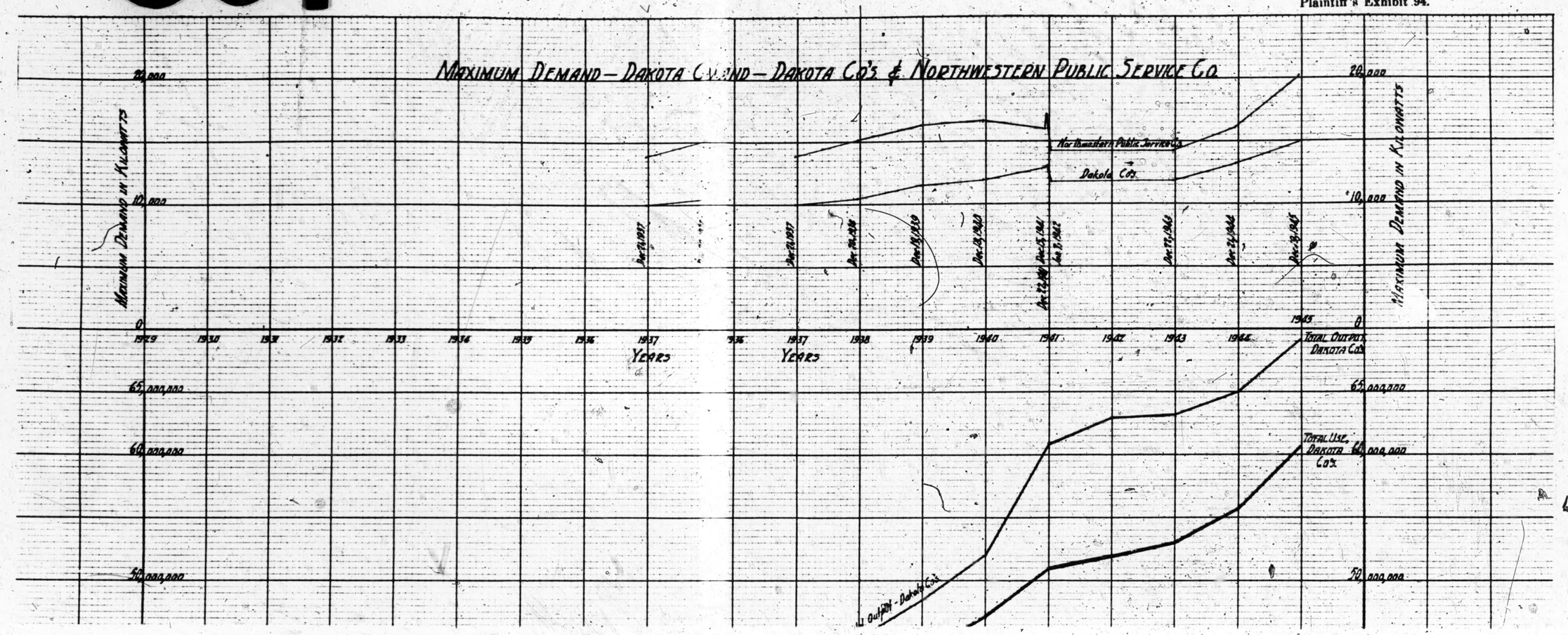
871 (PART)

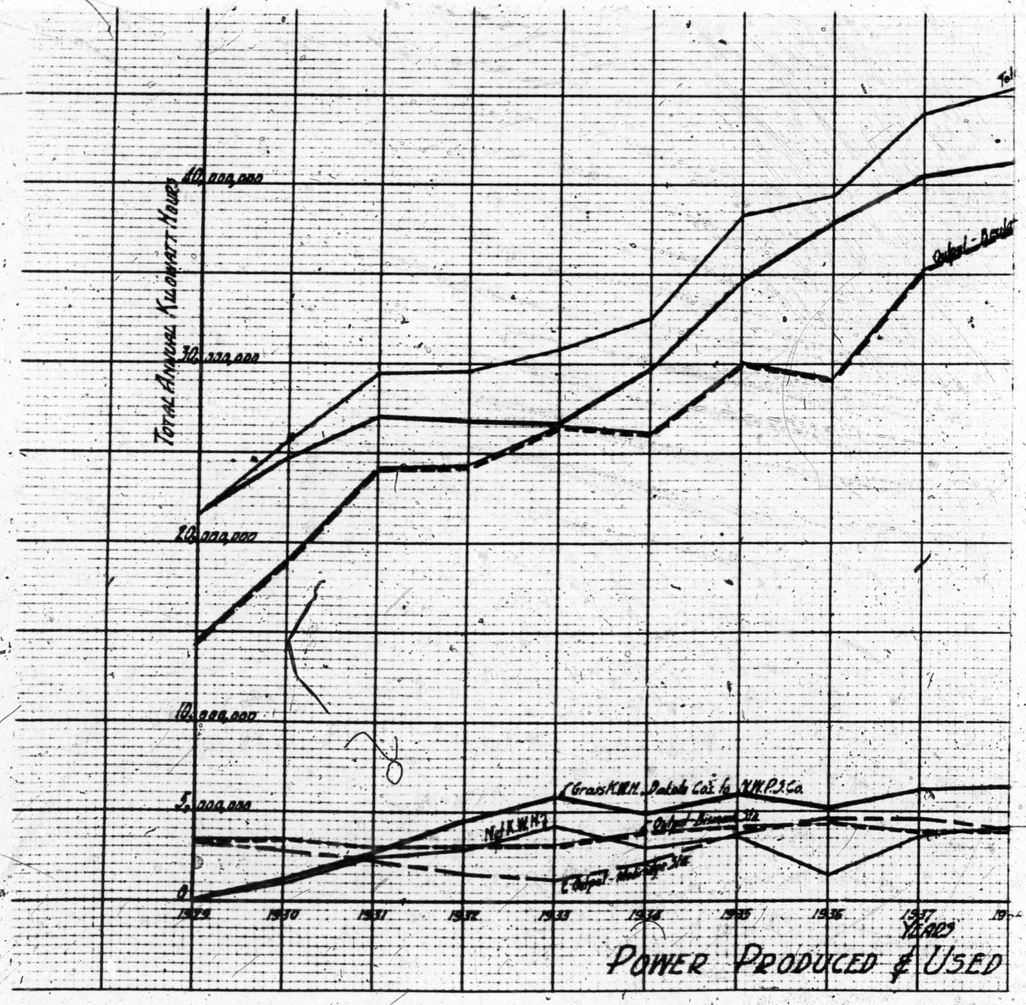
1936 Dec

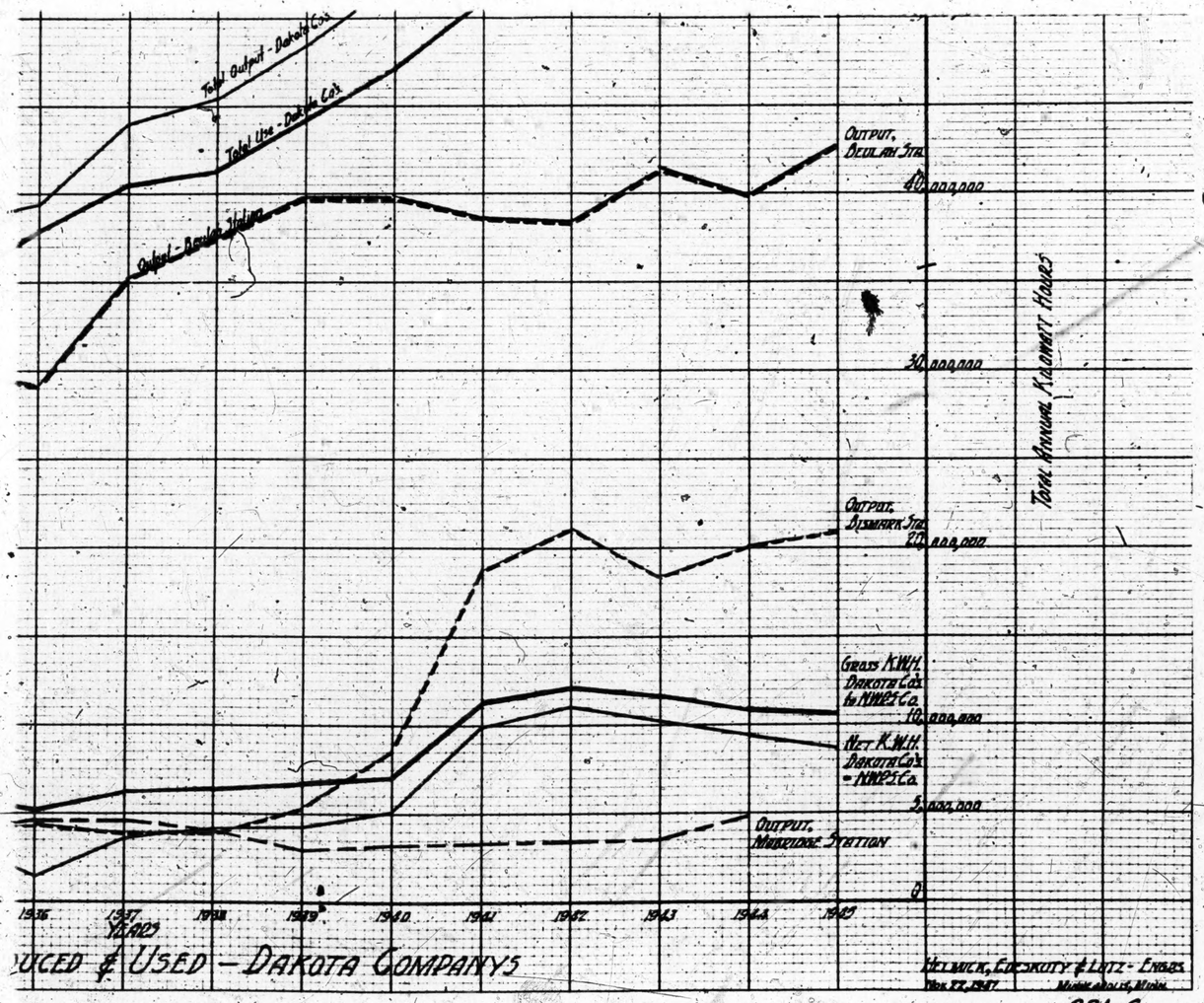
891

Plaintiff's Exhibit 94.

Maximum Demand – Dakota Co's and – Dakota Co's & Northwestern Public Service Co.







Helmick, Gieskieff & Lentz - Engrs.
Nov 27, 1947
Minneapolis, Minn.

221-A

the authorities cited in the briefs which were filed on behalf of the defendant on the motion to dismiss, both made in this case and in the companion case, No. 262.

And separately and last, but not least, we urge that this case be dismissed now for the reason that this Court is without jurisdiction of the subject matter of the action. That lack of jurisdiction is raised as a special defense in the answer. It is still before the Court. It is the second defense and, of course, that matter is available at any time. We again urge the Court to dismiss the action as not one within the official jurisdiction of this court, and we repeat in support of the motion each of the reasons and each of the grounds heretofore urged on motions to dismiss filed both in this case and in action No. 262.

There being no showing, Your Honor, at all of any domination by the defendant, there being no proof at all that the defendant company caused any of these things complained of in any of these causes of action, we feel the plaintiff has failed to prove its case.

Therefore, for this and for each and all of the other reasons which I have enumerated in making this motion, the defendant respectfully moves for judgment of dismissal of the entire action now, at the close of Plaintiff's case.

The Court: The motion is denied.

Mr. Royhl: Defendant offers in evidence the deposition of C. J. STRIKE, taken on stipulation in the city of Boise, Idaho, on May 6, 1947, before L. G. Hamilton, Notary Public, as follows:

A portion of the deposition of C. J. Strike is omitted because it appears in plaintiff's case from page 428, line 8, to page 433, line 37 from the bottom, of the record herein.

Q. Was there some public relations problems on the part of these North Dakota Companies that were more or less acute at that time?

A. There were a number of problems on the Northern Power and Light System, which arose largely from unreliable service. That applied at Ellendale, Eureka and Gettysburg, the three that I was most familiar with, because they were adjacent to the Northwestern Public Service Company's property, and naturally we were quite closely in contact with the public relations situation.

Q. Following the survey and your investigation, as you have related, of the operating companies, what was done with the physical property of the North Dakota operating company?

A. You say North Dakota operating companies—do you refer to the North Dakota Power and Light?

Q. Yes.

A. May I merely state in my own words the chronological thinking that prompted the program we followed, because there isn't any one particular thing that I could answer on, other than to tell you what we found the situation to be, and the program which we inaugurated, which was carried out over a period of quite a few years.

Mr. Benson: I would request that the witness confine himself to the facts, and not to discussions between themselves, that is, other members of his organization, or his holding company.

Q. Well, can you state what conclusion you came to, following this survey, as to what would be done?

A. The conclusion we came to was that the properties of the Northern Power and Light Company were scattered over such a wide area that the location of new generating equipment in any one location couldn't possibly meet the service problems that confronted us. As an example, you had an area [round] Mobridge, you had an area around Gettysburg, and you had an area around Ellendale, and by locating the generating equipment in any one place, you had the problem of transmitting that energy into this far flung system of small towns, and the conclusion was that system service could best be protected by three interconnections—an interconnection with the Northwestern Public Service Company at Gettysburg, which gave a feed into that area, and an interconnection west of Aberdeen, at Ipswich, which gave a feed into that area, and an inter-

connection north of Aberdeen, at Barnard, which fed into the Ellendale area. By that plan, we could give reasonable service over the transmission facilities of the Northern Power and Light, which were not stable for that area. The transmission lines from Steele, North Dakota, south through Wishek, and Eureka, Bowdle, thence south to Gettysburg, and west to Mobridge, was a very light line, poorly constructed, and we had tremendous transmission service problems, and the interconnections that we concluded enabled us to maintain service, where as if we hadn't had the interconnections, we would have been confronted with the rebuilding of our main bone transmission lines from the North Dakota Power and Light System. I might state there that the basic source of power for the Northern Power and Light was the North Dakota Power and Light System.

Q. In other words, the Northern Company had inadequate generating facilities?

A. At the time we acquired the management, my recollection was that by running everything they had they could about get by—they operated the steam plant at Ellendale, the [deisel] engines at Gettysburg, the steam plant at Mobridge, the [deisel] plant at Lemmon, and there was a [deisel] unit installed at Ipswich at the time we acquired the management of the property.

Q. Was that adequate, in your opinion, generating capacity to protect the service of the company?

A. It was not adequate to protect the service of the company, but more particularly it was not adequate because it was scattered in so many locations, and we had the transmission problem of getting it into these various areas.

Q. Did you eventually construct those interconnections you have spoken of at Ipswich, Gettysburg and Barnard?

A. We eventually made all three connections—the Northwestern Public Service Company financed, built and owned all the three connections.

Q. Did that include substations at Gettysburg and Aberdeen?

A. That included the substations at Gettysburg, Aberdeen, and—well I believe those were the only substations, that is my remembrance.

Q. You say this was constructed and paid for entirely by the defendant company?

A. By the Northwestern Public Service Company.

Q. Approximately, can you state what that cost was?

A. The overall cost, according to my recollection, was, in round figures, $300,000.00, and from that would be deducted a figure which would represent the estimate of a necessary substation at Aberdeen for Northwestern Public Service Company's own service, and my recollection is that the engineers estimated that if it were not for the interconnections between the properties that they could have built a substation which would have served Northwestern Company's own requirements for approximately $20,000.00, which left a net investment chargeable to the interconnection of these properties of approximately $280,000.00. I have in my mind a $287,000.00 figure—I do not know where I get that, but it was approximately $287,000.00, which would be the net investment that Northwestern Public Service Company made, to effect the interconnections I have described at Gettysburg, Ipswich and Barnard.

Q. I take it that you do not pretend at this time to state exactly the cost figure?

A. I couldn't state it exactly. In nine years a good deal gets away from you.

Q. Was there any remuneration to the Northwestern Company, the defendant, through contributions by the North Dakota companies, being the Northern Company and the North Dakota Company, for that service prior to January 1st, 1936?

A. What service do you refer to—the interconnection facilities?

Q. Yes.

A. No, there was no reimbursement to Northwestern Public Service Company during that period.

Q. Ultimately was there a contract entered into between the companies concerning a charge to the Northern Company for the use of those interconnection facilities?

A. Ultimately an agreement was made, which as I recall, was some time in 1936, and made retroactive, as I recall, to the first of the year, 1936, in which the fixed charges, the fixed operating expenses, were apportioned

approximately one-half to the Northwestern Public Service Company and one-half to the Northern Power and Light Company.

Mr. Benson: May I have that answer read?

(Answer repeated by Reporter.)

Q. That is, the formal contract was made some time during the year 1936, and made retroactive to January 1, 1936? A. That is my recollection.

Q. In your opinion was the construction of these interconnection facilities necessary for the preservation of the service of the Northern Company?

Mr. Benson: Just a moment. I would like to ask a question.

By Mr. Benson:

Q. Mr. Strike, are you an engineer?

A. I am not an engineer.

Q. What was your training before you went into the business, in the early days?

A. Practical experience. I was brought up in the electrical business at New Hampton, Iowa. My father was municipal manager for thirty-seven years, and my early training was with him in that operation. I finished high school, and in 1913, I went to work for the Municipal Electric Light Plant at New Hampton, Iowa, until 1915, when I moved to South Dakota, and went into the electrical contracting business.

Mr. Benson: Now will you read the question please?

(Question repeated by Reporter.)

Q. And did you consult with the holding company about this?

A. Well our policies were the result of our own analysis, based upon our own engineering staff, and we made recommendation to the holding company as to our conclusions. We, of course, were operating in a dual capacity, in that we represented the Middle West Utilities Company, in the operation of Northwestern Public Service Company, and represented the United Public Utilities Company, in the operations of the North Dakota Power and Light Com-

pany, the Northern Power and Light Company, and the Knife River Coal Mining Company, and our policy was to analyze and determine what moves should be made, constructionwise or operatingwise, and then to make our recommendation to the holding company if it was something that they should pass upon.

Q. What I am trying to get at is whether the opinion counsel has asked you about was the opinion—did you have such an opinion yourself? A. Very definitely.

Q. Individually you had such an opinion?

A. Based upon the recommendation of my engineering department, and other departments we have in utility practice.

Q. That is what I am trying to get at—this was a combination of you and the engineering department?

A. But I believe that is a correct statement, the conclusions were mine—I think it is a natural sequence, that a general management has its staff of technicians and experts, who advise and make recommendations, the composite of which make up the conclusions of the management, and I have a definite opinion, from a management point of view, based on that background.

Mr. Benson: That is all.

By Mr. Royhl:

Q. What was that opinion? That is, as to the necessity of these interconnections you have mentioned?

A. The opinion was that poor electrical service is expensive if it is free, and the very nature of the Northern Power and Light Company's system, its location, its far-flung transmission system, made it almost mandatory to bring in the interconnections to fortify the service. The service had deteriorated to such a point that municipal ownership was rampant throughout the system, particularly at Eureka, South Dakota, and only by forecasting this interconnecting program, and pleading for time to prove that that would improve the service, were we able to stop the municipal ownership movement, particularly in Eureka and Gettysburg.

Q. I take it that you observed, following that installation, the results in the territory? A. Very definitely.

Q. What were the results so far as the Northern Company were concerned?

A. Each move in interconnection was an additional fortification for service, and when the three interconnections were completed, we were able to feed into the Northern System, and to isolate sections of transmission line which were giving us trouble, letting the North Dakota Power and Light pick up to their side of the isolated location, and the Northwestern Public Service feeding in from the south, with the result that we greatly improved service to all of those communities.

Q. When was that interconnection facility construction completed, approximately?

A. Well it took us the greater part of the year, as I recall, up until some time in 1930, to formulate a definite program, and to actually get construction under way. My recollection is that the interconnections were completed probably in 1931—it might have gone into '32, but '31 would be my best estimate without having the actual data before me.

Q. Those were started shortly after 1921, or in 1921?

A. 1929, you mean?

Q. 1929, yes?

A. They were started as soon as the engineering studies were completed. It was a question of engineering coordinated with economics.

Q. Was there some change of ownership, or control, of the North Dakota Company, the Northern Company, and the Knife River Company, along in 1932 or 1933?

A. Yes. Our original contract with the property was entirely with Middle West Utilities Company, and it was based on their acquisition of the control of the common stock of the United Public Service Company, so our relationship was entirely with our own holding company. Then when Middle West Utilities Company became financially involved, and it is my recollection that they decided that they could not hold the United Public Service property, because the security holders were underlying the United Public Service under the name of the United Public Utilities Company, and about that time, which was along in '31, as I recall, a Bondholders' Protective Committee, whatever they called themselves, came into ex-

istence, and a man named Ralph Bard is the man I contacted, and about that time Mr. White came in as receiver of the United Public Utilities, as I recall.

Q. Was that S. W. White? A. Samuel W. White.

Mr. Benson: Well now let's identify the Bondholders' Committee.

Q. What was this Bondholders' Committee?

A. Of the United Public Utilities Company. The United Public Utilities Company had financed itself with bonds and notes, and various evidences of indebtedness, and the Security Holders probably would be a more appropriate description of this committee—they became concerned, and moved in.

Q. Or a Creditors' Committee?

A. Yes. The Middle West at that time backed away, and we were advised that they didn't believe that they could hold their ownership through the United Public Service.

Q. You say that Mr. White became the receiver, or trustee, along in 1932?

A. About '31 or '32, somewhere along in there.

Q. Well from then on did you deal with him as the representative of the nominal owner or holder?

A. We had some continuing relationship with the Bondholders' Committee, or this Securities Committee that I referred to, and our contact with Mr. Bard, that gradually dissipated itself over a period of a very few months, and then our contacts were entirely with Mr. White.

Q. About that time did Mr. White personally become a member of the Board of Directors of the North Dakota Company, the Northern Company, and the Knife River Coal Company?

A. About that time he came on the boards of the three companies.

Q. Did he continue on those boards with you during such time as you were with the companies? A. Yes, he did.

Q. Were these interconnecting facilities completed prior to the time that Mr. White became connected with the company?

A. My remembrance is that the interconnecting facilities were completed prior to the time that Mr. White became actively engaged in his work. I might be approxi-

mating the time, but my recollection is that we had no discussion with Mr. White as to the facilities. I might add that those facilities were built by the Northwestern, based upon the statement that it was the intention of the Middle West Utilities Company to merge those electric properties into Northwestern, and that probably accounts for our not asking anybody's opinion, or authority, or permission, from the United Public Utilities side of the matter.

Q. Referring now to the North Dakota Company, where was its main generating unit? A. At Beulah.

Q. Where was the Knife River Company located?

A. At Beulah, North Dakota.

Q. Can you say that the coal company, and the two operating power utilities companies, were owned by the same holding company? A. That is correct, yes.

Q. Will you just briefly state the nature of the generating station of the North Dakota Company at the Beulah Mine—the part it played in the general operation of that company?

A. Well, it was the lowest cost station, first, by reason of its most modern design of all our other stations, second, by reason of its location at the mouth of the mine, where there was no freight on coal, and the Knife River Coal Mining Company delivered coal into the hoppers of the power plant which gave a low cost production at that station.

Q. That was right at the mouth of the mine?

A. That was right at the tipple.

Q. You say that that was a very low cost generating plant?

A. As plants were in that territory, that was one of the low cost stations, one of the lowest cost stations.

Q. Did you, in the operation of these several companies, cause a study to be made, or make one yourself, concerning the feasibility of coordinating the generating station at Beulah into the general picture of all of the companies?

A. Yes.

Q. Approximately when was that instigated?

A. Those studies were instigated immediately when we took charge of the properties, in the fall of '29. Our first concern was one of fortifying service to the Northern Power and Light property, which I have previously de-

scribed in this testimony. When that was completed, our next concern was what could be done to reduce the overall system power costs for the North Dakota Power and Light and the Northern Power and Light properties, which brought into account the analysis of the Beulah generating station, all other stations, the closing down of certain stations.

Q. Now, after this study, did you come to some conclusion, in the overall management of these companies, with respect to the use of these facilities at Beulah?

A. Yes.

Q. What was that?

A. The conclusion was that in the interest of all parties we should make the maximum use of the Beulah station by operating it at the highest possible load factor. That means letting it carry all the load that it could carry, as many hours of the day and night as it could carry, and then to bring in behind the Beulah operations, in the order of efficiency, other plants of the combined system. For instance, the station at Mobridge, had a small Westinghouse turbine, but a very efficient little turbine, and that was one of the units that came right in behind the Beulah station. The Bismarck station was considered an efficient arrangement, by reason of its steam heating combination, and there was a plan worked out with the Beulah Knife River station running as a base plant, and that was the program that was followed.

Q. Did you, as a result of that, increase the load factor?

A. Very definitely.

Q. At Beulah?

A. Yes—very definitely increased the load factor, and because a very substantial portion of your expenses are fixed, you reduced the unit cost per kilowatt hour.

Q. That resulted in a very advantageous cost factor, did it?

A. It resulted in a reduction of the overall system power cost of the North Dakota Power and Light System.

Q. Was that put into effect?

A. That was put into effect—pardon me, you say what was put into effect?

Q. The handling of the Beulah generating plant in accordance with your conclusion?

A. Yes. We had a centralized despatching system, with dispatchers located at Aberdeen, who dispatched all of the service of the Northwestern Public Service Company in South Dakota, and the North Dakota Power and Light and the Northern Power and Light, and their instructions were, of course, to follow this pattern I have just described in the operation of the system, and assuming no transmission difficulty the Beulah station was operated at full capacity, up to the ability to transmit over the transmission lines of the system.

Q. Did you consult, as this matter progressed, during the time Mr. White was connected with the North Dakota Company, with him concerning these matters?

A. Yes, we consulted with Mr. White. I would say that in most instances our consulting was that of submitting our recommendations. I want to make clear that we didn't ask Mr. White to tell us what to do, or anyone in the Middle West organization. Our own staff, on those properties, determined what, in our opinion, was the most practical and economical thing to do, and then we made definite recommendations, not only to Mr. White, and his holding company, but to the Middle West Holding Company.

Q. Subsequent then, and after such recommendations were approved by those connections, did you proceed along the lines indicated?

A. Yes. We occasionally would have some modification on something we proposed, due to the result of compromise, but we ultimately would conclude whatever it was and proceed.

Q. In your opinion was this operation of the Beulah plant, at the peak load you speak of, or approximately peak load, a benefit to the operations of the North Dakota Company?

A. Very definitely, because it reduced the unit cost per kilowatt hour, which applied to North Dakota Power and Light Company's own general business kilowatt hours, made quite a substantial saving, annually.

Q. Was there any excess energy generated in that program, over and above the system use of the North Dakota Company?

A. Well, I will have to answer that in two ways—one

would be the incidental, cumulative effect, and the other would be the hour by hour load. My recollection is that in the early stages of this operation, which means 1930 and 1931, the Beulah station, the Knife River station of the North Dakota Company, together with the operation at Mobridge and Bismarck, practically took care of all of the kilowatt hour requirements of the North Dakota Power and Light and the Northern Power and Light. There were times of the day or night, when, due to transmission troubles, and ultimately to the peak load on the system, they were obliged to buy capacity, or kilowatt hours, from the Northwestern Public Service Company, from over these three interconnections. You must understand that this is not a static condition, you are dealing with growing load, and because there was no major change in the generating capacity, the condition was gradually shifting.

Q. Would there be times of the day when there would be surplus energy in the North Dakota System?

A. Very definitely, and the plan of operation was to flow that surplus energy down through the Northern Power and Light System, through these interconnections, into the Northwestern System.

Q. Were contracts made as between the North Dakota Company and the Northern Company, for the disposition of energy?

A. I don't recall that there was originally any contract between those two companies, because they were both subsidiaries of the United Public Utilities Company. It was a rather flexible arrangement, and it was operated to use the Northern System as a vehicle to bring these kilowatt hours from the Beulah station into the Northwestern Public Service Company's system, and the compensation of the Northern System was a question of being sure that their purchase price from the North Dakota Power and Light Company was low enough to warrant them in becoming this common carrier, so to speak, of this dump energy.

Q. Do you know now what the Northern Company paid the North Dakota Company for this dump energy during the time that you were with these companies, following Mr. White's coming into the company?

A. Yes. I might state that originally, when the interconnections were made, it was largely a case of merely ex-

changing kilowatt hours to protect the service. There was no thought of shifting energy from one system to another. We started out on a basis that was the approximate system operation and maintenance cost of the two systems. Ultimately, and that was about the time Mr. White came into the situation, we made a study to determine what price Northwestern Public Service Company could pay for energy from the Northern Power and Light System, and ultimately from the North Dakota Power and Light System, and approximately its own production costs.

When we determined that figure, which was 5 mills per kilowatt hour, then we determined a figure that would enable the Northern Power and Light to transmit this energy from the Knife River Station of the North Dakota Power and Light, through its system, to the Northwestern, and that figure was determined to be 3½ mills. So the plan put into effect, about 1931, 1932 I think it was, which was about the time Mr. White came into the picture, was a 3½ mill rate from the North Dakota Power and Light to the Northern Power and [Ligh], and a 5 mill rate from the Northern Power and Light to the Northwestern Public Service Company, and the Northwestern Public Service Company, in turn, would feed energy back into the Northern Power and Light, when required, at the same 5 mills, so it was a netting of those kilowatt hours. So the interchange rate between Northern Power and Light and the Northwestern Public Service Company was established at 5 mills, and was based upon the approximate fuel cost of Northwestern Public Service Company's station at Aberdeen, less the cost of maintaining banked boilers. Now the reason for that last item of deduction was that the transmission system of the Northern Power and Light was very unreliable, very lightly constructed, and while the Northwestern Public Service was taking kilowatt hours over that system into its system, they were unreliable kilowatt hours, and so Northwestern Public Service was obliged to maintain, in either rolling capacity, or banked boiler capacity, a sufficient amount of generation to not only pick up the energy that they might be taking into the Northwestern System, from the Northern, but also to pick up such parts of the Northern's load as might fall on it, due to transmission difficulties between Aberdeen and Bismarck.

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TRANSCRIPT OF RECORD

(Pages 1009 to 1488)

Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER,

vs.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

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EIGHTH CIRCUIT.

No. 13,257.
CIVIL.

NORTHWESTERN PUBLIC SERVICE COMPANY, A CORPORATION, APPELLANT,

vs.

MONTANA-DAKOTA UTILITIES CO., A CORPORATION, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

FILED DECEMBER 26, 1941.

United States Court of Appeals,

EIGHTH CIRCUIT.

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fixed charges (interest, taxes, depreciation, amortization and operation) of the inter-connection facilities, at the rate of Twenty Thousand ($20,000.00) Dollars annually - payable in equal monthly installments - for the use and availability of said inter-connection facilities and for the performance of the First Party's agreements hereunder, it being understood that Second Party has no obligation for any part of the construction cost of said inter-connection facilities or for the use and availability thereof for any period prior to January 1, 1936.

It is mutually agreed that the rate at which electrical energy will be transferred will be five mills ($.005) per K.W.H. at the point of metering, said meters to be located at the point of inter-connection or such other places as may hereafter be agreed upon.

It is further mutually agreed that either party may terminate this Agreement upon twelve (12) months written notice to the other party and that unless so terminated, this Agreement shall automatically renew itself from ear to year.

It is further mutually agreed that should the Agreement be terminated, that the actual out-of-pocket costs of labor and expense in dismantling the inter-connection facilities and returning the material to the store-room in Aberdeen, South Dakota, shall be borne equally by the parties hereto.

PARTY OF FIRST PART
NORTHWESTERN PUBLIC SERVICE COMPANY

ATTEST:

_____
Secretary

By _____
President

PARTY OF SECOND PART
NORTHERN POWER & LIGHT COMPANY

ATTEST:

_____
Secretary

BY _____
Vice-President

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So, it is my recollection, that the net result was that Aberdeen fuel cost at that time was about 5.7 mills, and the engineering studies, which I assume are still available, in the files, indicated that after deducting the cost of maintaining banked boilers, for the protection of this interconnected system, the figure, in round figures, was 5 mills. That was determined by engineering studies, and those studies were submitted to both holding companies, that is, the Middle West Utilities Company, and to Mr. White's company.

Q. At first, you say, that was just an oral arrangement that was carried out?

A. It was more than an oral arrangement. We determined that was the thing to do, and we put it into effect.

Q. You put it into effect, based upon your oral arrangement? A. Yes.

Q. Later was it merged into a written contract?

A. My remembrance is that we made a contract ultimately covering that, and covering the allocation of general expenses, which is another item.

Q. For the interconnecting facilities?

A. No, the allocation of general expenses was the general office expense.

Q. Oh yes, I see what you mean. The complaint alleges a written contract, which you have mentioned as being the 1936 written contract, which carries a rate for the exchange of energy, and also a rate in the nature of a rental charge for the interconnecting facilities, that contract being between the Northern Company and the defendant company. Now you said you had submitted this to both of the holding companies?

A. We submitted our recommendations as to what should be included in that agreement, and the final agreement was the result of controversy and compromise between lawyers and the holding companies.

Defendant's Exhibits 227, 227-A, 227-B and 227-C were received in evidence.

Defendant's Exhibit 227, which is also referred to as Defendant's Exhibit "1" in Strike's deposition, is as follows:

Defendant's Exhibit 227.

June 19, 1936.

Mr. F. E. Kruesi, President,
c/o Northwestern Public Service Co.,
385 N. Pine Street,
Grand Island, Nebraska.

Dear Frank:

Mr. Lakin dropped in for a few minutes this afternoon on his way back from Huron, and, in general, he seems to be of the opinion that a payment of $20,000. by Northern Power & Light Co. to Northwestern Public Service Co. is justified on the basis of the present value to Northern of the inter-change facilities.

I am agreeable to the spirit and purport of the proposed contract between Northern and Northwestern, but I believe that, upon reflection, you will agree that it is inadvisable from the standpoint of either company for Northern to make representations regarding the actual construction cost or operating cost of the facilities. I have, therefore, redrafted the proposed form to eliminate such representations, and have also made a couple of deletions and a couple of minor changes, in the interest of simplification and clarification.

I think you will find, however, that the spirit and the effect of the proposed agreement has not in any way been altered by my suggested changes. I will be glad to have your reaction to them.

Mr. Lakin also agrees that the studies now being made by your organization and by Sargent & Lundy, with respect to developing additional capacity, are very timely, particularly, with respect to the Bismarck district.

I hope that by now you and "C. J." are rested up after the strenuous schedule which you undertook on my account. I enjoyed the trip over the properties and I found

C.I.S. (1) C.I.A.

On this extra copy I have marked the places where I have suggested changes from the old contract

6/9 Filed Feb. 25, 1948.
Roy S. Harkey, Clerk.
By C. C. Schwartz, Deputy

Defendant's Exhibit 227-A. 1010

AGREEMENT

THIS AGREEMENT, Made and entered into this 22nd day of April, 1936, by and between Northwestern Public Service Company, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located in the city of Huron, County of Beadle, State of South Dakota, hereinafter known as "Party of First Part" and Northern Power and Light Company, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located in the city of Huron, County of Beadle, State of South Dakota, hereinafter known as "Party of the Second Part".

WITNESSETH:

That, Whereas, First Party is the owner of an electric inter-connected transmission line system serving eastern central South Dakota with its main generating station located at Aberdeen, Brown County, South Dakota, and, Second Party is the owner of an electric inter-connected transmission line system serving northern South Dakota and southern North Dakota, AND

Whereas, First Part has heretofore, at its own cost and expense, constructed inter-connection facilities with the transmission system of second Party, which facilities are more specifically described as follows:

Item 1. Portion of Aberdeen's inter-connected sub-station and control equipment used exclusively for tie-in with Northern Power & Light Company.

Item 2. Gettysburg sub-station used exclusively for tie-in between two systems and serving Gettysburg, a Northern Power & Light Company property.

Item 3. 33 K.V. Circuit from Aberdeen to Barnard and from Aberdeen to Ipswich, a distance of fifty miles for inter-connection with lines of Northern Power & Light Company.

1010b

Defendant's Exhibit 227-B.

Item 4. 66 K.V. Circuit from Highmoor to Gettysburg, South Dakota, for inter-connection with Northern Power & Light Company at that point, 68 miles.

Condensation Ex 4

Whereas, such inter-connection facilities make possible the inter-change of surplus power between the Parties hereto and thereby enables both companies to provide more reliable service, AND

Whereas, although neither party guarantees to maintain reserve capacity, especially dedicated to the service of other party, both parties maintain reasonable reserve capacity for emergency use, and

Whereas, under ordinary circumstances, the combined reserve capacity of both parties hereto is adequate to protect the service of both parties under any reasonable conditions which can be expected to obtain,

NOW THEREFORE, It is agreed as follows, to wit:

First Party agrees to maintain and operate the said inter-connection facilities as hereinbefore described making available to Second Party such reserve capacity as First Party may have available at any and all times, which for all practical purposes, is adequate to supply Second Party with a firm source of power sufficient to protect service in the entire territory served by Second Party adjacent to the territory served by First Party.

First Party further agrees that it will purchase such surplus power as may be available from time to time from Second Party as First Part can use without disadvantage to its own operations.

Commencing as of January 1, 1936, Second Party agrees to pay First Party, as Second Party's portion of the

1010

particular satisfaction in the favorable impression which I gained of the fellows in C. J.'s organization.

With best regards,

Very truly yours,

SAMUEL W. WHITE,
President.

Copy—Mr. C. J. Strike,
Huron, S. D.

Defendant's Exhibit 227-A, which is also referred to as Defendant's Exhibit "1-A" in Strike's deposition, is as follows:

Defendant's Exhibit 227-A.

C. J. S.

On this Extra copy I have marked the places where I have suggested changes from the old contract

S W W

6/19

Defendant's Exhibit 227-B, which is also referred to as Defendant's Exhibit "1-B" in Strike's deposition, is as follows:

Defendant's Exhibit 227-B.

Agreement.

This Agreement, Made and entered into this 23rd day of April, 1936, by and between Northwestern Public Service Company, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located in the city of Huron, County of Beadle, State of South Dakota, hereinafter known as "Party of First Part" and Northern Power and Light Company, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located in the city of Huron, County of Beadle, State of South Dakota, hereinafter known as "Party of the Second Part".

Witnesseth:

That, Whereas, First Party is the owner of an electric inter-connected transmission line system serving eastern central South Dakota with its main generating station located at Aberdeen, Brown County, South Dakota, and, Second Party is the owner of an electric inter-connected transmission line system serving northern South Dakota and southern North Dakota, and

Whereas, First Party has heretofore, at its own cost and expense, constructed inter-connection facilities with the transmission system of Second Party, which facilities are more specifically described as follows:

Item 1. Portion of Aberdeen's inter-connected sub-station and control equipment used exclusively for tie-in with Northern Power & Light Company.

Item 2. Gettysburg sub-station used exclusively for tie-in between two systems and serving Gettysburg, a Northern Power & Light Company property.

Item 3. 33 K. V. Circuit from Aberdeen to Barnard and from Aberdeen to Ipswich, a distance of fifty miles for inter-connection with lines of Northern Power & Light Company.

Item 4. 33 K. V. Circuit from Highmoor to Gettysburg, South Dakota, for inter-connection with Northern Power & Light Company at that point, 62 miles.

Whereas, such inter-connection facilities make possible the inter-change of surplus power between the Parties hereto and thereby enables both companies to provide more reliable service, and

Whereas, although neither party guarantees to maintain reserve capacity, especially dedicated to the service of other party, both parties maintain reasonable reserve capacity for emergency use. and,

Whereas, under ordinary circumstances, the combined reserve capacity of both parties hereto is adequate to protect the service of both parties under any reasonable conditions which can be expected to obtain,

Now Therefore, It is agreed as follows, to wit:

First Party agrees to maintain and operate the said inter-connection facilities as hereinbefore described making available to Second Party such reserve capacity as First Party may have available at any and all times, which for all practical purposes, is adequate to supply Second Party with a firm source of power sufficient to protect service in the entire territory served by Second Party adjacent to the territory served by First Party.

First Party further agrees that it will purchase such surplus power as may be available from time to time from Second Party as First Party can use without disadvantage to its own operations.

Commencing as of January 1, 1936, Second Party agrees to pay First Party, as Second Party's portion of the fixed charges (interest, taxes, depreciation, maintenance and operation) of the inter-connection facilities, at the rate of Twenty Thousand ($20,000.00) Dollars annually—payable in equal monthly installments—for the use and availability of said inter-connection facilities and for the performance of the First Party's agreements hereunder, it being understood that Second Party has no obligation for any part of the construction cost of said inter-connection facilities or for the use and availability thereof for any period prior to January 1, 1936.

It is mutually agreed that the rate at which electrical energy will be transferred will be five mills ($.005) per K. W. H. at the point of metering, said meters to be located at the point of inter-connection or such other places as may hereafter be agreed upon.

It is further mutually agreed that either party may terminate this Agreement upon twelve (12) months written notice to the other party and that unless so terminated, this Agreement shall automatically renew itself from year to year.

It is further mutually agreed that should the Agreement be terminated, that the actual out-of-pocket costs of labor

and expense in dismantling the inter-connection facilities and returning the materiai to the store-room in Aberdeen, South Dakota, shall be borne equally by the parties hereto.

Party of First Part,

NORTHWESTERN PUBLIC SERVICE COMPANY,

By.....

Attest: President.

.....

Secretary.

Party of Second Part,

NORTHERN POWER & LIGHT COMPANY,

By.....

Attest: Vice-President.

.....

Secretary.

Defendant's Exhibit 227-C, which is also referred to as Defendant's Exhibit "1-C" in Strike's deposition, consists of a draft of an agreement which is identical with Defendant's Exhibit 227-B, except for the pencil notations which appear on said Exhibit 227-B.

Q. Mr. Strike, I show you papers which have been marked as Exhibits "1", "1-A", "1-B" and "1-C", and will ask you if you received these through the United States Mail on or about the date of Exhibit No. "1", which was June 19, 1936?

A. My recollection is that I originated this first draft.

Mr. Benson: Of which document?

A. Of Exhibit "1-B", and I either mailed it in, or carried it in, I couldn't recall which it would be, to Mr. White, and he, in turn, transmitted it back to me, with some suggested changes. Again I cannot tell you whether it came through the mail, or whether I was in Chicago at the time.

Q. You handled these transactions, inter-company, a great deal, did you, in person, while on your Chicago trips?

A. Usually you would accumulate things that you wanted to talk about, and to keep the record straight you would make a memorandum, or an actual letter, and go in and present it to Mr. White, or to the Middle West people, whoever might be involved.

Q. Now referring to Exhibit No. "1", the letter, is that the signature of Samuel White?

A. I think so. I do not have anything to compare it with, except I could get a letter out of my files that I got about two days ago.

Q. Now following the return to you of these exhibits, "1", "1-A", "1-B", and "1-C", did you prepare an additional contract?

A. Well, my recollection is that we were bit by bit reconciling differences of opinion between the two holding companies, and that, following this memorandum, we concluded an agreement, embodying the things that Mr. White had in mind, and the things that the Middle West Utilities holding company people would have in mind. My recollection is that there was no material change in the final contract as compared with the draft we submitted.

Q. I call your attention to a paper marked Exhibit "B", which is attached to Plaintiff's complaint in this action, and which appears to be a photostatic copy of the 1936 contract—I do not know whether in our answer—we haven't answered yet in that case—

Mr. Benson: You haven't answered.

Q. (Continuing) Well, anyway, was the ultimate contract as signed between the Northern Company and the Northwestern Company prepared and signed after this Exhibit "1", "1-B", and "1-C" came into your hands—also, Exhibit "1-A"?

A. That is my recollection. We were endeavoring to reduce this to contractual form, and the exhibits you have just referred to preceded the actual conclusion and execution of this contract.

Q. After you got this set-up you spoke of, up there

at the Beulah Mine, did you continue to observe its operation and conduct, as to its success and benefit? A. Yes.

Q. From the studies which you, and your department, had made of that operation, what was your conclusion concerning the benefit of the operation to the Knife River Coal Company?

Mr. Benson: Objected to as incompetent, irrelevant, and immaterial. Now they seek to show that those damages were not as great because they helped out a mining company at another angle. We are assignees and successors of the Public Utilities Company. No foundation laid.

Mr. Stafford: This is pleaded in the answer, Paragraph 13. Knife River Coal Mining Company was part of the three companies owned by United Public Utilities. It is affirmatively pleaded.

Mr. Benson: And under the rules is it in issue? We did not succeed to the ownership of UPU, and we claim there is no foundation.

Mr. Stafford: They did succeed to the ownership. They are the direct successor. You bought all of the stock and all of the outstanding securities. We have alleged that one of the benefits throughout this period of operations was Knife River Coal Mining situation, just as Mr. Strike has testified.

The Court: We will take an answer. Overruled.

Mr. Benson: The objection may stand to this whole line of testimony concerning Knife River Coal Mining Company?

The Court: You may have the same objection with the same ruling, yes.

A. Well, the conclusion of course was that whenever you added a kilowatt hour to the Beulah station, you created a market for screenings, and one of the problems around a coal mine, and particularly a lignite mine, is to get rid of the screenings.

Q. Was that true of the Knife River Company?

A. That was true of the Knife River Company, and the effect of this arrangement was that it reflected itself in

a good local demand for screenings right off the tipple, and was definitely beneficial to the mine.

Q. Was that one of the things you had in mind in working up this general plan?

A. Yes. We considered the Knife River Coal Mining Company just as a unit of the property, the same as the North Dakota Power and Light, and the Northern Power and Light, and our efforts were to favor the Knife River Coal Mining Company with business. As an example, we changed our Aberdeen station from the burning of Montana coal over to the burning of Beulah lignite coal, so that we could give them the benefit of our business.

Q. Was that very substantial?

A. A very substantial load—the Aberdeen load wasn't quite as large as the Knife River station, but next to the Knife River station in coal requirements.

Q. That was a profitable venture then for the Knife River Company?

A. I will first state that the basis upon which that coal was purchased was the delivered price on a million b. t. u.'s of heat at Aberdeen, competitive with the best deal we could make for Montana coal, and it's my own opinion that it represented a profitable business to the Knife River Coal Mining Company. But there were two sides to the [equasion]—one was, what could the Northwestern Public Service Company pay for the lignite screenings, and that was determined by reason of the competitive contract which we had with the Montana people, and the other was whether the business, at that price, was profitable to the Knife River Coal Mining Company, which in my opinion it was.

Q. Did that result in the elimination of excess screenings for the Knife River Coal Mining Company?

A. We had no screenings problem at the mine after this program was put into effect. My remembrance is that we were just cleaned up all the time on screenings, and sometimes, of course, had to crush coal for the power plant. All other operators in that area were bogged down with screenings, and that was a problem with lignite operation, but that was completely eliminated for the Knife River Company under this method of operation.

Q. Now let's apply this Beulah generating plant op-

eration to what the results were for the North Dakota Company. Did you make a study of that, through your operating heads, and department heads? A. Yes, sir.

Q. And did you observe it, yourself, in the handling and management of the company?

A. I observed it myself. My recollection is that the reduction in overall production costs on the North Dakota Power and Light System, by reason of the improved load factor from the Beulah station, that that reduction, applied to the kilowatt hour sales of the North Dakota Power and Light Company to its own general business customers, represented approximately $16,000.00 a year savings to the North Dakota Company.

Q. Now the sale of this dump power to the Northern Company, was that result a satisfactory and beneficial one to the North Dakota Company?

A. Yes, in my opinion, because the 3½ mill rate was over and above fuel cost, and the incremental of producing this energy at Beulah—there was a margin of profit over and above their increment cost.

I might state that the 3½ mill rate was designed to be sure that the Northern Power and Light Company was not penalized in transmitting the Knife River Station energy through its system, but we were also interested, and carefully determined, that the net result was profitable to the North Dakota Power and Light Company, because both companies were subject to regulation by the Commission.

Q. Now applying that Beulah generating plant operation you have spoken of, and are now discussing, can you say what its result was and what its effect was, to the Northern Company?

A. The effect to the Northern Company was that their power costs were very substantially reduced. The energy that they bought from the North Dakota Power and Light, at 3½ mills, and the energy they bought from the Northwestern Public Service Company, at 5 mills, was far below the production cost of any equipment that they had on their system, so that they were the big benefactors from the whole arrangement, that is, the Northern System.

Q. Can you now estimate the probable generating cost on their own system?

A. The Northern Power and Ligh...

Q. Yes. Would it be as much as 10 mills?

A. Yes—in my opinion, the Northern Power and Light Company's total production operation and maintenance cost, at the time the property came under our supervision, was at least one and a quarter cents per kilowatt hour, because of the high cost at Ellendale and places of that type.

Q. You are talking about generating cost of the k. w. now? A. Of the kilowatt hour, yes.

Q. That would be 12½ mills?

A. 12½ mills. They had one station, at Mobridge, a Westinghouse turbine, that had good efficiency, and my recollection was that they got down somewheres around 7 mills for that one station, but their problem was packing all of these inefficient other stations, at Gettysburg, Ellendale, and places of that kind.

Q. That was a benefit to the Northern Company, the difference between the cost of generating on their own system, and what it cost them to replace those k. w.'s by k. w.'s purchased from the North Dakota Company, at 3½ mills, and from the defendant at 5 mills. Is that right?

A. May I clarify this point, that before the interconnections with the Northwestern Public Service Company, the Northern Company didn't dare to close down these inefficient plants, because of the service problem, and so they couldn't avail themselves of this cheap energy from the north without carrying the standby production cost to fortify service, and so when the interconnections were made at Gettysburg, Ipswich and Barnard, so that the service was fortified, then they could close down all this inefficient equipment, and they took all of the energy from the North Dakota Power and Light System that they could get, and purchased only breakdown energy from the Northwestern System, at 5 mills, which was below the fuel cost of any plant that they had, in accordance with my remembrance. It may be that the Westinghouse turbine at Mobridge had a fuel cost of around 5 mills, I have forgotten, but compared with anything else that they had, their 5-mill purchase of energy was less than the fuel cost from any station that they had, and so you have to tie together that [equasion] to get the benefit to the Northern System.

Q. Now the plan you had worked out there of increasing the load factor at the Beulah generating plant, of the North Dakota Company, and the sale of energy from the North Dakota Company to the Northern Company, and, in turn, from the Northern Company to the Northwestern, the defendant company, that had been in operation several years prior to the entering into of the written contract, Exhibit "B", attached to the complaint, in 1936? A. That is correct.

Q. On the same basis? A. On the same basis, and—

Q. Was that known to the owners of the North Dakota Company and the Northern Company during all of that period?

A. Definitely—they received copies of the operating reports each month, we discussed it with them, we put it into effect because we had the engineering studies to back us up, and it didn't make a lot of difference to us whether we had a contract or not. It was the result of engineering and operating studies and because our business was a regulated business we put it into effect. Now the only part that was not put into effect was the fixed charges on the interconnecting facilities. That was not put into effect until the agreement was signed, because that did not, in our opinion, constitute a day by day operating question. We made our recommendations, and Mr. White was a beautiful staller, and was able to gain whatever period he gained between 1931 and 1936 by—I have no criticism, except that is what it was, a stalling game.

Q. After the Middle West holding company severed connections with the North Dakota operating company, did you start, as an officer of these companies, to make a distribution, by charges, of the interconnecting facilities?

A. We made no distribution of those charges until our contract went into effect, which was in '36.

Q. Did you start agitating the necessity of an agreement and arrangement, inter-company?

A. Oh, very definitely. From the very beginning, we pointed out the advisability and the necessity of effecting a contract to relate all of these circumstances.

By Mr. Benson:

Q. You stated that you started at the beginning agitating and, as you said, taking care generally of these things—now what was that you were referring to, that is what I wanted to find out at this point?

A. May I make a statement to clarify the whole thing? When we were first instructed to take over the property, we were told that they were going to be merged, and the agreement for interconnecting facilities, and the distribution of fixed charges, was not an element, because we thought it was just a matter of weeks or months until it would be consummated, and during that period the Middle West Utilities Company went into receivership, and the United Public Utilities Company went into receivership, and then I realized that there was going to be no merger for some time, and I said, we should reduce all of these things to writing, and make a proper allocation of the fixed charges on interconnecting facilities.

Q. And that was about what date?

A. That was beginning along in 1932, '31 and '32—my recollection is that the Middle West went into receivership in '31 and it was about that same time that the United Public Utilities Company went into receivership, and after the smoke cleared away, and you saw what debris was piled up, you realized that it was going to be of long duration, and I immediately urged the execution of an agreement to cover these things which we thought were merely temporary expedients prior to that time. We expected to have this merger through within months after we acquired the management of the properties in the fall of '29. I think that covers the answer to your question, that just as soon as the pattern was clear to me that there wasn't going to be a consolidation, I began to move for a reduction into writing of all these contracts and things that we were doing, in the way of sale of power and the allocation of general expenses, general office expenses, between the properties.

Q. Who did you negotiate with so far as the North Dakota operating companies were concerned on this subject?

A. So far as the North Dakota operating companies were concerned, we represented them just as we represented the Northwestern Public Service Company, because it was the same officers and the same directors. So when we would draw conclusions, we would submit that to Mr. White, representing the United Public Utilities, and to whoever happened to be in the saddle at the time in connection with the Middle West Utilities Company. It was a peculiar arrangement, in that Mr. White was paying the Middle West Utilities Company a management fee to advise him.

Q. With reference to the negotiations, where you felt that these various relations, intercompany, should be reduced to writing you say those negotations ran from approximately 1931, or 1932, until the 1936 contract was signed?

A. That is correct. The Northwestern Public Service Company did not collect for any apportionment of fixed charges of operating expenses during that period.

Q. Referring to the interconnecting facilities? A. Yes.

Q. Now after this contract, Exhibit "B", which is the 1936 contract, were payments made by the companies pursuant to that written contract?

A. That is my recollection, that we followed the contract and payments were made in accordance therewith.

Q. I believe at no time were those terms of the 1936 contract changed during the time you were connected with the company?

A. That is my recollection, there was no change during that time. As I recall, there was some discussion about the time I left the property in regard to additional capacity, and things of that kind, which I think later resulted in a modified contract, or a new contract subsequent to my leaving the property.

A portion of the deposition of C. J. Strike was not read by defendant. It appears in plaintiff's case from page 435, line 10, through page 436, 12th line from the bottom, of the record herein.

Q. This unit cost of $1.10 was a monthly unit cost?

A. That was a monthly charge per kilowatt for fixed charges only, and did not carry with it any energy of any kind.

Q. That then would be $13.20 per kilowatt hour per year? A. Per kilowatt year, not kilowatt hour.

Q. Now then, in your experience and your studies, and the studies of your departments and discussions which you had with these engineers you say—somebody and Lundy— A. Sargent and Lundy.

Q. Sargent and Lundy? A. Yes.

Q. Have you an opinion as to whether or not $13.20 is a proper unit charge for reserve capacity?

A. At that particular time, based upon $125.00 a kilowatt of the installed capacity, it was my opinion that that was a fair basis for either party—it made no difference whose money was invested.

Q. Regardless of which way it went, it was a proper unit charge? A. That is right.

A portion of the deposition of C. J. Strike was not read by defendant. It appears in plaintiff's case from page 436, 11th line from the bottom, through page 437, 24th line from the bottom, of the record herein.

Q. During the years from 1929 to 1936, when the '36 contract was entered into, and in your negotiations with Mr. White, or with the Creditors' Committee, were they, in their representation of the North Dakota operating companies, inclined to make investments of cash money?

A. I had no general discussion at any time with any one, rather no specific discussions—it was my general understanding that the last thing they wanted to do was to get more money in, they were trying to figure ways of getting money out—that was my general impression from discussions with the so-called protective committee, headed by Mr. Bard, and my discussions with Mr. White, and from our own observations they were dragging the cash out of the operating companies about as fast as they could get it.

Q. You did observe that in the conduct of the business of these companies?

A. Yes. I never discussed it in specific instances with them.

Q. Did Mr. White's connection with these companies change from trustee or receiver, and if so about when did that occur?

A. I do not recall when the United Public Utilities went out of receivership, and reorganized. My memory fails me there.

Q. You don't have the year?

A. The Middle West and the United Public Utilities both ultimately came out of receivership in reorganization—they were set up as going concerns again, and the receivership closed. My guess would be that that was probably through '35.

Q. What connection did Mr. White have with the holding company which owned the operating North Dakota companies after the receivership was lifted?

A. He was president of it.

Q. And did he continue in the capacity of President during the time you were connected with the company?

A. Yes.

Q. Then down [throught] the years, between 1929 and 1938, while you were with the companies, you dealt with Mr. White for a time either as receiver or trustee, and later as President of the North Dakota operating companies?

A. As President of the United Public Utilities Holding Company.

Q. Right. And as I understand, during all of those times. White was a member of the Board of Directors of the three North Dakota companies which we have mentioned today?

A. Yes. That is my recollection, during that entire period.

Q. While it isn't involved in this litigation, Mr. Strike, but as showing the attitude of the interlocking directors to the business of these corporations, you have mentioned that there was a management contract reduced to writing some time during the years. Is that correct?

A. That is correct.

Q. Were the terms and conditions of the operating contract arrived at by negotiation with the holding companies and their officers?

Mr. Benson: Wait a minute. In view of the confusion in terms, let's get this straight. You talk about a "management contract" and an "operating contract". Now let's see what we are talking about.

The Witness: They are the same thing.

Mr. Benson: Let's identify them. Are you talking about a contract for the division of management expense, or are you talking about a contract with the Middle West, or its receiver?

Mr. Royhl: I am referring to a contract with respect to the distribution of management expense.

Mr. Benson: All right. I just wanted to be sure.

A. When we first acquired control of the property, and again based upon the conclusion that it was a temporary expedient, we made only such charges against these United Public Utilities subsidiaries as constituted so-called out-of-pocket expense. That was in the fall of 1929, and in the early part of 1930. When it became evident that we were not going to have those properties merged, then we determined a basis of allocating the general office management and departmental expense between the companies which were serviced out of the Huron office. Now by reason of the nature of the electric business, being rather uniform, the basis of distribution of expenses of the electric companies was gross revenue, which was eminently fair, we thought, between the North Dakota Power and Light, the Northern Power and Light, and the Northwestern Public Service Company. The Knife River Coal Mining Company was a different kind of a business, and so we had a different basis. We did not charge them with their percentage of all of our engineering department expense, because most of our engineers were electrical men, and knew nothing about coal mining, and so that there was a differential as applied to the Knife River Coal Mining Company. And so this was worked out, and an exhibit made each month, a spread made, on the basis

of this study, and that study ultimately bound itself into a contract between these operating companies. My recollection was that we didn't ask the approval of Mr. White, or of the Middlewestern Utilities Company—we put it into effect because that was the soundest basis we knew for the distribution of those expenses. That carried right down through my regime, except that those first few months we made only direct charges allocations of the out-of-pocket expenses.

Q. Were these holding companies at all times advised as to how you were handling this matter?

A. Very definitely advised, and were furnished monthly with a detailed operating report, which disclosed the basis of the charges. We had many items of inter-company relationships. As an example, the North Dakota Power and Light and the Northern Power and Light were tremendously loaded with excess line material, scattered all over the two Dakotas, almost, and one of the first things was to centralize those stores, and to help work out that surplus material, and so we had inter-company charges for material back and forth. All of that constituted a part of our operating records, of which the Chicago office, Mr. White's office, and the Middle West office, had full information.

Q. Mr. Strike, the complaint in this action charges that during your term of office with these several corporations, and while you were an interlocking officer and director of the North Dakota, Northern, and the Northwest Public Service Company, that in the making of rates and charges for energy, inter-company, of 5 mills, and in the making of an interconnecting facilities charge to the Northern of $20,000.00 a year, that you devised those rates and charges as schemes and plans which were conceived by you, and put into operation, for the purpose of exacting large charges from the North Dakota Company and the Northern Company, and for the purpose of off-setting charges of said two companies for energy generated in North Dakota, and transmitted and sold to the Northwestern Public Service Company, and that in arriving at these charges mentioned, and these rates, you acted unjustly, without consideration, fraudulently, unreasonably, unfairly, and unlawfully. Will you state whether or

not at any time, you, as an individual, interlocking officer, or director, of these corporations, in the handling of the business of those corporations, ever so acted?

A. I would deny the allegations you have read there, because in the conduct of the business we never differentiated between holding company property. Our job was that of operating company, and we found no difficulty in determining a basis of distribution, be it the question of fixed charges or the question of interchange rates between the companies, or an allocation of general expenses, and I am sure you will find in the records of those companies a constant reflection of that type of policy. I further state that we were never dictated to by either of the holding companies, although each of the holding companies always tried to gain an advantage for their particular side of the controversy. We, being in the position of representing both parties, had to stand our ground. I believe you will find in the negotiation of these contracts, in the correspondence, that we used good sound logic, based on engineering studies, and accounting studies, which disclosed the basis of equity. We were particularly careful, because the business is a regulated business, we were operating under the control of the North Dakota Railway Commission, and all of these things were subject to their jurisdiction. During all of the period, we never had, to my knowledge, a controversy with the regulatory people. They were perfectly satisfied that the basis of negotiations and transactions were equitable to all parties concerned. I want to make the further statement, that in determining the interchange rate between Northwestern Public Service Company and the United Public Utilities group, which was the North Dakota and the Northern Power and Light, our first concern was to be sure that Northwestern Public Service Company was not penalized by the arrangements which were developed, and our second concern was to set the mechanics up to give the greatest possible benefit of the low cost production at the Knife River Station of the North Dakota Power and Light Company, and to give the greatest possible market for the screenings of the Knife River Coal Mining Company.

Q. Did you at all times act honestly and honorable in

the handling of these various rates and charges, and contracts?

A. Yes, I would stand on all of our negotiations and all of our transactions, as being in keeping with sound utility practice, and equitable to the groups we represented.

Q. Through the years that you were a member of the Board and an officer of these several corporations, did representatives of the North Dakota Companies visit the property?

A. You mean representatives of the holding companies?

Q. Yes. A. Yes.

Q. And about how often?

A. Oh, usually once a year Mr. White would come out to the property, and ordinarily would come with one of the Middle West people. At one time he had a part of his Board of Directors visit the property. I believe that was about 1937.

Q. Did you accompany these people over the system of the North Dakota Companies?

A. We would invariably meet them at Bismarck, take them over the system, and then bring them into Huron, and they would depart from there, so that they had an opportunity to visit the physical property that they owned and controlled, and also to observe the general office operations.

Q. On those occasions would you go over the business of the corporation? A. Yes.

Q. Approximately how far is it from the Beulah generating plant to Aberdeen?

A. My remembrance is that by auto road it is a little over 300 miles. I think transmission line mileage is probably around 285 or 290 miles—I just don't remember now.

Q. You have stated generally the condition of the transmission lines in the North Dakota Company system. Predicated upon the distance, and upon the condition of the transmission lines, was energy produced at the Beulah plant a dependable energy for the Northwestern Public Service Company?

A. No, for two reasons. Technically the transmission of energy at 38,000 volts 285 miles is almost a practical impossibility, due to the resistance you have in that distance of miles. The problem we encountered, however,

was the poor construction of the lines from Bismarck east into Aberdeen, through the Northern Power and Light system, the bottleneck that existed in those lines. We were never able to get much current at the beginning even over the bus-tie to Aberdeen, due to the distance and elements. I believe 1,000 kilowatts, up to possibly 1,500, in the early days of the contract, was the best we could get through there, after taking care of the other load, which is the general business load of the Northern Power and Light.

Q. I am not sure that I got your point concerning the necessity and value of the interconnection facilities at three points in the Northern Company's system. Will you re-state that?

A. Well, the location of the Northern system, running across the state from Lemmon, on the west, to Ellendale, on the east, you go through some very rugged country, over around Ashley and Wishek, and the distance of transmissions made it impracticable to locate power at any one point—As an example, put in a plant at Ellendale that would back up service in Mobridge, or vice versa, and the most practicable method was to feed in at these three logical points of contact, and in that way you could feed backward up to the break in the line, and, as I explained, by being tied with the North Dakota system on the north, in case of any trouble on the main line, you could feed down from the North Dakota so far as the break, and feed back in from the south end, whereas, if you had your generation located either at Mobridge or Ellendale, you would be isolated by the one transmission lead across there, and we felt that it wasn't practicable to locate any large generating station on the Northern system because you had no center of load. The Northern is a system made up of little towns, Mobridge itself being, as I recall, about 3,500 population, and the rest of the [town] being about 1,500 and from there on down to two and three hundred population.

Q. Will you state, in your opinion, and from your knowledge, whether or not the interconnecting facilities were necessary to the operation of the Northwestern Public Service Company?

A. The interconnecting facilities had no conception of

a benefit to the Northwestern Public Service Company, for the reason that there was no firm power available, coming in from the U. P. U. system, we were too far away from Beulah, and the transmission facilities were inadequate, and the interconnecting facilities were put in originally solely to fortify the service of the Northern Power and Light. My own opinion is that the only possible benefit Northwestern could gain would be off-peak in some breakdown service. There were times when we could pass some current down through Gettysburg into Highmore, and into that area, and we were able to bring some energy into Aberdeen over the bus-tie at certain periods, but over the peak we had practically no current flowing.

Mr. Royhl: I think that it all.

Cross Examination by Mr. Benson:

Q. Will you refer to defendant's Exhibits "1", "1-A", "1-B", and "1-C",—I am referring to Page 2 of Exhibit "1-B"—this writing in red pencil on that page is Mr. White's, isn't it? You [my] refer to the previous exhibit.

A. Well, I think these are Sam White's notes—I am not too sure about that—some of them look like it might be, and some not.

Q. Now refer to a pencil memorandum, on Page 2, of Exhibit "1-B", where it says "not firm"?

A. Well, I do not know whose writing—I just have a guess that it might be Otto Stokke's.

Q. Mr. Stokke is in the room?

A. Mr. Stokke is in this room, yes.

Q. Who is the Mr. Stokke to whom you referred?

A. Mr. Stokke, when I was with the Northwestern Public Service Company, was Superintendent of our power plant, and in charge of our gas business.

Q. Superintendent of power plants—that means he would be the man that will know what you can generate?

A. That would be right.

Q. Do you have any recollection about the significance of this pencil notation, "not firm"?

A. No, I haven't any recollection of ever seeing the document, except that I think from the wording of it it was my dictation of the original draft, and this was going

around, and apparently people have been putting notations on the margin all through there.

Q. Now if you will refer to Defendant's Exhibit "1-C", do you know what that is—

A. It looks like a copy of the same thing.

Q. Let's look at some of these places?

A. Just off-hand, it looks like it is a copy of the other one, one is marked and one isn't—catch the bottom line here, and the second page—

Q. Well, I haven't had time to go into it here.

A. It looks to me to be an exact duplicate—the only difference is, one has some pencil notations, and the other doesn't.

Q. Now you are familiar with Exhibit "1-B", are you—have you read it? A. Yes, I read it this morning.

Q. Is it not firm power contract?

A. Oh no, never intended as such.

Q. And there never were any firm power contracts made between the Northwestern, and Northern, and North Dakota, while you were there?

A. The only contract that we had, and the arrangements were, that the facilities were available in emergency, but there was no guaranteed capacity—in other words, the Northwestern did not guarantee to deliver so many thousand kilowatts to the Northern Power and Light, or vice versa. It was an "if and when" basis, but the nature of the two systems was such that there was available a supply of power.

Q. Now you were President of Northwestern, North Dakota Power and Light, and Northern Power and Light, until July 1st, 1938?

A. About that time. I came out here about the middle of June, I do not know the exact date, but my resignation was effective at that time—my remembrance was that it was about the first of June.

Q. Was there ever a signed contract, covering the charges made against Northern Power and Light for inter-connection facilities before October 6, 1936? A. No.

Q. I am not trying to trap you, I want to explain what I am interested in—in some of the records there seems to be reference to a contract made in April, 1936. Do you recall whether there was a written contract signed before October?

A. I do not recall that there was. We were drafting contracts, and they were being kicked back and forth, between the two holding companies groups for many months, and I can't recall just what took place in there. I have only my recollection that the contract was signed late in '36, and made retroactive to the first of the year.

A portion of the deposition of C. J. Strike was not re-offered by plaintiff on defendant's case. It appears in plaintiff's case from page 437, 23rd line from the bottom, through page 439, line 7, of the record herein.

Q. When did you buy the Blunt plant?

A. Well we operated at Blunt under a lease with the Northern Power and Light, the Northwestern Public Service Company did, for some two, three, or four years, I don't recall the length of time, at the end of which time, we purchased the distribution system from the Northern Power and Light Company, the Northwestern Public Service did, because it was impossible to connect Blunt into the Northern Power and Light System—I say impossible, it was [impractible], in our opinion.

Q. Do you recall when the election took place at Pierre on this question of whether they should sell their plant to Northwestern?

A. I do not recall the date. I certainly do recall the election.

Q. Do you think that September 3, 1929, would be the correct date?

A. I don't have any idea, I have forgotten—I conducted some sixty or seventy elections in my regime, back in that country, and I couldn't remember dates, I would have to refresh my memory.

Q. That was rather an important piece of property, so considered, at that time? A. To who?

Q. To you.

A. I do not think it was any more important to us than it was to the Montana-Dakota Utilities Company. They made a strong attempt to upset our election, and buy it

themselves, so I do not know which one it was the most important to.

Q. Which one prevailed in that attempt?

A. Neither one did.

A portion of the deposition of C. J. Strike was not re-offered by plaintiff on defendant's case. It appears in plaintiff's case at page 439, lines 8 to 21, of the record herein.

Q. Who was E. L. Albert?

A. He was our electrical superintendent.

Q. What were his duties?

A. He had charge of the transmission lines, the substations, and the distribution system, both construction and operation.

Q. Who was C. L. Sanstedt?

A. He was the Treasurer of the Northwestern Public Service Company, and also of the North Dakota Power and Light, the Northern Power and Light, and the Knife River Coal Mining Company.

Q. He didn't have anything to do with the engineering?

A. He was not an engineer, he was solely Treasurer and accountant.

Q. Who was W. N. Frost?

A. He was General Superintendent at that time.

Q. What were his duties?

A. Well as General Superintendent he had overall supervision of engineering and operations of the company. By operations, I mean power plant operations and gas operations, transmission and distribution operations, but nothing to do with accounting or sales.

Q. In September, 1929, was he under your supervision?

A. Well in September, 1929, we were operating rather parrallel, there hadn't been a clear line of demarkation at that time, and he was operating as General Superintendent, and I was operating as Vice-President and Sales Manager. It was over the next two years, as I recall it, that the transition took place, that I became Vice-President and General Manager, at the end of which time Mr. Frost worked under me, until he left our sevrice.

Q. Do you have any distinct recollection as to whether these work orders on the interconnecting facilities ever came to you for examination or approval?

A. I do not have any recollection as to whether I was signing work orders at that particular time or not, I would have to refer to the records to identify them. As I testified this morning, my position was one of transition from a new business manager to general sales manager, and gradually into vice-president and general manager, ultimately into the presidency, and I do not recall the dates on which my responsibilities were changed.

Q. Well, what was your participation in the determination as to whether or not these interconnection facilities, we will say, from Highmore through to Gettysburg, Aberdeen to Barnard, and Aberdeen to Ipswich, should be constructed?

A. Well, the consideration, although might have entirely originated with me, in that as general sales manager of the company I had the responsibility of public relations, and I was the first one thrown into the fire in trying to stop municipal ownership in the towns of Gettysburg, Eureka, and Ellendale, and it was my conclusion that the only thing we could do, and should do, was to interconnect, and it was on that basis that I pled with the towns to give us an opportunity to prove our ability to give them acceptable service, and so I originated the idea, so far as interconnections were concerned, and, as I testified this morning, it originated because of a service problem.

Mr. Benson: That is all we care to offer up to Page 83.

The questions and answers which follow until the context otherwise indicates were all read into evidence by defendant from the cross-examination and re-direct examination (as subsequently indicated) in the Strike deposition.

Q. You haven't made any examination of work orders with reference to the construction of the interconnecting facilities since you left the property of the Northwestern?

A. No.

Q. Did you participate in the preparation of work orders for that construction?

A. Work orders were prepared by the engineering department—after the management approval to proceed with the project, and I probably did not have any part in the preparation of the work orders, but I did no doubt in the approval of the work orders—that would be the mechanics of handling them.

Q. Do I understand your testimony this afternoon to be to the effect that it was impossible to put sufficient generating capacity on the properties of the North Dakota Power and Light Company and the Northern Power and Light Company, to take care of their problems, independent of the Northwestern Public Service?

A. Not impossible, impracticable, because to get it located, as I explained, these various corners, and you have so much transmission line in the Northern Power and Light system, that you would get your one plant bottled up—it was perfectly possible to add small units at Eilendale, or Gettysburg, or any other community, but the fuel cost of diesel units alone was considerably in excess of 5 mills, per kilowatt hour, to say nothing about fixed charges for operating expenses, and so the plain economics dictated that you wouldn't put in those small plants. Now the reason is that there were ample kilowatt hours flowing out of the North Dakota system at Beulah—all you needed was a few kilowatt hours to fortify service at that time.

Q. Do you remember when the North Dakota Power and Light ran its line down to Keldron—is that in South Dakota?

A. Keldron, I believe, is in North Dakota—let me get my bearings as to where Keldron is—have you got a map so that we can take a look at Keldron, I have forgotten where it is.

(Witness examines map.)

A. I do not know when that was built, I have no remembrance at all.

Q. That was done before you became—

A. Connected with the property—I think that connection was in, but I am not sure.

Q. That was before the Middle West acquired any interest in the North Dakota of the Northern companies?

A. I think that is right.

Q. The same would be true of the interconnection between the North Dakota and the Northern at Driscoll?

A. Yes, at the north end.

Q. You didn't make any study of any benefit to Northwestern Public Service Company by reason of interconnection facilities?

A. Yes, we made studies of everything. I say we made them—

Q. I am talking about you? A. Pardon me?

Q. Did you? A. Personally?

Q. Yes.

A. No, I never made any studies, they originated with our engineering department. I may have requested studies, or directed somebody to make a study. I testified this morning to the effect that there were no benefits in my opinion—

Q. What?

A. I say, I testified this morning that there were no benefits to the Northwestern Public Service, because of no firm power supply on that side of the interconnection, over and above the Northern's own requirements.

Q. And no savings—well, when you say no benefits, you mean no benefits of any kind?

A. I qualified it by saying that sometimes in breakdown service we were able to bring in a little service to serve a small area, particularly off-peak—there is some intangible benefits due to that.

Q. You couldn't express it in dollars and cents—when you say breakdown service, what do you mean?

A. I mean a transmission line going out of service where you have to feed in. If our line west of Huron, for instance, would go down between Miller and Highmore, or we could probably bring in a little energy through Gettysburg tie, and serve Blunt, and Harrold, and Holabird, and some of those small communities, particularly off-peak. On peak, we had difficulty getting through enough juice for the Northern's own requirements.

Q. Did you instruct anybody to make a study of how much energy could be taken onto the Northwestern system if interconnection facilities were constructed?

A. I do not remember the details, but of course you

have a certain capacity and the amount that would be available to the Northwestern would depend upon the growth of the electrical requirements of Northern's own business.

Q. Did you instruct anybody to make any investigation to ascertain how much energy could be secured by Northwestern, if interconnection facilities were constructed?

A. I do not recall of issuing any such specific instructions. My opinion is that we didn't, because we didn't approach it with the idea of buying energy. There was never any intention on the part of Northwestern Public Service to buy energy.

Q. Did you instruct anybody to make any investigation to ascertain what the energy costs of Northwestern were in its various generating units?

A. Yes, my recollection is I requested that studies of my engineering department showing costs to Northwestern Public Service Company at its Aberdeen station, and the purpose was to determine how much we could pay for the purchased kilowatt hours, and not change our overall cost at the Aberdeen station.

Q. Is that the only station you instructed them to make a study?

A. Well I believe that would be the only station, although I can't say that that is the only place I instructed—no, I couldn't say that, I wouldn't know.

Q. Was Aberdeen your lowest cost generating unit?

A. Aberdeen I think was the lowest cost—Mitchell and Aberdeen were very close together, but I believe Aberdeen was slightly less than Mitchell at that time.

Q. You couldn't feed Mitchell power up north on your line, very well, could you?

A. Yes, we always fed power north out of Mitchell.

Q. To where?

A. To Huron. As to how far the power would go would depend entirely on the hours of the day. If we were sending a current north out of Aberdeen into the Northern Power and Light System, then we would be pushing more current out of Mitchell north into Huron. My off-hand recollection of the system would be that Huron, and that area, was served about fifty-fifty between Mitchell and Aberdeen. In other words, about half of the energy in

that area was flowing from Mitchell north, and half from Aberdeen south, but again that would vary over the twenty four hours depending upon the load center.

Q. Do you recall the type of construction of the lines between Mitchell and Huron? A. Yes.

Q. At the time you were there?

A. Yes. That was a 33,000 volt three-wire line.

Q. Flat construction?

A. Flat construction—33,000 volts, Delta connected line.

Q. What was the size of the conductor?

A. I do not remember the size of the conductor.

Q. What was the construction of the line from Huron to Aberdeen?

A. It was a similar type of construction, but we had smaller conductors in the first section out of Aberdeen, I have forgotten how far south it was, down to Mellette, there, some place—we had a bottleneck in conductor capacity there.

Q. Did you have anything to do with the rate case before the North Dakota Railroad Commission, concerning the rate paid to the North Dakota Power and Light—paid by Northern Power and Light to the North Dakota Power and Light, for energy?

A. In what year was the case?

Q. I think it was in 1938?

A. Well if it was in '38, prior to May, I probably had something to do with it.

Q. You don't recall doing any work in preparation for that case? A. I do not recall any preparations, no.

Q. You didn't appear as a witness?

A. I do not remember. I do not remember the case even, if there was a case at that time. I only remember this, that in [in] discussions with the Commission the question was always raised as to the inter-company rates, and so long as the business was [larglelv] North Dakota business, and owned by the same holding company, it never seemed to be particularly material, and to my knowledge we had no conflict with the Commission over it.

Q. Did I understand from your testimony this morning that you said that when Mr. White became Receiver you thought that then the consolidation of the properties, of

the Northwestern Public Service Company, the Northern Power and Light Company, and the North Dakota Power and Light Company, would be long delayed?

A. I testified that when the Middle West went into receivership, and the United Public Utilities, both of them in [recieversship], it then appeared to me that it would be of long duration, and that we had better make up our minds that the consolidation wouldn't go through for some time, if ever. You see we had two separate holding companies, and two separate receiverships, separate receivers.

Q. Did you give up the idea then of a possible consolidation of those properties?

A. From our point of view, we always pressed the case, we made recommendations and suggestions, and I recall making up, or having made up, under my supervision, an estimate of the securities of the Northwestern Public Service that we could give the United Public Utilities Company for their property. We were hopeful that we could work something out, but nothing materialized.

Q. Could you give me the breakdown of how you arrived at the $20,000.00 per year charge against the Northern Power and Light Company for the use, if I may say so, of the interconnection facilities?

A. I can't give you a breakdown, but from the estimate that was prepared by competent engineers, I concluded that the total fixed charges, that is, interest, depreciation and taxes, and operating expense and maintenance, aggregated approximately $40,000.00 per year, and it was determined that this should be split fifty-fifty. Now I never agreed that the split of fifty-fifty was equitable, but it was the best trade we could make. After Sam White sat on the lid from 1931 to 1936, and gave us nothing, $20,000.00 was quite helpful.

Q. Well, if he had continued to sit on the lid, would you have cut him off?

A. I do not think we would, because I do not think that courts let you cut off people, and put the public in the dark—they say, settle your claims in court. There is a decision to that effect, in a Minnesota case, I believe, if I remember correctly. Our position was this, we built the interconnection facilities in anticipation of a merger,

and once we had them built we had to work ourselves out the best we could, and the deal we finally consummated in 1936 was just the best deal we could work out of a hard trade.

Q. You made a contract in 1936 to [allocated] the joint management expenses? A. Yes.

Q. And I understood from the interrogation which took place this morning that the officers of the Northwestern, the North Dakota and Northern, made that agreement among themselves?

A. It was an agreement between the corporations, it wasn't among themselves, it was an agreement between the three electric companies and the coal mine, but because the officers were the same, of course they executed the agreement for all the companies. There was a recital of the services that were made available in a pool, and the method of allocating, and, as I testified this morning, the electric property is rather uniform, on the basis of gross, but there was separate treatment for the coal mine, because all the facilities for the electric end of the business were not needed or useful at the coal mine.

Q. Had you made the same allocations for charges for several years prior to 1936?

A. We had made the same allocations for some years prior to 1936. When we first started our operations with these properties, the North Dakota properties, we charged only out of pocket expenses, and it was a kind of a gradual transition, that we worked into—I would guess that it was somewhere around '31 or '32 that we went on this basis of allocation, which was later reduced to writing in the contract, but that went into effect some years prior to '36, without a contract, but with the full knowledge of both parties, that is, both holding company parties.

Q. You made an agreement with the Middle West Service Corporation?

A. We made an agreement, oh no—the United Public Utilities Company had an agreement with the Middle West Service Company for services between themselves, but with which we had nothing to do at all.

Q. You didn't have any agreement between the Northern Power and Light and the Middle West Service

Company—did you ever have an agreement between the Northern Power and Light and Mr. Greene—wasn't Mr. Greene the receiver—

A. Mr. Greene was President of the Middle West at one time, Dan Greene.

Q. Wasn't he the receiver of Middle West?

A. The first receivers were Mr. McCullah, Mr. Hurley, and Mr. Insull, and I didn't remember that Mr. Green was ever a receiver. My recollection was that he came in as President of Middle West. Now I may be wrong in my recollection, but that is as I recall it.

Q. You say that the Northern Power and Light had no service agreement with Mr. Green as receiver?

A. Not to my knowledge.

Q. It is your best recollection that the Northern Power and Light Company never had a service agreement with either Mr. Green or with the Middle West Service Company?

A. That is my recollection. My recollection, as I previously testified, is that Mr. White, as President of the United Public Utilities Company, had a service agreement with the Middle West Service Company for all of his subsidiaries, only part of which we operated. He had other properties in Ohio and Indiana.

Q. Do you recall any of the facts concerning that, upon which you based your recollection?

A. No, except in discussions with Mr. White, he told me that he paid a fixed fee, as I recall it, to the Middle West Service Company for counsel and advice for his subsidiaries. That is the only basis of my recollection.

Q. Do you recall about when that was?

A. No, it was during the years from '31 to '38, along through there.

Q. It was after you had become closer to the top, I might say, of the management of the Northwestern Public Service Company?

A. I would say it was coincident with that about the time I became active in the general management, it would be about that time.

Q. Do you recall whether that conversation was in North Dakota, on one of his trips, or whether it was in Chicago?

A. Well, I wouldn't have any idea—I would guess it was in Chicago. I have just my remembrance of the discussion—I remember, in discussing some matters with Mr. White, he asked me to go and talk with Major Buell, and some of the engineers, he said, I am paying them for service, and I want their opinion on [on] it.

Q. Do you remember what type of matters those were?

A. Those were operating matters between companies, and construction and reconstruction of lines, particularly on the Northern Power and Light System.

Q. When you say operating matters between companies, what do you mean by that?

A. I mean the various power plant operations and transmission operations. As an example, the transmission lines from Beulah to Bismarck had a lot of bugs in it, so that whenever we got into a sleet storm, and the lines tightened up, the bells would tip over into the braces and throw the line out, and we had to go through and reverse the braces on the line, and redesign it, so to speak, so as to be able to give service. Those things cost lots of money. We had boiler plant problems at Beulah. The foundations were inadequate, and the boilers were settling, uneven—one boiler was down about an inch and three-quarters in one corner. Ultimately, we put a mat under the boilers, which took care of the trouble. There were many many items, which the engineers constantly had on the tressel board, so to speak, for discussion, and as I would discuss them with Mr. White, he, in turn, would direct me to discuss them with the Middle West Service Company, to have the benefit of their judgment, for which he was paying, as he described it.

Q. What is your recollection about whether the North Dakota Power and Light Company ever had a service agreement with the Middle West?

A. I have no recollection of any service agreement by either North Dakota, or Northern, or Knife River, directly with the Middle West.

Q. Do you have any recollection as to whether or not the Northwestern Public Service Company had such a service agreement?

A. I believe the Northwestern had a service agreement with the Middle West. I have forgotten, in nine

years, what it was,—at least we had a basis for billing, they billed us for services rendered.

Q. When you talk about an agreement then, you are talking about a written agreement? A. Yes.

Q. As distinguished from an oral agreement? A. Yes.

Q. Was your staff adequate to solve such problems, the Northwestern Public Service Company's staff, adequate to solve such problems as you say Mr. White told you to take up with the Middle West Service Company?

A. No, we never maintained a staff adequate to do all engineering for all types of construction, etc. Our staff was adequate for taking care of operating and maintenance problems, and small renewal and replacements in power plants, but when it came to design of new power plants, when it came to designing the mat that went under the boilers, at the Beulah station, we would go outside and purchase that, either from the Middle West Service Company, or from Sargent and Lundy, or some outside consulting firm. In other words, the nature of that business is so varying that it is cheaper to go out and buy technical service for a large job, than it is to maintain a staff of your own.

Q. Who is this firm of Sargent and Lundy?

A. They are just an engineering firm in Chicago which we happened to be using at that particular time.

Q. What was their relationship with the Middle West?

A. So far as I know, no relationship. There may have been, but I didn't know any relationship existed.

Q. And you have never heard since?

A. I haven't heard since. The United Public Utilities Securities Committee, used the firm of Lucas and Luick, and they looked into the inter-company relationships, and studied the basis of intercompany billing.

Q. That was this committee headed by the man you mentioned, who was that—

A. Ralph Bard. And Mr. White sent out a man by the name of Earl Lakin who was General Manager of his Indiana and Ohio properties, also an engineer, and formerly with the Kansas Electric Power Company—he came out and investigated the inter-company relationships, and particularly was brought in at the time we were considering studies for additional generating capacity,

as to which company should install—that was in the process of study when I left the properties in 1938.

Q. Did Sargent and Lundy do engineering work for the Northwestern Public Service Company?

A. They did some work for us, I have forgotten how much, and where—they did some work for us.

Q. You gave us a little history for the way you became connected with the Northwestern Public Service Company. Where did Mr. Kruesi come from?

A. Mr. Kruesi originally was assistant to the President of the Middle West Utilities Company, Martin Insull. At the time of the receivership, the receiver discontinued that arrangement, and Mr. Kruesi was with the Middle West Utilities Company in Chicago, and when Mr. Parker resigned, Mr. Kruesi was elected to succeed him.

Q. Then Kruesi went back to the Middle West Service Company?

A. Then Kruesi went back to the Middle West Service Company, at the time, that is, prior to the resignation of Mr. Green and Mr. Olsen.

Q. Where did Mr. Sandstedt come from?

A. Sandstedt was originally from the Nebraska Power Company at Omaha, and was brought to the Northwestern Public Service Company at the time it was originated. The Union Power and Light Company, which was the [necleus] company, had their offices in Omaha, and Mr. Bell, the then Treasurer of the Union Power and Light and the first treasurer of the Union Power and Light, and the first treasurer of the Northwestern Public Service, hired Mr. Sandstedt from the Nebraska Power. Now Sandstedt was with some machinery company, J. I. Case, or someone, about that same time, in Omaha, but his background in the utility business was with the Nebraska Power.

Q. J. I. Case is a farm implement company?

A. That is right. He was bookkeeping for some of those companies, and he also homesteaded in Wyoming.

Q. Well give us the history of G. R. McArthur, will you, please?

A. Mr. McArthur, according to my first knowledge, was public speaking instructor in the college at Huron, and later went with the Chamber of Commerce, Secretary of the Huron Chamber of Commerce. He came into our

organization about 1928, as I recall it, in charge of public relations of the Northwest Public Service Company, and from that developed into an assistant of mine, and continued in that capacity at the time I left there.

Q. Where did J. F. Buckmier come from?

A. Buckmier came from the accounting department at Aberdeen, South Dakota, the Aberdeen Light and Power Company, and was brought into the general office shortly after the organization of the Northwestern Public Service Company.

Q. Where did A. B. Sanborn come from?

A. Sanborn succeeded me, and didn't get there until a month after I left, and I am not sure where he came from.

Q. Did you know Mr. Blackstun? A. Very well.

Q. What were his connections other than a director of the North Dakota Power and Light and the Northern Power and Light?

A. Well, Mr. Blackstun originally came from the Kansas Electric Power Company as industrial engineer for the Northwestern Public Service Company, and when we acquired control of the North Dakota Properties, we wanted somebody located up there who could represent us on a day by day basis, so we moved him to Bismarck to represent the general office, management, and all departments, and he resided in Bismarck.

Q. Can you tell us where Mr. William M. Dunn came from?

A. Mr. Dunn was originally County Auditor at Yankton, South Dakota, and later became State Auditor of the State of South Dakota. He came from that job to our company as traveling auditor. He held that position for some time, and then was made Division Manager at Columbus, Nebraska; then moved to Yankton, South Dakota, as Division Manager, and from there into the general office, subsequent to my regime.

Q. When the interconnection facilities were constructed from Aberdeen to Barnard, was it the talk to send power up that line to Ellendale, Fullerton, and Forbes, that part of the Northern Power and Light Company's property?

A. The original line that ran from Aberdeen north was a 6,900 volt line, to serve the town of Barnard, and when these properties came under our direction that line

was not adequate to give any supply of power into what was known as the Ellendale district, and so we built a new line, and then under-built it with a low voltage line to Barnard, and that line was designed to give back up service that I described earlier in my testimony, adequate to serve that area, and to feed clear over into where that line tapped off at Wishek, or in the Wishek locality. That was my point in my original testimony, that the nature of that Northern Power and Light system, if you had a block of power either feeding in from Aberdeen, or a generating station at Ellendale, it was bottlenecked from getting into the Mobridge area by reason of the transmission through those bad hills, and that line was adequate to serve that entire area back to the main trunk, which was near Wishek.

Q. You did send power from Aberdeen up to Ellendale, Fullerton and Wishek, from time to time?

A. Yes, from time to time. This was maintained as a bus-tie, and it would depend entirely on load as to how far current would be flowing—if you happened to have a line out you might be feeding around, but as a normal operation, we were able to get about 1,000, a maximum, as I recall it, of 1,500 kilowatts, over that bus-tie at Aberdeen into the Northwestern system, but in feeding back we could feed much more than that because we had the source of power right at the bus-tie.

Q. You did feed—

A. We did in an emergency—but the normal operation was to let the North Dakota Power and Light plant at Beulah carry all the kilowatt hours that they could, and under normal conditions they practically served all of Northern Power and Light. We were merely an insurance policy behind that load. I think you will find that the earlier records will indicate that the kilowatt hours netted did not mean very much, in the early years of '31 and '32.

Q. The interconnection at Gettysburg was made for the purpose of getting Northwestern Public Service Company power into that territory?

A. Well, particularly for the town of Gettysburg. That is where the fireworks were starting, and they had inadequate diesel capacity. The original plant at Gettysburg was built by a man named Frank Boyle, back in

1919, '18 or '19, and was purchased by Lee Runsel, who was the predecessor owner of the Northern Power and Light Company, and there was no additional units added, so the diesel plant was inadequate. The transmission line from Gettysburg north to Bowdle, and from Bowdle north to Steele, North Dakota, and was very unreliable, had tremendous outages on it, and we either had to put in more diesels at Gettysburg, or fortify it with service protection from the south, and it was determined that the most practicable thing was to give them that interconnection.

A portion of the deposition of C. J. Strike was not read by defendant. It appears in plaintiff's case from page 440, line 7, through page 441, 22nd line from the bottom, of the record herein.

Q. They did get built to Leola?

A. They built into Leola, yes.

Q. And then you reinforced their generating capacity at Ellendale?

A. Whatever their program was, either feeding in from Ellendale or feeding in from Mobridge. They had to rebuild the line from Ipswich clear through to Selby, because that was a 22,000 volt line, with a No. 4 conductor, and very inadequate.

Q. If they were going to do that, the place for the additional generating would have been Ellendale?

A. Well, it all depended upon the area you wanted to protect. You have some 130 or 140 miles of line between Ellendale and Mobridge, and there has been no [on] in that country who has ever found it possible to give service over a one-way transmission line by reason of sleet conditions. That was our experience over the years—it is just the same as Beulah experience, there were times when our Beulah plant was isolated, due to sleet storms. That is why the interconnections were so vital between all utilities.

Q. You say "were" or "are"? A. Both—were and are.

Q. In other words, you think the provisions of the Federal Power Act are sensible?

A. I certainly do. I have very good evidence of it in our interconnections between the Montana Power, the Utah Power and Light, and the Idaho Power, where we get a diversity element which brings us 37,000 kilowatt additional combined capacity, by reason of that one element of diversity. That is particularly true with an east and west system, due to the time change—you have more diversity with an east and west system than you do a north and south system.

Q. How far into 1938 did you keep your finger closely upon the operations of the Northwestern, the North Dakota, and the Northern?

A. Right up until the first of May.

Mr. Royhl: Of '38?

The Witness: Of '38.

A. (Continuing) I was called down to Nebraska, and was interviewed by the Electric Power and Light people, the latter part of April, at which time I made my arrangements to come to Idaho, and I went back and notified the Middle West and the United Public Utilities Company that I was resigning, June 1st, or as soon thereafter as they could get a successor.

Q. You had nothing to do with the starting of any interchange capacity charges between the Northwestern, the Northern, and the North Dakota?

A. We had started our studies on that to determine a capacity charge. My rememorance is that at that time we felt that any one of the companies could have capacity at about $125.00 a kilowatt.

Q. I am not asking you to repeat your testimony this morning—I am asking as to the dollars and cents, which were paid—you have no recollection of, and had no control over any payments for interchanges that were made prior to July 1, 1938?

A. That is right, and as I recall there were no charges made for power plant capacity prior to that time.

Q. Did you watch the operation of the Beulah plant as to whether it was able to run to capacity all the time you were there?

A. I wouldn't say run to full capacity all the time I was there. We endeavored to maintain the highest pos-

sible load factor from that station. We had the complication that we would have to divide the load during the steam heating season, as an example—

Q. At Beulah? A. At Bismarck.

Q. All right.

A. (Continuing) I am referring to Beulah by saying that during this steam heating season, rather than run live steam into the steam heating mains in Bismarck, we would generate, at Bismarck, which would take the load away from Beulah, and there were times that we wouldn't get the full load that we wanted from the Beulah station, but to the best of the ability of the [despatchers] to organize their program, we operated the Beulah station at the highest possible load factor.

Q. Do you recall the installation of an additional boiler at Beulah during the early regime as General Manager and President of the Northwestern?

A. No, I do not recall any additional boiler at Beulah.

Q. I will ask you whether or not you recall there was a Reilly-Badenhausen bent tube boiler installed at Beulah in 1937?

(Paper handed to witness)

A. I had forgotten that. I had forgotten the third boiler—my remembrance was merely a two boiler plant, two turbines, but now that you refresh my memory, I recall it.

Q. Will you just think about that for a moment, and see whether you recall the reasons for installing that third unit, the Reilly-Badenhausen boiler?

A. Well, the big reason would be to insure full operation of the plant, because with the two original boilers, with one down, you couldn't carry the full 6,000 kilowatts, and I think the third boiler was put in to insure the full operation of the plant when you take out one boiler at a time for maintenance.

Q. That would enable you then to use the Beulah plant to full capacity, in conformity with your plan to use the Beulah plant and the Beulah mine to their full capacity? A. As a base load.

Q. And that was the reason for putting in this Reilly-Badenhausen?

A. That was the reason for putting in the third boiler, yes.

Q. You don't remember any boiler except as I mentioned? A. No.

Q. Do you know anything about two Reilly boilers which were installed at Bismarck in 1938?

(Counsel shows witness paper.)

A. I only remember that they were in the process of construction. That was one of the first steps in redesigning and building up capacity in the Bismarck plant, preparatory to adding another turbine which followed subsequent to 1938.

Q. And that enabled the North Dakota Power and Light, as you stated before, to furnish more power to this whole system of the three companies?

A. I wouldn't state that it probably enabled the North Dakota Power and Light Company to keep separate the growth on the combined North Dakota and Northern systems. It is my recollection that they were getting a little less surplus power all the time, and they were obliged to make plans to increase production to take care of their own requirements.

A portion of the deposition of C. J. Strike was not read by defendant. It appears in plaintiff's case from page 441, 21st line from the bottom, through page 442, line 17, of the record herein.

Q. Did you study the losses from the Beulah plant down to Keldron?

A. Of course the losses via that route would be less than they would be by the other route—first, because of shorter distance, and second, better construction. I do not have any detailed recollection of the individual studies, I just have my general knowledge of the territory, and the type of construction. There was a 38,000 volt line all the way down to Keldron, and it was a straight shot from Beulah down to Glen Ullin, and down that way, so that would be the shorter route from Beulah into that section. You see your fuel cost on your Beulah station was about

2¼ or 2½ mills, less than half the fuel cost of your diesel plants and most of your steam plants so that you could take quite a bit of loss in sending the energy down there, and still make it a profitable deal for the United Public Utilities property.

A portion of the deposition of C. J. Strike was not read by defendant. It appears in plaintiff's case at page 442, line 18 through 29, of the record herein.

Q. In your testimony in chief, I rather gathered the impression that the only properties the United Public Utilities Company owned were North Dakota Power and Light and Northern Power and Light, but I do not think you intended to convey that impression?

A. I certainly didn't, because they had properties in Indiana and Ohio, under the operation of Mr. Lakin, and they had an ice property down in Fort Smith, Arkansas, as I recall, but my remembrance is that we had something like 60 percent of the gross United Public Utilities Company total operations. That is rather an offhand recollection.

Q. They also had the Knife River Coal Mining Company property?

A. I assumed he included that in the group we were supervising.

Q. Do you know where T. T. Parker is now?

A. He is in Phoenix, Arizona, or somewhere in Arizona. He was with the Arizona-Edison Company, but recently, I understand, he has gone with some water company down there.

Q. If the properties of Northern Power and Light and North Dakota Power and Light had been consolidated with the Northwestern, you would have made these same interconnections?

A. Very definitely. The conclusion was arrived at on the assumption of consolidation, and in the years from '29 through to '38, nothing took place that made me believe it wasn't sound judgment, and many things took

place which confirmed the judgment, because of the terrific storm problems in that area. I have seen four inches of ice on the transmission conductors, I have seen 150 miles of that line down on the ground, in sleet storms, and you just had a terrific problem, and with all the inter-connections we had trouble some times maintaining service to parts of that area. I am sure that an analysis of the operating records, over that period of time, will reveal the many many times that those interconnections were worth their weight in gold, so to speak.

Q. Did I understand you to say that these interconnecting facilities did not reduce the cost of power to the Northwestern Public Service Company?

A. In my opinion, the interconnecting facilities did not reduce the cost of power. The importation of power over the bus stops, at 5 mills, was as related to our average fuel cost of 5.7 mills, and in reconciling the banked boilers cost, as near as we could figure it was an exchange of dollars at the time it was made, in 1931, or 1932, or whatever year it was, that that 5 mills was just about an exchange of dollars. Now it may be that in subsequent years the Aberdeen costs gradually came down a little, due to changes in power plant—I can't recall the change from the 5.7 mills down to what it was in '36 or '38. There was a difference of possibly a fraction of a mill.

Q. You never had any mining experience, have you?

A. I never had any mining experience until the time we were up in charge of the Knife River Coal Mining Company.

Q. Who ran the mine for you?

A. Mat Mounts. At the time we acquired the operating control, it was under the general management of W. T. Kraft, but we dispensed with his services in the early stages of things, and employed another sales manager.

A portion of the deposition of C. J. Strike was not read by defendant. It appears in plaintiff's case from page 442, line 12 from the bottom, through page 443, line 30, of the record herein.

Q. What was your interest rate?

A. I have forgotten the formula. I happened to remember these figures.

Q. You do not remember the elements?

A. I do not remember the elements, except that it included fixed charges of interest, taxes and depreciation, all of which have changed, of course, since '32, '33, or '36, whatever year it was—you get cheaper money and higher taxes—that is the way it has been out here.

Q. You figured that $13.20 over a long term contract?

A. No, I said based upon $125.00 per kilowatt year, in our opinion, was a fair demand charge.

Q. You had depreciation in there?

A. Interest, depreciation and taxes, are in that figure.

Q. Your interest would remain constant in dollars?

A. Depending upon what you were able to do. Most of us have been able to fund our indebtedness. We sold our last bonds at 2.7265, for example, and back in '32 we talked about 5 per cent, but now to off-set the savings in interest charges, taxes have gone up tremendously.

Q. How about your depreciation?

A. Depreciation, of course, depends upon the type of equipment you have.

Q. After you depreciated the property would you charge interest on the original investment?

A. Well, that is an argument that I do not believe anybody in the utility business yet has been able to find an answer to. You set up your depreciation on your physical properties, and put it into a reserve, but you can't take that money out of the business, and pay off your indebtedness, because tomorrow you may need to replace the property, so that the only thing an operating utility can get on its reserve is the value of that money at the current interest rate.

Q. Or the use you make of it in some other property?

A. Yes, and in the regulatory business, Commissions take that into consideration, and the question had never been settled, so far as I know.

Mr. Benson: I think that is all.

Redirect Examination by Mr. Royhl:

Q. You have mentioned a man by the name of Lakin. Was he an employee of the Middle West, or the Northwestern Public Service Company?

A. No, Lakin was President and Manager of the United Public Utilities properties in Ohio and Indiana, and I believe is on the Board of Directors of Mr. White's United Public Utilities holding company at the present time.

Q. He is under Mr. White then in that organization?

A. Yes.

Q. Is he the same man mentioned in Mr. White's correspondence, Exhibit No. 1?

A. Yes, the same Earl Lakin.

Q. If he visited these properties, in 1936, involved in this litigation, it would be as a representative of Mr. White?

A. Mr. White called me on the telephone and told me he was sending Lakin out, that he had confidence in him, [Laking] was an engineer, and he j wanted to check our judgment. Lakin was sent out by M. White to review the contract, and to go into all of these matters, and to go back and make his report to Mr. White. He did not report to us.

Q. That refers to the question of the 5 mills energy charge of the 1936 contract?

A. Well it refers to all of the things that are under discussion. The thing we were trying to do was to get a contract signed, which involved the fixed charges on interconnections, and to get ratified all of the things that were being done, and bound up into a signed contract.

Q. That refers to the '36 contract?

A. Yes. This was one of Mr. White's methods of checking and rechecking, to assure his judgment was good, and I think, as I testified this morning, also to stall us so far as he could, because it was cheaper.

Q. Now you have testified concerning the reserve capacity charge, and that none such were made, to your knowledge, for any period prior to your severing connections with the defendant company. Is that right?

A. That is my remembrance.

Q. In the contract, Exhibit "C", attached as part of Plaintiff's complaint, it appears that subsequent to your

leaving the company, an intercompany capacity contract was entered into, which was made by the terms of the contract as alleged retroactive to January 1, 1938—if charges were made and collected upon such a contract, you would have no knowledge of that?

A. I would have no knowledge, and it must have been predicated upon changed conditions of equipment, boilers, or turbines, something installed by one company or the other. All I recollect is that we set the mechanics up for such an operation, but it hadn't taken effect yet.

Q. I think that is all, Mr. Strike, unless there is something you wanted to add?

A. Well, no—I do not know whether you want this on the record or off the record—I merely wish to make this statement, that in the consideration of all of the elements which were involved in this deal, I would like to make it very clear that during my regime, our staff, to the best of our ability, represented, on an equitable basis, the four companies, the Northwestern Public Service Company, the North Dakota Power and Light Company, the Northern Power and Light Company, and the Knife River Coal Mining Company. We were very conscientious of our responsibilities, and I would invite any and all of you to study the records, to see the thoroughness with which we approached each of these questions to be sure that equity was dealt out. Now if it does not look that way, looking back in retrospect, then it was just a mistake of judgment. I merely wanted to make that statement.

Mr. Woods: That is all of the deposition we will offer except the exhibits.

Mr. Benson: I will begin with the third question on Page 119.

Q. You discussed with Mr. White from time to time the matter of reserve capacity contract that might arise in the future?

A. No, I do not recall any detailed discussion, other than the fact that we were both interested in having the engineers continue their studies, so that we would have a program to follow and receive, in advance of the

power requirements of the territory—in other words, not be caught short.

Q. And did you tell him what you have told us today, that as the generating capacity stood at the time you left that there was no basis for an inter-capacity charge?

A. I do not remember whether I told him that, I do not remember whether I wrote him that, but it was certainly my conclusion, that at that time there was no basis for a capacity charge because neither company had built for the other.

Mr. Benson: That is all we desire to offer.

Defendant offered the following testimony from the deposition of SAMUEL W. WHITE, which was received in evidence:

Q. Will you please state your full name?

A. Samuel W. White.

Q. Where do you live, Mr. White?

A. 1416 Elinor Place.

Q. Chicago? A. Evanston, Illinois.

Q. What is your business?

A. I am president of United Public Utilities Corporation, a public holding company.

Q. How long have you been president of United Public Utilities Corporation?

A. Since it started business, on January 1, 1935.

Q. Prior to that time did you have any connection with or anything to do with properties now owned by United Public Utilities Corporation?

A. I was appointed equity receiver on April 15, 1932, for United Public Service Company, United Public Utilities Company and Southern United Gas Company by the District Court of the United States for the Northern District of Illinois, Eastern Division.

Mr. Benson: What is the number of that?

Mr. Stafford: Q. Do you recall the number of that proceeding?

A. Yes. It was Howard J. Umland, complainant, No.

11652. I acted as equity receiver until June 20, 1934, when I was appointed temporary trustee by the same court in proceedings for the relief of debtors under Section 77B of the Bankruptcy Act.

Q. Did those proceedings succeed the equity receivership proceedings?

A. Yes, sir. The number was 49983. On July 19, 1934, I was appointed permanent trustee, and so served until the reorganization of the United Public Utilities Company.

Q. Well, when was that completed?

A. Reorganization was consummated as of the close of business December 31, 1934.

Q. All right. During that time, Mr. White, did you have any connection with the defendant in this case, Northwestern Public Service Company, either as an officer, director or stockholder? A. No.

Q. Did you have any such connection with Middle West Utilities Company? A. No.

Q. Did you have any such connection with Middle West Service Company? A. No.

Q. Did you have any such connection with the Middle West Corporation? A. No.

Q. Did you have any connection or interest in the properties or subsidiary companies of any of those three companies, namely Middle West Utilities Company, The Middle West Corporation, or Middle West Service Company? A. No.

Q. I think I made that inquiry with reference to the period when you acted as receiver and as trustee, and I make the same inquiry with reference to the period from January 1, 1935, to the present.

A. The answer would be no in all cases with the exception that since July 1, 1945, United Public Utilities Corporation has been a subsidiary of The Middle West Corporation, and I have been interested in the securities of the United Public Utilities Corporation.

Q. Since that date?

A. Well, it was before and since that date.

Q. Will you explain for us what interest you had in the securities of those corporations, both before and after July 1, 1945?

A. Well, I personally have been a holder of only one

share of preferred stock of United Public Utilities Corporation. My wife happens to have been a substantial stockholder.

Q. Of which corporation?

A. United Public Utilities Corporation.

Q. Well, my inquiry was directed with reference to Middle West Utilities Company.

You also included in that two of the subsidiaries of The Middle West Corporation, and I pointed out that since July 1, 1945, United Public Utilities Corporation has been a subsidiary of The Middle West Corporation.

So that the extent then of your interest was the one share which you testified to in United Public Utilities Corporation, the stock you have in it and that [you] wife held, and your only connection was that that company after July 1, 1945, was a subsidiary of The Middle West Corporation? A. That is correct.

Q. You testified that you were appointed receiver April 15, 1932; and you have also told us that the companies of which you were appointed receiver were United Public Utilities Company and Southwestern—

A. Southern United Gas Company.

Q. (Continuing) Southern United Gas Company?

A. Yes.

Q. What was the relationship, if any, between United Public Service Company and United Public Utilities Company?

A. United Public Service Company was the parent holding company, which owned all of the common stock of United Public Utilities Company and Southern United Gas Company and two other subsidiaries.

Q. The other two companies you refer to were not in—

A. Were not in the receivership.

Q. They were not in the receivership?

A. Not at April 15, 1932. One of them never was. I believe the fourth subsequently went through 77B or reorganization of some sort.

Q. Will you tell us if you know who owned the stock or controlling stock of United Public Service Company at that time?

A. The Middle West Corporation. Middle West Utilities Company owned all or practically all of the common

stock of United Public Service Company at the date of the receivership.

Q. Which in turn owned all of the stock of United Public Utilities Company? A. Correct.

Q. Referring to the properties owned by United Public Utilities Company, was there included among those properties the securities of North Dakota Power & Light Company? A. Yes, all of them.

Q. By "all of them" you mean all of the securities of North Dakota Power & Light?

A. All of the notes and stock of the company, with the exception of a $25,000 bank loan.

Q. All of those with that single exception?

A. I beg your pardon. The company had no bank loan.

Q. Then all of its securities and all of its stock were owned and held by United Public Utilities Company when you became receiver? A. That's correct.

Q. Among those properties or securities owned by United Public Utilities Company were there any securities of Northern Power & Light Company at that time?

A. Yes. United Public Utilities Company owned all of the bonds, notes and stock of Northern Power & Light Company, with the exception of a $25,000 bank loan.

Q. Also among the securities and properties held by United Public Utilities Company at that time were there any securities or stock of Knife River Coal Mining Company? A. Yes.

Q. Will you tell us what they were?

A. The company owned all of the notes and capital stock of the Knife River Coal Mining Company.

Q. Also at the time you became receiver, did the securities and assets of United Public Utilities Company include any securities or stock of the defendant, Northwestern Public Service Company? A. No.

Q. They did not contain any such securities? A. None.

Q. After your appointment as receiver, Mr. White, did you make any investigation as to the physical properties of the North Dakota Company, Northern Power & Light and the Knife River Company as to its properties, its relationship, its contractual arrangements and the like?

A. Yes.

Q. Can you tell us generally what that investigation consisted of?

A. Well, I made trips over the properties. I had numerous conferences with the management, to try to find out just exactly what the business position of these companies was.

Q. Well, specifically did you make any inquiries of any persons at that time, that you recall?

A. Yes. I had many talks with Mr. Strike.

Q. Who is Mr. Strike?

A. At that time he was vice president of both North Dakota Power & Light Company and Northern Power & Light Company. I had talks with Mr. T. T. Parker, who was the president of the company.

Q. President of both companies?

A. President of both companies. With Mr. C. L. Sandstedt who I believe at that time was treasurer.

Q. Of both companies?

A. Of both companies, and was particularly familiar with them.

Q. Did you make any inquiries of those gentlemen or of others with reference to any existing interconnections with other companies, that is, interconnections between either North Dakota Power & Light Company, Northern Power & Light Company, or any other public utility company in the electrical field?

A. Yes, the existing arrangement was explained to me in detail on numerous occasions.

Q. This was during the period of your receivership that I am inquiring about? A. That's right.

Q. It was on numerous occasions during your service as receiver that these various explanations were given to you? A. That's right.

Q. Did you make any inquiry or receive any advice from these gentlemen or other as to any arrangements which might then have existed between the North Dakota Company and the Northern Company on the one hand and Knife River Coal Mining Company? A. Yes.

Q. You testified [your] got your information from Mr. Strike, Mr. Sandstedt and Mr. Parker. Were there any other people whom you consulted or from whom you received information as to these matters?

A. Oh yes. I talked with the whole operating organization in the joint management. I saw the properties and

their relationship to each other, in company with the management, and I had the facts and the relationships explained to me both at the time of visits on the property and in connection with their visit to Chicago, and some of it by correspondence.

Q. Well, now, who gave these explanations to you, the three gentlemen you have mentioned?

A. Primarily those three gentlemen because it was in their company that I made the inspection trips. They were the men who held the responsibility to me for the operations.

Q. Now, who did you inquire of and receive information from with reference to the arrangement with Knife River Coal Mining Company?

A. Mr. Strike, Mr. Sandstedt, and the operating managers of the mine, and the superintendent, the mine manager, and so forth.

Q. Mr. White, do you recall making an inquiry of Mr. Strike on December 30, 1932, with reference to the contracts for interchange or purchase or sale of power between the subsidiary or affiliated companies of United Public Service Company and also with reference to written contracts or other arrangements between Knife River Coal Mining Company and Northwestern Public Service Company or other Middle West subsidiaries? Do you recall making such an inquiry?

A. I recall making an inquiry about all contracts, without particular relationship to those individual contracts, when I was asked by the Bondholders' Protective Committee to furnish them with a list of all contracts.

Q. Did you receive any response to your inquiry?

A. Yes.

Q. Mr. White, I will show you a document marked Defendant's Exhibit 3 for identification.

Defendant's Exhibit 228, which is also referred to as Defendant's Exhibit 3 in White's deposition, was received in evidence. It reads in part as follows:

Defendant's Exhibit 228

Northwestern Public Service Company
General Offices.
Huron, South Dakota

January 4, 1933.

Subject: Inter Company Transactions With Dakota Group-United Public Service Properties.

Mr. Samuel W. White, Receiver,
United Public Service Company,
20 North Wacker Drive,
Chicago, Ill.

Dear Mr. White:

In reply to your letter of December 30th, I wish to advise that there are no contracts in effect covering the inter-change or purchase, or sale of power or coal between the subsidiaries of the United Public Service Company under our jurisdiction and Northwestern Public Service Company.

When these properties came under our supervision in 1929, we attempted to work out a mutual plan whereby Northwestern Public Service Company costs would not be increased and to pass on to the United Public Service properties any business which might help their situation. This is the basis on which we have operated and from time to time the basis of inter-change has been changed.

Effective at this time, in accordance with a memo on inter-company rate analysis which I recently furnished to you, the rates are as follows:

North Dakota Power and Light Company sales to Northern Power and Light Company ..... .0035 per K. W. H.

Northern Power and Light Company sales to Northwestern Public Service Co.	.0050 per K. W. H.
Knife River Coal Company's coal sales to North Dakota Power and Light Company	$1.40 per Ton
Knife River Coal Mining Company sales to Northwestern Public Service Company	.75¢ per Ton
Knife River Coal Mining Company sales to Northern Power and Light Company	.85¢ per Ton

These are the rates now in effect and any inter-company rate analysis which was recently furnished you thoroughly justifies the rates on inter-change between the three electric companies.

In the case of the coal prices, Northwestern Public Service Company and Northern Power & Light Company are paying approximately the delivered cost on a B. T. U. basis compared with the cheapest fuel we have found, which is Roundup coal from Roundup, Montana.

In connection with the price of coal and power between North Dakota Power and Light Company and Knife River Coal Mining Company, this is rather arbitrary, arrived at with the purpose of keeping the rate at a fair basis, and leaving as much earnings as possible to the Knife River Coal Mining Company, in that the rates of the North Dakota Power & Light Company come under the jurisdiction of the Railroad Commission.

As previously advised there are no written agreements in connection with these inter-company transactions, however, I have felt for some time that a memo should be made for the interest of all, in that the properties have separate receiverships, even though there are some affiliated connections.

Another reason is that Northwestern Public Service Company is carrying the investment maintenance and operating costs of approximately $287,000.00 of investment solely for protection to United Public Service Company

properties, and in consideration of this we should have a contract covering these interconnections.

If you so desire we would be pleased to prepare such a contract and submit it to you for your approval.

Yours very truly,

C. J. STRIKE

CJS/B

Q. I direct your attention to the second page of that exhibit and ask you whether or not you know whose signature it bears? (Handing document to the witness.)

A. Yes. It bears the signature of Mr. C. J. Strike.

Q. Do you know that to be Mr. Strike's signature?

A. Yes.

Q. Again referring to the same exhibit, can you tell us whether or not you received that letter from Mr. Strike on or about the date it bears? A. Yes.

Q. Mr. White, I show you again Defendant's Exhibit 3 for identification, and ask you to examine the same and state whether or not it is in the same condition now, as it was when you received it, with the exception, of course, of the reporter's mark? (Handing document to the witness.) A. Yes, and the punched holes.

Q. The punched holes? A. At the top.

Q. At the top? A. That's right.

Q. Mr. White, I asked you to produce certain documents for me for the purpose of this deposition, from your files. Will you state whether or not this Defendant's Exhibit 3 was so produced by you? A. Yes.

Defendant's Exhibit 229, which is also referred to as Defendant's Exhibit 78 in White's deposition, was received in evidence and reads as follows:

Defendant's Exhibit 229.

Telephone RANdolph 8730

Suite 2216, 20 North Wacker Drive

Samuel W. White

Receiver for
United Public Service Company
United Public Utilities Company
Southern United Gas Company
Chicago

December 30, 1932.

Mr. C. J. Strike,
c/o Northwestern Public Serv. Co.,
Huron, South Dakota.

Dear Mr. Strike:

The Reorganization Committee of United Public Service Company has requested that I furnish them with copies of all contracts for the inter-change or purchase or sale of power between subsidiary or affiliated companies of United Public Service Company and subsidiaries of Middle West Utilities Company.

Does Knife River Coal Mining Company have written contracts covering its coal sales to Northwestern Public Service Company, or other Middle West subsidiaries, or are these transactions merely put through on a mutually equitable basis as determined by the management?

Also, is the arrangement for the purchase, sale or inter-change of power with Northwestern Public Service Company carried out under a written agreement or otherwise.

I would thank you to send me copies of all such written contracts of your three United Public Service subsidiaries as might fall within the scope of the above inquiry.

With best regards,

Very truly yours,

SAMUEL W. WHITE,
Receiver for United Public
Service Company.

Q. Mr. White, did you know at that time, learn at that time, what the rates were between Knife River Coal Mining Company and North Dakota Power & Light Company, as to the purchase of coal or lignite by North Dakota from Knife River? A. Yes.

Q. You did know? A. Yes.

Q. And will you please state what that rate was?

A. $1.40 a ton on lignite from Knife River to North Dakota—

Q. Did you know at the same time what coal rates were in force for lignite from Knife River to the Northern Power & Light Company?

Mr. Benson: I want to renew our objection to all of this testimony concerning transactions between the defendant company, or any companies, northern companies, and Knife River Coal Mining Company, as immaterial and not relevant to the controversy between the parties to this present litigation.

The Court: The objection will be overruled.

Mr. Morrison: May that same objection where it appears in the deposition stand with the same ruling, unless otherwise indicated by the Court?

The Court: I think you have that in there, but in event you haven't, it will be so ordered at this time. You may have the same objection to all of this Knife River Coal Mining Co. evidence, with the same ruling of the Court.

Mr. Morrison: And we reserve the right at the close of the case to move to eliminate all of that.

Q. Do you know?

A. Yes.

Q. Will you please so state? A. 85 cents a ton.

Q. That was at the same time?

A. That is at the same time, yes.

Q. Did you also know what price, if any, was being charged at that time by Knife River Mining Company to Northwestern Public Service Company, the defendant in this case? A. Yes.

Q. Will you please so state? A. 75 cents a ton.

Q. And those rates were in effect at the time, at or about the date that Defendant's Exhibit 3 for identification bears, to-wit: January 4, 1933? A. Right.

Q. Mr. White, do you know the basis on which those rates were established? A. Yes.

Q. And did you know that basis at the time when you were receiver?

Mr. Benson: Answer yes or no, please.

Q. Will you please state what that basis was?

A. The prices to Northwestern Public Service Company and Northern Power & Light Company were the prices at which competitive coals could be delivered to those companies on an equivalent B. T. U. basis.

Q. Specifically, 75 cents was competitive for coal delivered to Northwestern Public Service Company and 85 cents for coal delivered to Northern Power & Light Company, is that correct? A. For coal or lignite.

Q. Either coal or lignite? A. Yes.

Q. Now, will you please tell us—excuse me—

A. (Continuing) The price of North Dakota Power & Light Company was similarly determined.

Q. Where was the mine of Knife River Coal Company located with reference to the plants of North Dakota Power & Light Company?

A. The tipple of the Knife River mine is immediately adjacent to the power plant of North Dakota Power & Light Company and connected by a conveyor belt.

Q. Is that plant located at [Buelah], North Dakota?

A. Yes. I should have restricted that remark solely to that [Buelah] plant of North Dakota.

Q. Did this price of $1.40 per ton rate for lignite from

Knife River to North Dakota apply to lignite delivered to all of North Dakota's plants or just to the [Buelah] plant, or was there any differential?

A. As I recall, it applied to [Buelah] and Bismarck. I do not believe that at that time the Beulah mine supplied lignite to the Dickinson plant of North Dakota.

Q. I think I understood your testimony correctly, Mr. White. You have testified that the 75 cents and 85 cents per ton rates were fixed and determined by competitive delivery cost of coal to the plants of Northwestern Public Service Company and Northern Power & Light Company, and that the $1.40 per ton rate for lignite from the same mine delivered to [Buelah], which was at the tipple, and to Bismarck, was fixed on the same basis. Do I have a correct understanding? A. That is right.

Q. Well, to me there is an obvious discrepancy between $1.40 competitive delivered and 75 cents or 85 cents competitive delivered. Can you explain why those rates are on the same basis?

A. Surely. Freight, which is a very large item on the cost of coal, enters into those calculations.

Q. And the freight differential was sufficient to sustain the differential in those coal rates?

A. That is right.

Q. And what was the freight rate on coal from the tipple at [Buelah] to the North Dakota Electric plant at [Buelah]? A. None.

Q. Then I would like a further explanation of your previous answer.

A. There would have been freight for any competitor to put coal into that plant.

Q. In other words freight from the mines of competitive coal or lignite? A. Right.

Q. And that freight differential just supplied this difference?

A. The price at which another mine would have supplied lignite plus the freight on that lignite would have amounted to approximately $1.40 a ton.

Q. With reference to that coal rate at [Buelah], you testified, I believe, that the delivery was accomplished from the Knife River [Buelah] mine to the [Buelah] plant by conveyor belt; that is, continuous in a sense that it was not seasonal? A. Yes.

Q. And did that possibly have anything to do with determining the rate of $1.40?

A. It had all to do with the rationalization of the price, and also was an actual element of additional cost, that the mine was under obligation to operate throughout the summer, when mines ordinarily did not operate for the sale of lignite. Lignite does not store well. When stored it disintegrates because of the high moisture content, and therefore the selling season on lignite is limited almost entirely to the heating season; but this mine, with [it] obligation to supply fuel requirements of the [Buelah] generating station, had to operate during the summer, both the mine and the tipple; and when screenings were not available it had to crush coal to furnish the plant requirements.

Q. Now, at the time of your receivership, Mr. White, and the time we were referring to previously in your testimony as to the inquiries you were making and advice you were receiving, do you recall whether or not the defendant, Northwestern Public Service Company, and either North Dakota Power & Light Company or Northern Power & Light Company were [ifnterchaning] electric energy? A. Yes, they were.

Q. Did you make inquiry as to the circumstances [surroundign] that interchange of energy? A. Yes.

Q. Who did you inquire from?

A. The management, particularly Mr. Strike and Mr. Sandstedt.

Q. Did you make one inquiry or several inquiries, or can you recall how that came about?

A. There was an arrangement that was in effect at the time I became receiver, and in my exploration of the various factors in the business, it was one of the first items that my attention was called to as being fundamental in the operations of the companies.

Q. Did you inquire as to whether or not the companies, on this interchange energy were settling this interchange, one to the other, at any rate?

A. Yes. I was told the rate at which energy was interchanged.

Q. Who told you about that, if you recall?

A. The management.

Q. What persons particularly?

A. Mr. Strike and Mr. Sandstedt.

Q. Did they at that time call to your attention or supply you with any rate studies in connection with the establishment of that interchange energy rate, referring now to the period of your receivership, 1932 to January of 1935? A. Yes.

Q. Do you, Mr. White, have any recollection at the present time of what Mr. Strike told you was the rate in force on the interchange of energy between those companies at that time? A. Yes.

Q. Will you please state? Well, directing your attention specifically as to November, 1932?

A. That was the time of the study that was made during my receivership.

Q. Do you know who made the study?

A. Mr. Gazin, who was an engineer for the company.

Q. Now, you say you do have a recollection of what rate was then told to you which was in force on the interchange of energy between the companies? A. Yes.

Q. Will you please state what that rate was?

A. 3½ mills per kilowatt hour from North Dakota to Northern Power & Light; 5 mills per kilowatt hour from Northern Power & Light to Northwestern Public Service Company; and 5 mills per kilowatt hour from Northwestern Public Service Company to Northern Power & Light.

A portion of the deposition of S. W. White is omitted because it is summarized in plaintiff's case on page 504, lines 3 through 12, of the record herein.

Q. And you testified Mr. Gazin was an engineer employed by the company. By which one of the three companies? A. All three.

Q. Well, by "all three", you mean North Dakota, Northern Power & Light and Northwestern? A. Right.

Q. He was an employee of the two companies which were under your jurisdiction as receiver, that is, North Dakota and Northern Power & Light? A. That's right.

Q. Mr. White, I don't know if I understood who W. R. Gazin is, or was.

A. W. R. Gazin was an engineer on the properties of Northwestern, Northern, and North Dakota; was part of the joint general management at Huron for those companies.

Q. Now, was his status any different insofar as his relationship with Northwestern and your three companies, which you have described—was it any different than that of Mr. Strike and the billing clerks and all other people who were in that office at Huron? They were working for all of the companies, were they? Is that your statement?

A. Yes.

Q. And you don't know whether he had been working for Northwestern Public Service Company before the properties were acquired by—or before Middle West acquired the control of United Public Service Company?

A. I don't happen to know that, no sir.

Q. You don't know anything about his prior history?

A. No.

Q. He is just a man who was out there working for the Northwestern and in your companies, so far as you understood? A. That's right.

Q. And you did not pay him any separate compensation for services, your company?

A. Yes. His salary was allocated between the companies.

Q. No. I say you did not pay him any special compensation different from what you paid to all the rest of the Northwestern employees? A. That's right.

Q. So he was just in a pool with all of the rest of them?

A. That's correct.

Q. And who picked him out to prepare this document, Defendant's Exhibit 4, Mr. Strike? A. Mr. Strike.

Q. When did you first hear of Mr. Gazin, when you got this report, Exhibit 4, or had you met him before that?

A. Oh, I think the first time I heard of him was on the occasion of my first visit out there.

Q. Do you recall where you met him? A. In Huron.

Q. In the offices of Northwestern Public Service Company? A. Yes.

Q. Mr. White, on account of your investigation and continuing inquiry during your receivership term and trustee-

ship, did you ascertain whether or not there was any charge being made or price being paid by either of the companies to the other on account of interconnection facilities?

A. I made no inquiry on that subject, but I had the subject called to my attention.

Q. Who called it to your attention? A. Mr. Strike.

Q. On what occasion or occasions?

A. Rather continuously for a period of three or four or more years.

Q. In other words, over the whole extent of the receivership? A. Yes, and beyond.

Q. What did Mr. Strike say to you about those interconnection facilities and charges? Were these contentions of Mr. Strike made to you orally or in writing?

Mr. Benson: What do you mean by "contentions"? Do you mean statements of Mr. Strike?

Mr. Stafford: Statements of Mr. Strike. Excuse the characterization. I was trying to save time.

A. Both in writing—

Q. Can you recall any of the occasions on which they were made orally?

A. Yes. It was brought up in conversation in my office.

Q. Where?

A. In Chicago, and it was the frequent subject of discussion on the occasions of my trips out there.

Q. Who was present at those conversations?

A. I took various people along with me on those trips. I don't recall having made one during the receivership alone. By "alone" I mean without some one from Chicago accompanying me.

Q. By "someone from Chicago" do you mean someone from your organization? A. No.

Q. Who do you mean?

A. Someone from the Middle West Company or Middle West Service organization; also, in going over those properties, we were usually accompanied by from two to four or five members of the operating staff of the joint general staff.

Q. Do you recall who those people might be?

A. Yes. Mr. Strike, on all of them. Mr. Sandstedt on all or practically all; and on occasion one or two members of their engineering staff.

Q. You say by "their" engineering staff. Who do you mean by "their"? A. The three—

Q. The three?

A. The three companies under the joint management.

Mr. Benson: Let's get this straight so that I don't have to straighten that out every time.

Q. When you say "the three companies under joint management" you are just forgetting Knife River; you are talking about the three utility companies, is that right? A. That is correct.

Q. You mean Northwestern— A. When I say three.

Q. You mean Northwestern Public Service Company, Northern Power & Light Company and North Dakota Power & Light Company?

A. That's right. When I say "three", the fact of the matter is that that management also had direction of the business of Knife River Coal Mining Company.

Q. I see. That is why I wanted to get this straight, when you were talking about that.

A. I guess I left it out because the formula for the allocation of expenses of that joint general management was somewhat different for the coal mine than it was for the other three companies.

Q. These conversations you say occurred over various dates, at various times, during this period of your appointment as receiver through the termination of the receivership, and thereafter? A. Yes.

Q. But you cannot recall the specific dates? A. No.

Q. Will you now please tell us the substance of what Mr. Strike said to you in those conversations with regard to the intercompany arrangements?

A. Mr. Strike told me that when the U. P. U. subsidiaries were acquired by Middle West Utilities Company the management of those companies was turned over to his organization, and that Northwestern Public Service had not attempted to assess the U. P. U. subsidiaries with a full prorata portion of the cost; that the Northern Power & Light Company was in very bad physical con-

dition, had been subject to some very serious interruptions of service, because of weak transmission lines and inadequacy of properly located generating capacity, and that because it had been the intention of Middle West Utilities Company to work out a plan for a merger of all of the utility properties in North Dakota and South Dakota, Northwestern Public Service Company had undertaken to correct the poor service condition on Northern Power & Light Company by building some interconnection facilities; that Northwestern had expended what he represented at that time as a third of a million dollars of its own money to bolster up Northern Power & Light Company; that in view of the intention to merge those [operation], and also because Middle West owned all of the companies, that he had made no point about the lack of a return to Northwestern on its investment in those interconnection facilities, but that now that a receivership had separated that ownership of the companies, which previously had been a common ownership, that he felt as a part of a joint management that he could not justify a continuation of the previous arrangement under which Northwestern received no return on its investment; and he kept hammering at me for an arrangement which would provide some sort of a return on that investment.

Q. What you have just recounted to us, was that the substance of the conversations with Mr. Strike, what he said to you, which conversation you previously testified to? A. Yes.

Q. Do I understand you correctly that he made these statements to you once or were they continuously or intermittently, or what was that?

A. Well, intermittently, but with increasingly frequency.

Q. In your answer I believe you say Mr. Strike referred to the fact that Middle West Utilities Company was also in receivership. Do you know anything about the time Middle West Utilities Company went into receivership? If so, will you please state the circumstances about that?

A. Yes, I know that it went into receivership, equity receivership, on April 15, 1932.

Q. That is the same date that your receivership commenced? A. That is right.

Q. So that during the time that these conversations occurred, both of these companies were in receivership, and Mr. Strike was aware of that fact? A. Yes.

Q. And during the course of your receivership and following down to its termination, which I believe was December 31, 1934, is that correct, the termination of the operation of the properties by you as receiver and trustee? A. Yes.

Q. Well, during that period did you take any action to accede to the request made by Mr. Strike concerning the crystallization of the company interconnection relationships and the request by him to fix and determine an arrangement whereby a part of the cost of those facilities should be borne by the two properties which were under your receivership? A. No.

Q. Will you please explain to us the reason that prompted you as receiver not to accede to those requests?

A. Well, Northern Power & Light Company was not only in bad physical condition but it was in bad financial condition, and under any arrangement by which interest on that investment would have been paid the Northern Power & Light Company would have been the company to pay. From a practical standpoint it was not reasonably possible for them to incur additional operating expenses, and I resisted or deferred Mr. Strike's contentions on the basis of poverty and other pressing matters.

Q. It was necessary, was it not, that the Northern Power & Light Company continue to have and maintain these interconnection facilities? A. Yes.

Q. Was it your opinion as receiver at that time that it was necessary to continue— A. Yes.

Q. (Continuing) —the interconnection arrangement?

A. Yes.

Q. Why was that, Mr. White?

A. Because of the insufficiency of Northern Power & Light's own generating facilities and the weakness of their system.

Q. By "weakness of their system" what do you mean? Will you explain? A. Their transmission system.

Q. By that do you mean that the lines were too light to carry the necessary load the required distances?

A. Well, they were too light to stand up under adverse

weather conditions, and therefore were subject to service interruptions.

Q. Well, did Northern Power & Light have any other source of power besides that generated on its own lines and that which it received over interconnection with Northwestern?

A. Yes, it had a source in North Dakota Power & Light Company.

Q. Why didn't the power available to it from North Dakota suffice to fill its needs?

A. Under certain conditions it would have and did, but there was not enough margin of protection to satisfy Northern Power & Light's needs in the generating facilities of North Dakota. Furthermore, that power from North Dakota was not dependable under all weather conditions because of the distances that it had to be transmitted.

Q. If those interconnection facilities which existed between Northwestern and Northern Power & Light had been discontinued or did not exist, was there any alternative course that Northern Power & Light could have followed?

A. According to the engineering advice that I received at that time, this interconnection was absolutely essential and necessary to Northern Power & Light Company.

Q. Well, if they had not had it, wouldn't they have had to supply the necessary additional generating capacity on their own system?

A. Had they been able to supply that additional capacity on their own system by building new and additional generating facilities they could have dispensed with the interconnection, but they were not financially capable of financing new power plants.

Q. Mr. White, in one of your last answers before the luncheon recess you mentioned "according to the engineering advice" that you received. Do you recall from whom you received that engineering advice?

A. Yes. I received it from the engineers in the Middle West Utilities Company and from the engineers in the Dakota management.

Q. In the what?

A. From the engineers in the Dakota management and from Mr. Strike.

Q. And what were the circumstances under which you would receive advice from the engineers of Middle West Utilities Company? By that I mean what arrangement did you have?

A. I had an arrangement with the receivers of the Middle West Utilities Company, in which the services of their organization were available to me.

Q. You say, "the services of their organization". Can you be a little bit more specific as to what kind of services?

A. Accounting, engineering, rates. Well, in general, the services of any of their specialists in any of the phases of the utility business.

Q. And did you make that arrangement with Middle West Utilities Company, as receiver? A. Yes.

Q. I presume you did avail yourself of the services for which you were paying?

A. I didn't avail myself of all of the services that were available to me, no.

Q. But you did avail yourself of the advice, engineeringwise with reference to these Dakota properties specifically in connection with inter-connection facilities?

A. Yes.

Q. And the capacities generating on the systems and the related problems? A. That's right.

Q. Mr. White, this morning you called my attention to it, and I have from time to time referred loosely to "North Dakota" "Northern" and "Northwestern". You understand by those terms I referred, by "North Dakota" to the North Dakota Power & Light Company; by the term "Northern" or "Northern Power" to Northern Power & Light Company, and by the term "Northwestern" to the defendant, Northwestern Public Service Company?

A. I so understand.

Q. If I continue to use those short terms you will understand and everyone here will that those are the companies to which we refer? A. Yes.

Q. During your receivership period from time to time over that period, were you kept advised by means of reports, memoranda or otherwise, with reference to the interchange energy rate which you previously described, with reference to the interconnection facilities, and the

operations of the Dakota companies, that is, the North Dakota, Northern and the Knife River Coal Mining Company, by anyone? I don't want it specifically as to what they show, so don't go into any details as to what they show, but just confine yourself generally.

A. I was going to say, showing among other things the information with respect to the quantity, price and financial proceeds of the purchases and sales of power under the interchange agreement.

Q. When you refer to "interchange agreement" are you referring there to a written agreement?

A. It was an arrangement at that time that was not committed to writing.

Q. You are speaking about the time of the receivership?

A. Yes sir.

Q. Did you ever request members of the operating management, as you call them, of these companies, to check into those arrangements concerning the rate as to the interchange of energy?

Mr. Benson: Well, may we clear up something here? He used a new term, the Dakota management. Is that what you are talking about, what you were talking about a moment ago when you used the term "Dakota management"?

The Witness: That would be the joint management of the Northwestern, North—

Mr. Benson: North Dakota Power & Light and Northern Power & Light?

A. Northern and the Coal Mining.

Q. Located at Huron? A. Located at Huron?

Mr. Stafford: Q. Let's go into that a little further, too. Who comprised that joint management at that time?

A. Mr. T. T. Parker was the president. Mr. C. J. Strike was vice president and had direct charge of operations. He functioned as a general manager. I don't recall that he had that technical title. Mr. Sandstedt had charge of the accounting and treasury work. Mr. Gazin had charge of the mechanical or power plant end of the operation and Mr. Albers, Albert, had charge of the electrical or distribution end of the business.

Q. Well, did you know these men when you were receiver?

A. I became acquainted with them shortly after I was appointed receiver.

Q. Well, did you consult with them or confer with them from time to time about the operations of the companies under your control?

A. I did with respect to those companies in North and South Dakota.

Q. I understand from you, I mean I understand from the testimony also, that these same men performed similar services for Northwestern, the defendant in this case?

A. That is correct.

Q. And you knew at the time that they did perform these similar services, is that correct? A. Yes.

Q. Did you have an opportunity during this period to check the activities that these persons you have named performed on behalf of the properti s under your control?

A. Yes.

Q. And did you so check them?

A. To the extent of my ability.

Q. During this period did you have the opportunity to observe the activities which these men performed on behalf of your corporation by direct observation or through reports? A. Both.

Q. And did you so observe their results? A. Yes.

Q. And the activities performed by them? A. Yes.

Q. Now, Mr. White, during that period were you satisfied as receiver in charge of these properties, with the matters and things performed by these men on behalf of your properties and the results accomplished by them?

A. I was satisfied with the quality of the work which these men were doing.

A portion of the deposition of Samuel W. White is omitted because it appears in plaintiff's case from page 469, 26th line from the bottom, through page 473, line 4, of the record herein.

Q. Mr. White, during your receivership, which extended from April 15, 1932 to and including December 31, 1934,

you have testified that you checked into these various matters and observed the results of the activities [perfomred] by persons who occupied offices in the companies, the Dakota companies. Did you form any opinion during that period as receiver as to whether or not the interconnection facilities which you previously mentioned were of any benefit to either Northern Power & Light or to North Dakota? A. Yes.

Q. And over that period of time did you acquaint yourself, become familiar with the method of operations of the companies the workings of the interconnection facilities, the functions that they performed and the operations of the plants of North Dakota and the various other operating conditions which obtained on those properties?

A. Generally, yes.

Q. Based on your familiarity and study you say you did form an opinion. Will you tell us, please, what your opinion was, as to whether or not the interconnection facilities, that is, your opinion as receiver during that period of time, whether those interconnection facilities were or were not beneficial to either Northern Power & Light or North Dakota, and if they were beneficial what benefits were realized by either of those two companies, or both?

A. The primary benefits were to Northern Power & Light Company because the interconnection provided energy to that company and protected it against emergencies and against peak demands, and generally assured the stability of the Northern Power & Light operation. The interconnection arrangement likewise provided an outlet for surplus energy of the North Dakota Power & Light plants, enabling particularly the [Buelah] plant to operate at a very high load factor, and it increased the amount of lignite sales by the coal mine.

Q. You have mentioned there that it was advantageous because it increased the load factor of the [Buelah] plant. Will you give us a little more explanation of what that was advantageous to increase the load factor of that plant?

A. Why? It was the same investment whether or not the energy delivered to Northwestern was manufactured or not, and it provided an outlet for a maximum percent-

age of [Buelah] generation without subjecting that [Buelah] operation to the variations in the load on the North Dakota and Northern systems.

Q. You say that the interconnections also helped to increase the sale of lignite by the Knife River Mining Company. Am I correct in my understanding, that Knife River was also one of the subsidiary properties of United Public Utilities Company? A. That's right.

Q. Of which you were receiver? A. Yes.

Q. In your operations of Knife River and North Dakota and Northern, as receiver of all three, how did you operate those companies? By that I mean did you operate them each individually or did you seek to operate them as a group for the overall best result to the common stockholder?

A. Well, I can point out that I was not receiver of any one of the three companies, but I was only receiver of the holding company that owned those three companies; that I did not operate the companies but I attempted to keep myself informed as to the adequacy of the operations and of the administration of those operations by the management that was on the ground; that management was thoroughly aware of the fact that the company of which I was receiver was 100 per cent owner of those enterprises, and that—

Q. Well, Mr. White, during your receivership did you have occasion to report to the Court from which you held your appointment as to the condition of these properties, the operating conditions of them and your opinion regarding the same? A. Yes.

Q. Mr. White, do you recall making a report to the United States District Court for the Northern District of Illinois in receivership proceedings on or about May 3, 1933, which report was rendered by you as receiver of United Public Service Company, United Public Utilities Company and Southern United Gas Company?

A. Yes.

Q. Do you recall whether or not in that report you included any reference to North Dakota Power & Light Company, Northern Power & Light Company, Knife River Coal Mining Company and the properties of those three corporations? A. Yes, I do.

Defendant's Exhibit 230, which is also referred to as Defendant's Exhibit 6 in White's deposition, was identified by Samuel W. White as a true and correct copy of his report as Receiver of United Public Service Co., United Public Utilities Co., Southern United Gas Co. dated May 3, 1933. A portion thereof was received in evidence, which reads as follows:

Northwestern Properties

North Dakota Power & Light Company
Northern Power & Light Company
Knife River Coal Mining Company

These three properties are operated from a divisional office at Huron, South Dakota, by the staff which operates Northwestern Public Service Company, a subsidiary of Middle West Utilities Company.

In previous years, and during most of 1932, these United Public Utilities Company subsidiaries were not charged with their full pro rata share of management and divisional office expenses, but, with the consent of your Receiver, these expenses are now being allocated in proportion to the gross earnings of each of the properties. The revision of this arrangement will increase combined operating expenses of the three companies by approximately $1,875.00 a month in 1933.

North Dakota Power & Light Company

This is a good electric property—with splendid generating facilities, and 467 miles of transmission lines.

These lines serve only 9,279 customers, however, or an average of 20 per mile of transmission. At Beulah, N. D., it has a modern plant of 6,000 K. W. capacity, immediately adjoining the tipple of the Knife River Coal Mining Co. mine, so that the plant has the benefit of a low fuel cost.

Inter-company arrangements under which this plant supplies energy to Northern Power & Light Co. on the south, and that Company, in turn, resells part of such energy to Northwestern Public Service Co., permit of an extremely high load factor at the Beulah plant, thus re-

ducing the unit cost of production and creating a benefit not only for North Dakota Power & Light Co., but, also, for the other two companies which take part of the power at prices favorable to them.

While efficient management has been able to effect commendable results, agricultural conditions throughout North Dakota have increased the management's troubles and minimized the results to be expected from that efficiency.

The Company's business for 1932 has been maintained at a good average level, as compared with other public utilities in the territory. Electric revenues held up remarkably well, and there has been an actual increase in the number of electric consumers during the year. Heating revenues showed an increase of approximately 5%, due entirely to rather severe weather conditions. Last year this Department was affected adversely by competition of natural gas, not from the standpoint of business lost but rather from the necessity of readjusting rates in order to meet the competition. Electric expenses have remained about constant.

A severe sleet storm occurred in October, and resulted in a substantial increase in maintenance charges, and a consequent reduction in net earnings.

The physical condition of the properties is good.

All bank loans outstanding on April 15, 1932, in the amount of $70,000 have been retired during the year.

The volume of the Company's business is expected to be well maintained in 1933, but impairment of gross revenues is threatened by public pressure for a reduction in rates.

Northern Power & Light Company

This is a widely scattered electric property with 762 miles of transmission line, serving 57 cities and towns in the northeastern section of South Dakota, and in the southern portion of North Dakota, the properties, as a whole, lying immediately south of and being interconnected with, the lines of the North Dakota Power & Light

Company. The Company has meager generating facilities which are used principally for stand-by service, the larger portion of its energy requirements being purchased from North Dakota Power & Light Company. The transmission system is in only fair physical condition. The Company serves 7,786 customers with the very low average of about ten customers to the mile of transmission line, so that the business cannot reasonably support a high standard of maintenance of its distribution facilities. Serving, as it does, small towns which are just about wholly dependent upon agriculture, the business of Northern Power & Light Company has been generally unsatisfactory in 1932, with curtailment of service of all classes and a loss of 162 customers.

The management had maintained a policy of rigid operating economy for some time prior to my appointment as Receiver, so that, as compared with 1931, operating expenses in 1932 before depreciation show a decline of only 3.4%. In the opinion of your Receiver, however, the affairs of this Company are being efficiently administered.

During the year, the Company has retired its $25,000 bank loan which was outstanding on April 14, 1932.

Knife River Coal Mining Company

This Company's mine, located at Beulah, North Dakota, is a valuable and profitable property, which produces a good quality of lignite and at sufficiently low cost to permit the Company to compete successfully in the coal trade of most of North Dakota and South Dakota. Approximately 46% of the output of the mine in 1932 was sold to the electric generating plants under the same management as the coal mine.

This arrangement has been very satisfactory as it has enabled the mine to operate without appreciable loss during the slack season when there is little or no demand for commercial sizes. General market distribution through dealers is being increased and has made possible an increase in mining operations during 1932, the number of tons mined having been 12.5% in excess of 1931, with an increase of 7.5% in gross revenues. To accomplish these

increased sales in the face of a general reduction in prices during the year, produced by sharp competition, cost of mining the increased production has prevented the Company from maintaining the amount of net earnings it has been able to show during periods of more favorable market prices.

This exhibit was read to Mr. White, paragraph by paragraph, to refresh his recollection, and he testified that he had made each of the statements contained in the exhibit, that he believed said statements to be true at the time he made them, and that he still believed them to have been true as of the time that they were made.

Q. Mr. White, as I recall, previously, this morning, you testified, when I asked you what securities or stocks of North Dakota Power & Light Company were owned by United Public Utilities Company at the time you were appointed receiver on April 15, 1932, you answered that United Public Utilities Company owned all of the securities of North Dakota and all of its stock. I think you specifically stated that North Dakota at that time had no outstanding bank loans. Do you wish to make any correction at this time in that testimony?

A. Yes. As indicated in Exhibit 1 of my first report to the Court, showing the notes payable of all of the subsidiaries in the United Public Service System, North Dakota Power & Light Company had outstanding at April 14, 1932, $70,000 bank loan and my—

Q. Your recollection has now been refreshed and you wish to make that statement? A. That is correct.

Q. Mr. White, earlier you testified that you are president of the U. P. U. Corporation. Is that correct?

A. Correct.

Q. How long have you been president of that company?

A. Since January 1, 1935.

Q. Do you recall when that corporation was organized, approximately?

A. It was incorporated on December 8, 1934; certificate filed and recorded by the Secretary of State of New Jersey on December 10, 1934.

Q. Do you hold any other position with that corporation? A. Director.

Q. How long have you been a director of the corporation? A. Since January 1, 1935.

Q. Do you recall, Mr. White, how many directors U. P. U. Corporation had in 1935? A. Seven.

Q. [To] which you were one? A. That's right.

Q. Do you recall the names of the other six directors?

A. The directors throughout the year 1935, were Lee Barroll, Henry A. Erhard, Gerald P. Kynett, Herbert L. Nichols, Herbert S. Welsh, Samuel W. White, Nicholas P. Sech.

Q. Mr. White, who was Lee Barroll, if you know?

A. Lee Barroll was an investment banker in Baltimore, a member of the Bondholders Protective Committee for United Public Utilities Company bonds, and a member of the Reorganization Committee.

Q. That is the Reorganization Committee of United Public Utilities? A. Right.

Q. Which participated in the same reorganization in which you have previously testified you were trustee, and previously equity receiver? A. Right.

Q. And did Mr. Barroll at that time have any connection with or interest in Northwestern Public Service Company, if you know?

A. Not to my knowledge.

Q. To your knowledge did he have any connection with or interest in Middle West Utilities Company?

A. Not to my knowledge.

Q. Who was Mr. Henry Erhard, if you know?

A. He was an investment banker, a partner in Pearson, Erhard & Company, Boston.

Q. Boston, Massachusetts? A. Massachusetts.

Q. What was their business, if you know?

A. They were investment bankers?

Q. Had Mr. Erhard had any previous connection with United Public Utilities Company or any of its securities, prior to his going on the board?

A. He and all of the other investment bankers that went on the board, of whom there were five, had been identified with the sale of securities of United Public Service Company or United Public Utilities Company, and

I believe specifically had been connected with the sale of United Public Utilities Company bond. Each of those five men was a member of the Bondholders Committee.

Q. You say each of the five men?

A. Each of the five investment bankers, which I will later identify, were members of the Bondholders Protective Committee or the Reorganization Committee, or both.

Q. Now, you have named Mr. Barroll and Mr. Erhard as being bankers who were part of the members of those committees. Can you identify for us the other three members?

A. The other three investment bankers were Mr. Gerald P. Kynett of Philadelphia.

Q. He was one of the directors?

A. (Continuing) Who was an investment banker and a partner in Brooke, Stokes & Company, an investment banking house of Philadelphia; Mr. Herbert L. Nichols of Chicago was a firm member or president of [Hichols], Carey & Dickinson, investment bankers in Chicago; Herbert S. Welsh was a member of the firm of Welsh Brothers, investment bankers of Philadelphia.

Q. Now, Mr. White, can you tell us [or] your own knowledge whether Mr. Erhard then had any connection with or interest in Northwestern Public Service Company or Middle West Utilities Company? A. I cannot tell you.

Q. How about Mr. Kynett? So far as you know, did he have any interest in Northwestern or Middle West Utilities Company or any connection with those companies?

A. As far as I know, none.

Mr. Benson: What do you mean by as far as you know? Do you mean you don't know anything about it?

A. I have never received any intimation from him that he has; purely a negative statement. Generally speaking, yes, I know nothing about it.

Mr. Stafford: Q. How about Mr. Nichols?

A. I would reply the same to that.

Q. The last one, Mr. Welsh. Do you know whether he had interest in or connection? A. No.

Q. By "no" you mean you don't know?

A. I mean I don't know.

Q. Well, that is five of the directors. You have also

named yourself. We know that you are on the board. How about Mr. Zech, Nicholas P. Zech? Who was he?

A. Mr. Zech was comptroller of Middle West Utilities Co.

Q. Which was then in reorganization? Was Middle West at that time still in reorganization, do you know?

A. Middle West was either in receivership or trusteeship at that time, and until March—November 27, 1935.

Q. Now, Mr. White, do you know who elected or placed the various members of the board of directors of the new U. P. U. Corporation on that board of directors? A. Yes.

Q. Will you tell us, please, what you know about that?

A. All except Mr. Zech were elected by the Class A common stockholders of United Public Utilities Corporation, and Mr. Zech was elected by the Class B common stockholders.

Q. Who held the Class A stock at that time?

A. The Class A common stock was held in a voting trust; voting trust certificates were originally issued to bondholders of the predecessor company.

Q. That would be of the United Public Utilities Company? A. That's right.

Q. And do you know who the voting trustees were?

A. Yes.

Q. Will you tell us, please?

A. They were the same five investment bankers who were members of the board, namely, Messrs. Barroll, Erhard, Kynett, Nichols and Welsh.

Q. You have told me, I believe, and correct me if I am wrong, that those five voting members, trustees, voting the A stock, elected themselves and you to that board of directors? A. That's right.

Q. Now, do you know who elected Mr. Zech to that board?

A. United Public Service Company as the holder of a majority of the Class B common stock, two-thirds.

Q. They owned two-thirds of the Class B?

A. Common stock.

Q. Common stock of the United Public Utilities Corporation? A. That's right.

Q. As owners of that majority of B stock they elected Mr. Zech as a director on the board? A. Yes.

Q. Do you know how long the various members of that initial board of directors continued to serve as directors?

A. Yes. The five investment bankers were directors up until December 1, 1939.

Q. And what happened at that time, if anything?

A. Under Section 17 (c) of the Public Utility Holding Company Act of 1935, and Rule U 17 (c) of the Securities and Exchange Commission, Messrs. Erhard, Kynett and Welsh became ineligible as directors and officers of the company on December 1, 1939, by reason of their financial connections, and were obliged to resign.

Q. That was Mr. Erhard, Mr. Kynett and Mr. Welsh. Did Mr. Barroll continue?

A. Mr. Barroll continued because he had, prior to 1939, severed his connection with the investment banking business and had gone into the rubber manufacturing business. Mr. Nichols likewise had severed his connection with the investment banking business and had gone into the public utility business.

Q. Well, Mr. Barroll and Mr. Nichols, did they both continue up to the present time as members of your board of directors, of U. P. U. Corporation?

A. They have been directors continually since the company started business up to the present time.

Q. And you have continued as a member?

A. And I have likewise continued.

Q. Now, Mr. Zech continued on the board at that time also in 1939, did he?

A. No. Mr. Zech continued from January 1, 1935 to April 28, 1943, and—

Q. Let me just take care of that one change intervening there. In 1939, your board, after giving effect to the vacancies enforced on Messrs. Erhard, Kynett and Welsh, consisted of four members, being Mr. Barroll, Mr. Nichols, Mr. White, Mr. Zech, leaving three vacancies. What did you do with reference to filling those vacancies, if anything? A. On January 30th, 19—

Q. 1940?

A. January 30, 1940, the board elected Mr. C. B. Lakin of Greenville, Ohio, as a member, and left two vacancies on the board until the next annual meeting in April.

Q. You had five at that time, and each continued how long, Mr. White?

A. Continued with the two vacancies until the annual meeting in April of 1940, at which time the stockholders voted to reduce the number of directors to five.

Q. How many directors do you have now, five? A. Yes.

Q. And would you explain how the board was subsequently increased from five to six?

A. When Mr. Zech's term as director elected by the Class B stockholders expired on April 28, 1943, The Middle West Corporation was under contract of sale of their holdings of United Public Service Company stock; they were unwilling under those circumstances to allow United Public Service Company to nominate a director for our board, to be elected by Class B stockholders, and they asked the directors of United Public Utilities Corporation to select a nominee. We selected Mr. Herbert W. Briggs, and he was elected at the annual meeting on April 29, 1943, as a director by the Class B common stockholders.

Q. Let me clear this up on the record just a minute. Mr. White, [you] last statement may be a little confusing. In order to clarify it, may I ask if this was the situation: That in 1943 the Middle West Corporation or the U. P. Service Corporation refused to designate or declined to designate a nominee to be elected by the B stock, of which they still owned two-thirds, and that thereupon the other five directors elected Mr. Briggs, and that upon such selection the B Stock was then voted, and Mr. Briggs thereby was elected to the board of directors.

A. That is correct.

Q. That is a correct statement?

A. That selection by the other four directors was made at the request of United Public Service Company.

Q. In other words, it was still a five man board and the remaining four directors, at the request of United Public Service Company selected Mr. Briggs, but United Public Service Company had nothing to do with the selection of Mr. Briggs as the individual to serve?

A. Not with the selection of the individual, but their stock was voted—

Q. They asked you to take Briggs, is that the idea?

A. (Continuing)—in favor of his election, after we had selected him. That's right.

Q. Now, Mr. White, that leaves us with a five man

board. Will you continue your explanation of how it grew into a six man board?

A. At some time prior to the annual meeting of stockholders of United Public Utilities Corporation, on April 26, 1944, the negotiations which The Middle West Corporation had had for the sale of United Public Service Corporation common stock had fallen through, and United Public Service Corporation proposed that they would again nominate a director to the board of the United Public Utilities Corporation; and they nominated Mr. Gail Belden of Wilmington, Delaware, who was the president of the United Public Service Corporation; and at that meeting of [Spril] 26, 1944, Mr. Belden was elected a director by the Class B. stockholders. Also prior to that same meeting the directors of United Public Utilities Corporation had decided that Briggs was a valuable addition to the board, and that because—that despite the fact that United Public Service Company was going to propose Mr. Belden for membership on the board, it was desirable to retain Mr. Briggs as a member. But at that stockholders' meeting the number of directors was increased from five to six, and Mr. Briggs was elected by the Class A stockholders.

Q. So that is five stockholders elected by the A stock and one stockholder elected by the B stock?

A. That's right.

Q. During 1945, then, do I understand that during that entire year the board of directors of United Public Utilities Corporation consisted of yourself, Mr. Briggs, Mr. Belden, Mr. Lakin, Mr. Welsh and Mr. Nichols?

A. That's right.

Q. Was Welsh on the board?

A. No. He went off at the end of 1939.

Q. Who was it? Do you have those minutes?

A. Alphabetically, the directors throughout the calendar year 1945, were Barroll, Belden, Briggs, Lakin, Nichols. White.

Q. I omitted to ask you something when I was asking you about your report which you filed as receiver on or about May 3, 1933, and identified here as Defendant's Exhibit 6. I would like to ask you if you know whether any distribution of that report was accomplished. Do you know whether it was distributed? A. Yes, it was.

Q. Well, can you tell us to whom it was distributed?

A. It was sent to all investment dealers and all security holders that had shown any interest in knowing the facts about the receivership. It was sent to the press.

Q. Do you happen to know whether those dealers were considerable in number or relatively few or what?

A. I would estimate 500.

Q. It was also called to my attention during the recess that I made a misstatement on the record, or in a question, and I would like to correct it. I asked you whether, when you had six directors, five stockholders were elected by the A stock and one stockholder by the B stock. I intended to ask you whether five directors were elected by the A stock and one director elected by the B stock?

A. I didn't notice that.

Q. Is that the fact?

A. Five directors were elected by the Class A common stock and the preferred stock, and one director by the Class B common stock.

Q. Do you know, Mr. White, what the circumstances were under which the B stock, voting as a class, was restricted to the election of only one director?

A. Yes. The original Articles of the corporation, of the United Public Utilities Corporation, provided that the sole voting privilege accorded to the Class B common stock was the right to elect one director, one member of the board, and that that restriction on voting power of the Class B stock would last until one half of the aggregate amount of bonds and preferred stock issued in the reorganization should have been redeemed. The bonds and preferred stock were issued in the reorganization in identical amounts, so that when the bonds were called and paid off on July 1, 1945, thereupon one half of the aggregate of the bonds and preferred stock were redeemed, and on that date all distinction between Class A and Class B common stocks of United Public Utilities Corporation were eliminated.

Mr. Robinson: Q. Mr. White, since that date has the owner and holder of the Class B stock elected more than one director to the board of United Public Utilities Corporation?

A. Since July 1, 1945, there has been no change in the

make-up of the board of directors of United Public Utilities Corporation. Also since July 1, 1945, there has been no distinction between Class A and Class B common stocks, but those two former classes are now combined to represent a single class of common stock.

Mr. Stafford: Q. Mr. White, can you describe for us in a general way the properties which the United Public Utilities Corporation owned or securities which they owned at the time of its commencement of business, January 1, 1935? A. Yes.

Q. Will you do so, please?

A. As of January 1, 1935, United Public Utilities Corporation was a holding company owning all of the bonds, notes and stocks of 21 operating subsidiaries with the exception of $84,000 of notes of two ice companies and of a 3½ per cent common stock interest in one gas company. Eleven of those subsidiaries comprising an Ohio and Indiana group, engaged in the distribution of electricity, gas and water, and furnishing one or more of those services to 84 communities in western Ohio and eastern Indiana. Three subsidiaries, constituting the Dakota group, of which two, North Dakota Power & Light and Northern Power & Light, furnished electric and/or steam heating service to 91 communities in North Dakota and South Dakota, and the third, Knife River Coal Mining Company, operated a lignite coal mine at [Buelah], North Dakota. Two other subsidiaries out of the 21 supplied and distributed natural gas in and near Fort Smith, Arkansas. The remaining five subsidiaries out of the 21 owned ice manufacturing plants in Fort Worth, Texas; Fort Smith, Arkansas; New Orleans and Monroe, Louisiana; Mobile and Anniston, Alabama; and Tallapoosa, Georgia. This is the summary, when we started out in January, 1935.

Q. Did that ownership continue through June of 1935?

A. Yes.

Q. And do you recall what per centage of the investment or value of the securities of those various subsidiary properties you just mentioned, the so-called North Dakota properties constituted, and by "North Dakota properties" I mean the North Dakota Power & Light, Northern Power & Light and the Knife River Coal Mining Company?

Mr. Benson: You mean in asset value?

Mr. Stafford: Yes.

A. About 40 per cent.

Mr. Benson: Q. You say the asset value, the value of the aggregate assets of North Dakota Power, Northern Power and Knife River Coal Mining Company constituted 40 per cent of the aggregate asset value of the 21 subsidiaries you talked about a moment ago?

A. Yes. I think it may be slightly over 40 per cent. That was a conservative estimate.

Mr. Stafford: Q. And do you happen to know or do you recall what percentage of the U. P. U. operating revenues earnings from those properties represented?

A. That would be closer to 50 per cent. Over 45.

Q. That would be 45 to 50 per cent? A. Yes.

Q. And would that same per centage obtain with reference to the net profits of the U. P. U. Corporation System?

A. I would judge that the percentage of net profits furnished by the three Dakota companies would be considerably larger than 50 per cent.

Q. Would it be as much at 66⅔ per cent of net profit?

A. I would say yes.

Q. Do you recall that it was the fact?

A. Well, I have those figures generally in mind, and I think that 60 or 65 per cent would be a safe figure.

Q. Mr. White, I will show you this letter dated June 10, 1935, this carbon copy of a letter addressed to Mr. F. E. Kruesi, President, North Dakota Power & Light Company, consisting of three pages, and I will ask you whether or not that document was produced by you for me from your files? A. Yes.

Q. I will ask you to examine the first page, the second paragraph, and then tell me whether that refreshes your recollection as to the per centages of operating revenues and per centage of net profit? A. Yes, it does.

Q. Do you now have an independent recollection of those per centages? A. Yes.

Q. Will you state them, please? A. Repeat the question.

Q. You say you now have an independent recollection. Will you please state your recollection?

A. The properties represent 40 per cent of the operating revenues and two thirds of the net profits.

Q. That is your present recollection? A. Yes.

Q. Directing your attention to the stock of the subsidiaries of United Public Utilities Corporation, do you know and can you tell us who owned the stock or held that stock on January 1, 1935?

A. The stock of the subsidiaries of United Public Utilities?

Q. Specifically of North Dakota, Northern and Knife River?

A. The stock was beneficially owned by United Public Utilities Corporation. It was held by Provident Trust Company of Philadelphia as trustee under a collateral trust bond indenture dated January 1, 1935.

Q. Are those stocks still held by the Provident Trust Company?

A. No. They are now held in the treasury of United Public Utilities Corporation because of the redemption on July 1, 1945, of all of the outstanding bonds and release of the indenture.

Q. Well, were they held continuously from January 1, 1935 to July 1, 1945, by Provident Trust Company as trustee, as you have described it? A. Yes.

The Witness: My statement was incorrect. As Mr. Elvig says, we held them from July, 1945, free and clear, until October 19, 1945, when we sold them to Montana-Dakota Utilities Company.

Q. Are you familiar with the methods by which the shares of stock of North Dakota Power & Light Company were voted during the years from January 1, 1935 to and including October, 1945? A. Yes.

Q. Will you please describe for us how that stock was voted?

A. The stock was voted by proxies given at our request by the Provident Trust Company of Philadelphia.

Q. You have used the word "our". Will you please qualify that [work]? Who do you mean by "our"?

A. United Public Utilities Corporation.

Q. Did United Public Utilities Corporation designate the names of the proxies to Provident Trust Company?

A. The proxies which United Public Utilities Corporation sent to Provident Trust Company, with a request that it be executed, contained a designation of the proxies.

Q. What did the Provident Trust Company do with the proxies after they executed it, if you know?

A. They sent them to United Public Utilities Corporation.

Q. What if anything did United Public Utilities Corporation then do with the proxies?

A. The United Public Utilities Corporation sent them to the respective companies.

Q. Who attended to the sending of those proxies to the respective companies?

A. My office here in Chicago.

Q. Did you have personal supervision of your office in sending those proxies? A. Yes.

Q. Were any directions given by you or your office as to how those proxies should be voted? I am particularly inquiring with reference to the election of the boards of directors of North Dakota, Northern Power & Light and Knife River.

A. We knew—I knew in advance of the annual meetings who was proposed to be elected directors, and approved of those selections before the annual meetings were called.

Q. In other words, you approved of the selection of the directors of those three subsidiary companies before the annual meetings were held, and the proxies for the stock were voted for those directors? A. That's right.

Q. And you approved the persons selected to sit on those boards of directors for the three companies?

A. Yes sir.

Q. I believe I asked you with reference to the proxies, and you sent them to Provident Trust Company only with respect to North Dakota Power & Light Company. Was the same procedure followed with reference to Northern Power & Light and Knife River? A. Yes.

Mr. Robinson: Q. Mr. White, during the period of January 1, 1935, through October 19, 1945, did the defendant Northwestern Public Service Company own or control any of the stock of United Public Utilities Corporation, to your knowledge? A. Not to my knowledge.

Mr. Stafford: Q. Mr. White, we just covered the period of the U. P. U. Corporation ownership of the shares of the three Dakota subsidiaries. Let me ask you to explain how those shares of stock were voted during the time, the preceding period, when you were trustee and/or receiver of the predecessor company, United Public Utilities Company?

A. I don't recall the mechanical operations in that period prior to 1935 when those stocks were deposited with the City National Bank and Trust Company as successor trustee under an indenture securing so-called first lien bonds of United Public Utilities Company.

Q. Those stocks, if I understand you correctly, were then held by City National Bank and Trust Company of Chicago, as trustee? A. Yes.

Q. All of the stock? A. All of the stock.

Q. Of each of the three subsidiaries? A. Yes.

Q. Now, Mr. White, over the period from 1935 to and including October 19, 1945, there undoubtedly were vacancies from time to time in the officers and directors of the three Dakota subsidiaries. Will you describe to us what, if anything, you had to do with the selection or approval of successors to fill those vacancies?

Mr. Benson: During what period?

Mr. Stafford: The period of U. P. U. Corporation ownership.

A. I was consulted before any changes were made in the officers of any of those companies; rejected at least one proposal for a change in the official line-up, and in the case of the president who succeeded Mr. Strike I interviewed him at considerable length, went over his entire record and experience with him, and approved his selection before he was taken as president of either our company or of Northwestern. Where they were advanced from the lower ranks to an official position to fill a vacancy created by resignation or other reason, I was consulted before those changes were made in the official line-up.

Q. Mr. White, you have testified that you gave prior approval to the slate of directors of each of these three subsidiaries prior to their election by casting of the stock

by the proxies executed by Provident Trust Company. Did you also give prior approval to the election of the officers of those three subsidiary companies by the board of directors?

A. I must have misunderstood your original question because these more recent comments of mine have been directed to the selection of the officers.

Q. That's right, as to vacancies. A. As to vacancies.

Q. That's right.

A. Now, the policy with respect to directors was to put the key officers on the board; but if I am answering the question you have just asked I would say that year, I did know when any of those officers were going to be added to the board.

Q. You say that was the policy. Whose policy was that, Mr. White?

A. Well, it was the United Public Utilities Corporation's policy in all of its subsidiary companies, all of which were wholly owned without any outside investment interest in them.

Q. Mr. White, can you tell us whether U. P. U. corporation has had in the past, and specifically in 1935, up until October 19, 1945, any general policy with reference to inter-company arrangements between its three Dakota subsidiaries and Northwestern Public Service Company, the defendant in this case? A. They did. We did.

Q. Will you tell us what that was, what that policy was? To satisfy all objections we will ask first: What was the policy and then, second, what were the reasons?

A. Our policy was to pay particularly close attention to all matters in which a joint management was administering problems in which the interest of United Public Utilities Corporation subsidiary was opposed to the interest of any other corporation in which that joint management, with which that joint management might be connected. I think that will answer your question.

Q. What do you mean, Mr. White, by "pay close attention" to the affairs? You mean by that the U. P. U. directors to follow the affairs of those companies closely?

A. Primarily the management of United Public Utilities Corporation recognizing—

Mr. Benson: Can you answer that yes or no? The directors.

A. I mean the management and the directors.

Mr. Stafford: Q. Are you familiar, Mr. White, with the reasons which underlay that policy on the part of the U. P. U. Corporation and management? A. Yes.

Q. Will you state what those reasons were?

A. Yes. It was because of an awareness on our part in the first instance that any joint management arrangement had to have a positive justification. We were also aware of the fact that the members of any joint management were in themselves in a difficult position in their efforts to assure themselves that intercompany arrangements were equitably made, and we conceived it our duty to relieve the members of the joint management from their responsibility in those joint arrangements, by making first an inquiry into the details and confirming the arrangements after they were made. By the same token, when I as administrator of the affairs of United Public Utilities Corporation, approved those arrangements, where I thought the occasion required, I took them to my own board for confirmation, and in many cases for consideration before I approved them. I might also add that in a number of cases I personally represented our Dakota subsidiaries in negotiation, preparation of intercompany arrangements and agreements.

Q. By "Intercompany arrangements and agreement", are you referring, Mr. White, to the arrangement between the three Dakota subsidiaries, namely, North Dakota, Northern and Knife River on the one hand and Northwestern Public Service Company on the other?

A. Yes, and also intercompany arrangements between our own U. P. U. subsidiaries.

Q. My attention is called to an error. Let me ask you: By intercompany arrangements do you also include the arrangement made from 1939 on between the Dakota Public Service Company, Knife River and Northwestern Public Service Co? A. Yes.

Q. Mr. White, Exhibit B to the complaint in this case is a contract between Northwestern Public Service Company and Northern Power & Light Company, dated Oc-

tober 7, 1936. I will ask you whether you recall how the negotiations for that contract came about, and when?

A. Yes, I do recall how the negotiations came about.

Q. Now, will you tell us generally your recollection of the inception of those negotiations?

A. It came about through the insistence of Mr. Strike that the availability of the interconnection facilities to Northern Power & Light without compensation to Northwestern, in the form of return on their investment had continued to the absolute limit, and that it was absolutely necessary that compensation be provided to Northwestern.

Q. Well, during the course of those negotiations, Mr. White, were memoranda prepared by Mr. Strike and others and submitted to you? A. Yes.

Q. Was the matter submitted to you at any time during the period by Mr. Kruesi? I will fix the time more specifically. In December, 1935?

A. I recall that in December, 1935, the subject was under very active discussion—

Defendant's Exhibit 232, which is also referred to as Defendant's Exhibit 8 in White's deposition, was received in evidence. It reads in part as follows:

Defendant's Exhibit 232.

Northwestern Public Service Company

Date December 30, 1935.

Intercompany Contracts.

Location Northwestern And U. P. U. Subsidiaries.

To S. W. White.

From F. E. Kruesi.

I attach copy of Mr. Strike's letter to me of December 28th, together with copies of the proposed contracts referred to. I am sending Mr. Vennard a copy of the proposed inter-connection agreement between Northwestern and the Northern Power & Light and North Dakota Power

and Light. To Mr. Purchas I am sending copies of the proposed coal contracts. I am sending Mr. Olsen copy of Mr. Strike's letter in order that he may be informed regarding the matter.

You will note that all of the proposed contracts are cancelable by either party on short notice. They would have to be in view of the fact that in each contract the price is fixed. All they are intended to do is to put in writing and contract form, arrangements which now exist. As conditions change from time to time, they can be amended by supplements agreeable to both parties.

* * * * * * *

These proposed contracts are only drafts and it is appreciated that there are points and wordings in each which may not be considered to be as good as they can be made. For example, in the energy contract between Northwestern Public Service and Northern Power and Light and the North Dakota Power and Light Company, on page 1, under item 1, the United Public Utilities Company is mentioned. Whereas, of course, there is no actual tie with that Company but only with a subsidiary of that company. Similarly there is a question whether this contract should be a three-party one or simply between the Northwestern Public Service Company and the Northern Power & Light Company.

My idea in sending them to you and the others immediately after their receipt is that it will help facilitate early action on them and that after everyone has had an opportunity to give them study, I will bring Mr. Strike in so that we may have a conference in Chicago between all parties of interest.

Under order #36 of the Federal Power Commission, Northwestern Public Service Company and Northern Power and Light Company will have to file copies of all such power agreements with the Commission before January 15th and after such agreement is once filed, it cannot be changed or amended without approval of the Commission.

I think that for this reason serious consideration must be given to the wording of the energy [agrement]:

F. E. KRUESI.

FEK:vlb

encl

CC—EAO
RWTP
EV

Inter, Company Contracts.

December 28, 5.

F. E. Kruesi.
C. J. Strike.

I am enclosing herewith suggested inter-company contracts for the sale of coal by Knife River Coal Mining Company to the electric companies and also a proposed contract for the inter-change of power between the three electric companies, all of which are self-explanatory.

In connection with the coal contracts, I wish to advise that the contract with Northwestern Public Service Company for Aberdeen is made on a basis which meets the cost of Montana coal under a contract which we now have for our Mitchell, South Dakota plant. In other words, we are only asking Knife River Coal Mining Company to be competitive. The present rate is 75¢ per ton and because of our present contract with the Bair-Collins Company, it necessitates a 70¢ rate to be competitive at Aberdeen on Beulah coal.

When we discussed this matter last week I was under the impression that the present rate was 65¢. I find however, that the present rate is 75¢ per ton f. O. B. mine.

In connection with the rate charged to the United Public Utility subsidiaries, the rate at Beulah is made necessary by the fact that Knife River must hold itself in readiness hourly to fill the bunkers of the power plant and we believe the rate per ton to be defensible in every respect.

The rate to the power plants at Bismarck, Mandan and Dickinson is on the same basis as coal sold to state institutions where we are obliged to furnish the coal on a year-around basis. It is true during the winter months this rate would be too high, however, no company in our opinion, could furnish the coal at a lesser rate taking into consideration the fact that coal must be mined in the summer time for power plants only, and at an extremely high cost per ton.

With reference to the inter-connection agreement. You will note that we have made Northwestern one party and have joined Northern and North Dakota for the second party, the reason being that there are two very definite approaches to this inter-connection. One for inter-connection facilities with Northern to protect their service and to provide firm power under certain circumstances, and secondly, to enable North Dakota Power and Light Company to move its surplus available power through the northern system to Northwestern. We finally concluded that this contract would more nearly cover the situation.

There will be an additional contract between North Dakota Power and Light Company and Northern Power & Light Company covering the sale of energy for Northern's own consumption and also the providing of transmission facilities through the system over Northern on a no-profit basis to transmit surplus power to Northwestern.

With reference to the fixed charges on the investment in inter-connection facilities, this is a matter which has been under consideration since the properties were acquired. Originally, when Middle West acquired the United Public Service Company and its subsidiaries, the intention was to consolidate the Dakota properties, and Northwestern was encouraged and given permission to make this preliminary investment in inter-connection facilities. Before a consolidation was perfected both United Public Service Company and Middle West Utilities Company became financially involved and this whole matter of consolidation was left pending. Because of this, the matter of fixed charges on inter-connection facilities was likewise left pending and Northwestern Public Service Company has carried the entire investment including the maintenance thereof during this period. Now that both holding companies are reorganized and out of court, this matter should come up for definite consideration, and we therefore submit this proposed agreement which we believe to be equitably fair to all parties concerned.

With reference to the annual charge to the United Public Utilities subsidiaries of $20,000, in our opinion, this charge should be entirely to Northern Power and Light Company. However, there are some indirect benefits to North Dakota Power and Light Company by reason of having a market for its off peak surplus output and possibly the charge could be allocated between those two subsidiaries. Here again this ties in to the present rate of three and one-half (3½) mills between North Dakota and Northern which is not a firm power rate, but is also a surplus consideration.

We are now making a study of this situation and within a few days will forward you a proposed contract between North Dakota Power and Light Company and Northern Power & Light Company reflecting consideration of these various factors. In that this new plan involves additional expenses for Northern Power & Light Company, we think it is necessary to give consideration to the reduction of interest charges on inter-company notes which is now such a burden to Northern that the surplus of the company runs continuously in the red. We believe that this matter

should be taken up early in January, thoroughly discussed and if possible, disposed of at that time.

* * * * * * *

In conclusion I wish to state that we have fully recognized our responsibilities to all companies involved and have endeavored to conclude our recommendations on a basis which is defensible in every respect. We do not believe it is particularly damaging that we represent all companies in that we feel perfectly capable of rendering unbiased decisions affecting inter-company matters.

I fully appreciate that there are many entangling details which surround all of these matters and I only wish to advise that we have taken all of them into consideration in making these recommendations.

Yours very truly,

C. J. STRIKE.

CJS-B

Encl.

(End of Defendant's Exhibit 232.)

Q. Directing your attention to the second page, the second of the five pages of this exhibit, I will ask you if you can identify the signature which appears thereon? Can you? A. Yes.

Q. Whose signature is that? A. Mr. F. E. Kruesi's.

Q. Turning to the fifth of the five pages, I will ask if you can identify the signature which appears on that page? A. Yes.

Q. Whose signature is it?

A. It is the signature of Mr. C. J. Strike.

Q. Mr. White, did you produce at my request from your files this document identified as Defendant's Exhibit 8 for identification, and consisting of these five pages?

A. Yes.

Q. Will you look at the document and tell me whether it is in the same condition as it was at the time you received it from Mr. Kruesi? A. Yes.

Q. Mr. White, directing your attention again to Defendant's Exhibit 8 for identification, do you recall whether or not you brought the requests therein for the proposed contract to the attention of the board of directors of United Public Utilities Corporation? A. Yes, I did.

Q. Do you recall the date when you presented that matter to that board? A. January 29th, 1936.

Q. You don't purport to remember this except from your memorandum? A. Or except from the minutes.

Q. I will refer you to the minutes of the regular meeting of the directors of the United Public Utilities Corporation, held in Philadelphia, Pennsylvania, on January 29, 1936, and I will further refer you to the tenth page of those minutes, and I point out to you that it is there stated: "The president reported that Northern Power & Light Company is building its Venturia-Ashley line at an estimated total cost of $16,000 and an estimated saving in maintenance of $340 per annum; that Northwestern Public Service Company is asking for an annual payment to it by Northern Power & Light Company of $20,000 or $20 per annum for 1,000 K. W. firm power by way of return upon its investment of $340,000 made to serve Northern Power & Light Company." I will ask you whether that refreshes your recollection as to the time and place as to which you referred this matter to your board of directors? A. Yes.

Q. Do you now have a present recollection that you did refer it at that time and place? A. Yes.

Q. To the board of directors of United Public Utilities Corporation? A. Yes.

Q. I refer you to the first page of those minutes, wherein it is recited that Messrs. Lee Barroll, Henry A. Erhard, Gerald P. Kynett, Herbert L. Nichols, Samuel W. White and Herbert S. Welch, directors, were present; also that Mr. Francis H. Scheetz was present as counsel, was present by invitation. Does that refresh your recollection as to the persons present in that meeting? A. Yes.

Q. And will you tell us who was present at that time and place? Were they the gentlemen that I have just enumerated? A. Yes.

Q. Mr. White, it is alleged in the complaint in this action, and shown in or illustrated in Exhibit A to that

complaint, that you were a director of North Dakota Power & Light Company and of Northern Power & Light Company during the calendar years 1935, 1936, 1937 and 1938. It is also alleged that you were a director [or] Northern Power & Light Company until July 1, 1939, and of North Dakota Power & Light Company during all that year, subsequently to July 1 that was then known as Dakota Public Service Company. It is also alleged you were a director of Dakota Public Service Company for the years 1940 to and including 1944, and during 1945 to October 19th. Were you a director on the boards of those companies during those years and periods? A. Yes.

Q. Now, during that period when those boards of directors met, was it your practice to attend the meetings?

A. No.

Q. What was your practice, Mr. White, with regard to consenting to the holding of said meetings?

A. I gave my signed consent to the holding of most of the meetings.

Q. Was it the practice, Mr. White, to send you the waiver of notice and consent form prior to the holding of the meeting or subsequent to the holding of the meeting? A. Prior.

Q. You just stated you gave your consent to most meetings. What do you mean by "most" meetings? Were there exceptions? A. I recall at least one.

Q. Do you recall the date? A. No.

Q. Perhaps I can refresh your recollection. Mr. White, I show you a document which has been marked Defendant's Exhibit 9 for identification, which was received as Plaintiff's Exhibit 61-A, and reproduced in part in the plaintiff's case (R. p. 465 supra), purporting to be a memorandum addressed to yourself, the subject being, "Waiver of Notice" purporting to come from C. L. Sandstedt, dated May 12, 1936, and I will ask you if you know the signature which appears on that page?

A. Yes, that is a stamped facsimile, and a very good one, of Mr. Sandstedt's signature.

Q. Is he in the habit of sending you memoranda so stamped? A. Yes.

Q. And you are familiar with the stamp and recognize it? A. Yes.

Q. I also show you attached to the foregoing exhibit another document marked Defendant's Exhibit 9-A for identification, purporting to be a consent and waiver of notice to the annual meeting of the board of directors of Northern Power & Light Company, dated April 22, 1936, and I will ask you if you know the signatures which appear thereon? A. Yes.

Q. Tell us whose signatures they are, please.

A. Mr. C. L.—

Mr. Benson: Well, what are these documents? Aren't the originals in the minute books of that company?

Mr. Stafford: Not this one.

Mr. Robinson: This is not.

Mr. Benson: What?

Mr. Stafford: Not this one.

Mr. Robinson: This document is not.

Mr. Stafford: We will get to where we got it, in a minute.

A. The signatures are of Mr. C. L. Sandstedt, C. J. Strike, F. E. Kruesi, and M. J. Blackstun.

Q. You know each of those signatures?

A. I know them each. I know them all.

Q. Were they the directors at the time, of Northern Power & Light Company, aside from yourself?

A. They were four of the five directors, and I was the fifth.

Q. Were they at the time the four members of the board of directors of the North Dakota company, aside from yourself? A. Yes.

Q. And you were the fifth director? A. That is right.

Q. I call your attention to the white slip attached to Exhibit 9, reading "12-14-36. Mr. White suggested that we file the attached. (Nothing has been done about it") signed in typewriting, "M. Miller," and I will ask you if you recall giving those instructions?

A. I do not recall giving those instructions.

Q. This slip was attached to this document?

A. That was attached there by my secretary, apparently for her own information.

Q. Miss Miller was your secretary?

A. Miss Miller was my secretary?

Q. At that time? A. Yes.

Q. And she put that on there of her own volition?

A. I find in going through our files, similar memoranda attached to papers and files that I don't know anything about.

Q. I will ask you further, Mr. White, whether or not you did receive this Defendant's Exhibit 9 for identification from Mr. Sandstedt? A. Yes.

Q. And you did receive from him Defendant's Exhibit 9-A for identification and Exhibit 9-B for identification?

A. Yes.

Q. I will also ask you the same questions, as to whether you received from North Dakota Power & Light Company the copy of the minutes marked Defendant's Exhibit 9-C for identification and from Northern Power & Light Company the copy of the minutes marked Defendant's Exhibit 9-D for identification? A. Yes.

Defendant's Exhibit 233, which is also referred to as Defendant's Exhibit 10 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 233.

April 29, 1936.

Mr. F. E. Kruesi, President,
Northern Pr. & Lt. Co.,
385 N. Pine Street,
Grand Island, Neb.

Dear Frank:

I am not satisfied with the proposed form of contract between Northern Power & Light Co., and Northwestern Public Service Company, nor with the underlying principle involved in that contract, and in the payments that have been made so far during 1936. I request, therefore, that

no steps be taken toward the consummation of this contract until you and I can discuss the subject further.

Very truly yours,

.....

President.

Defendant's Exhibit 234, which is also referred to as Defendant's Exhibit 11 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 234.

Northwestern Public Service Company.

Date May 2, 1936.

Location United Public Utilities Corporation.

To Samuel W. White:

From F. E. Kruesi.

I have your letter of April 29th regarding the contract between Northern Power & Light Company and Northwestern Public Service Company. I thought you had approved this arrangement. The contract itself had been held up in the legal department at Chicago for a long time. I will see you about this next week. No action which has been taken will, of course, prevent reconsideration of the entire matter so that something may be arranged mutually satisfactory to both parties.

F. E. KRUESI.

FEK:D

(Read from deposition.)

Q. Now, Mr. White, referring again to Defendant's Exhibit 9-A for identification, I will ask you whether or not you ever returned that exhibit to Northern Power & Light or to Mr. Sandstedt? A. I did not.

Q. And I also ask you whether you can now recall the reason why you did not return that consent and waiver of notice?

A. Because of my objection; that notice came to me after the meeting, and my objection to the action which had been taken at the meeting, in which I did not concur.

Q. Isn't it a fact also, Mr. White, referring to Defendant's Exhibit 10, your letter to Mr. Kruesi, that you had already expressed dissatisfaction with the form of the contract at that time?

A. I believe that meeting was probably held before I expressed my lack of concurrence to Mr. Kruesi, but the minutes were sent to me, and the waiver of notice of a meeting held on April 22nd was not sent to me for signature until May 12th, so that it was not until May 12th that I knew they had—the directors had taken this action.

Q. But in the meantime, and prior to May 12, you had already written Mr. Kruesi, and you had received Mr. Kruesi's reply dated May 2? A. May 2.

Q. In which he tells you that no action which has been taken will of course prevent reconsideration of the entire matter, so that something may be arranged mutually satisfactory to both parties? A. That's right.

Q. It has been called to my attention, Mr. White, that yesterday I asked you a question as to when you received ordinarily consents and waivers of notice with respect to the meetings of directors of North Dakota Power & Light Company and Northern Power & Light Company, and you answered that you ordinarily received those consents and waivers prior to the date that the meetings were held. I will now ask you the same question: When did you receive, ordinarily, the consents and waivers of notice with respect to the directors' meetings of those two companies?

A. I believe in the majority of cases I received the notice of meetings when accompanies—in which waivers were to be asked, after the meeting.

Q. Did you at the same time you received the consents ordinarily receive the minutes of the meetings? A. Yes.

Q. So that at the time you got the consents which you were requested to execute, you at the same time were apprised of what had transpired at the particular meeting?

A. That's right.

Q. So that if I correctly understand you, in the majority of cases you did receive these consents together with the minutes of the meetings to which they [apperatained], subsequent to the dates that the meetings were held and not prior? A. That's correct.

Q. You also testified, Mr. White, that you did not attend those meetings, or at least the great majority of them you did not attend. Is that correct? A. That is correct.

Q. Can you explain to us why you did not attend the meetings of the directors of those two companies?

A. Yes.

Q. Will you do so, please?

A. Almost without exception the business transacted by the directors of those companies at their directors' meetings were thoroughly routine, and the expense of time and money for me to attend those meetings would not have justified my going out there for them.

Q. Do you care to add anything to your statement?

A. When there was business of other than a routine nature to be transacted, I practically in all cases knew about such business in advance of the meeting, and had expressed my opinion to the management.

Q. Who do you mean by the manager, Mr. White?

A. The president, or a vice president.

Q. Those two men, were they on the board of directors?

A. Yes. Ordinarily business other than of a routine nature, as indicated by the minutes, would be confined almost exclusively to the election of officers, on which subject I had previously expressed my opinion, or to the investment of cash in government securities, which in practically every instance was an action taken at my request and direction.

Q. How about dividends, Mr. White? Were dividends declared from time to time?

A. That was another exception, and I consistently directed the dividend policies.

Q. What do you mean by that statement, directed the dividend policies?

A. Before dividends were declared I exchanged views with the management on the cash position, the probable cash needs, and the amount of dividends that could prop-

erly be paid out. In certain instances there was disagreement between the management and myself as to the amount of dividends which could properly be paid, and that usually resulted in more extended discussions of the subject, all of which took place before the dividend meeting was called, or until—

Q. Well, I got it from your explanation, Mr. White, that in every instance where there was any question about the dividends to be declared, the dividend that was actually declared by the board had been agreed upon between you and the other members of the board, before the meeting? A. That's right.

Q. You were a member of that board of directors from January 1, 1935 to October 19, 1945; and you have testified you received regularly copies of the minutes of the meetings. Can you recall, Mr. White, any instance where there was a question of major importance, that is, as contrasted with routine matters, such as election of officers and the dividends you have testified to, where the board of directors took any action contrary to your wishes or desires? A. I recall only one such instance.

Q. Is that the instance to which you testified yesterday? A. Yes.

Q. Which specifically was the meeting held April 22, 1936? A. Yes.

By Mr. Robinson:

Q. Mr. White, yesterday you testified with respect to having notified the local management through a letter to Mr. Kruesi that you were dissatisfied with the action taken by the management [it] its meeting of April 22, 1936; and you also testified that you received from Mr. Kruesi a letter stating that no action that had been taken would of course prevent reconsideration of this entire matter. I will ask you, Mr. White, was any action taken by the local management subsequent to that exchange of correspondence, which precluded the reconsideration of the negotiations for the 1936 contract? A. I don't know.

Q. Mr. White, in June of 1936, was Mr. Lakin employed by United Public Utilities Company, Utilities Corporation, or one of its subsidiaries?

A. He was employed by eleven of its subsidiaries.

Q. And in June of 1936, did you ask Mr. Lakin to visit the properties of the Northern Power & Light Company and North Dakota Power & Light Company and to make an inspection and examination of those properties?

A. Yes.

Q. And did Mr. Lakin to your knowledge make such trip and such examination and inspection? A. Yes.

Q. And after having made that trip and that examination and inspection of those properties, did Mr. Lakin report back to you? A. Yes.

Q. Do you recall the purpose of the examination and inspection? A. Yes.

Q. What was that purpose, Mr. White?

A. It was to assist me in the determination of the fairness, desirability and necessity of an interconnection agreement along the lines that were under consideration, and to assist me in the representation of my judgment to my board of directors.

Q. Did you ask Mr. Lakin to examine the interconnection facilities that were then in existence between Northwestern Public Service Company and Northern Power & Light Company? A. Yes.

Q. And did he make such examination? A. Yes.

Q. What was the purpose of his having examined those interconnection facilities, please?

A. To determine their value and their cost.

Q. And did he make a report to you of the value and cost of those interconnection facilities? A. Yes.

Q. Would you care to state now the exact date upon which Mr. Lakin made his report to you? A. June 19th.

Q. 1936? A. 1936.

Q. Mr. White, after Mr. Lakin reported his findings and conclusions and recommendations with respect to the value and necessity for interconnection facilities, did you cause Mr. [Laken] to make a report of those findings and conclusion to the board of directors of United Public Utilities Corporation? A. Yes.

Q. And do you recall at what meeting that report was made? A. Yes.

Q. At what date was that meeting held, Mr. White?

A. June 30th, 1936, in Philadelphia.

Q. Mr. White, I am reading from Page 1 of the minutes

of the regular meeting of the board of directors of the United Public Utilities Corporation, held at 1335 Land Title Building Philadelphia, Pennsylvania, on June 30, 1936, at 10 A. M., Eastern Daylight Saving Time, wherein it is stated: There were present Messrs. Lee Barroll, Henry A. Erhard, Gerald P. Kynett, Herbert L. Nichols, Herbert S. Welsh and Samuel W. White, constituting a quorum. The next paragraph: Mr. Francis H. Scheetz of counsel and Mr. C. E. Lakin, president of the Ohio-Indiana subsidiaries of the corporation, were also present by invitation.

Now, Mr. White, I am now reading from page 5 of the minutes of that meeting, the last paragraph on that page:

Mr. Benson: In order to avoid the necessity of returning with the deposition the entire minute books of United Public Utilities Corporation, and without waiver by the plaintiff as to any objections to said minutes, except that the plaintiff will not object on the grounds that the originals are not returned with the transcript, it is stipulated that when and as the defendant desires to offer a portion of the minutes, the minutes will be identified by Mr. White as original minutes, and then the portions which the defendant desires to offer will be read into the record, but not as a part of the record, until there has been an appropriate ruling thereon as to the objections that may be made by the plaintiff.

(Read from deposition.)

Q. I am now reading from page 5, the last paragraph on the page, the minutes of the directors' meeting of United Public Utilities Corporation, held June 30, 1936, which Mr. White has just identified as the original minutes of that corporation:

"The president reported that no agreement had been reached between Northern Power & Light Company and Northwestern Public Service Company for a firm power supply referred to in the minutes of the directors' meeting held January 20, 1936."

There is a notation to the date, January 20, a pencilled notation indicating such date should be "29".

"As a result of a survey made by him of the property of the Northern Power & Light Company, Mr. C. E. Lakin

concurred in the opinion of the president that the use of the interconnection facilities of Northwestern Public Service Company at an annual charge of $20,000 per annum, under a five year contract, effective from January 1, 1936, and terminable on 18 months notice by either party, would be advantageous to the subsidiary even without firm power. After a full discussion the board concurred in this opinion."

Mr. Robinson: Pursuant to the stipulation of counsel, I now offer in evidence the paragraph starting at the bottom of page 5 of the minutes of the meeting of the board of directors of United Public Utilities Corporation, held June 30, 1936, which I have just read.

Mr. Robinson: Q. I show you, Mr. White, pages 5 and 6 of the minutes which you have just identified as the original minutes of a meeting of the board of directors of United Public Utilities Corporation, held June 30, 1936, and ask that you look at the last paragraph, beginning on Page 5. Do you now have a recollection as to what transpired at that meeting? A. Yes.

Q. Mr. White, I ask you whether you now recall whether you made a report to the board of directors on that date? A. Yes.

Q. Did you make a report to your board of directors on or about June 30, 1936, that no agreement had been reached between Northern Power & Light Company and Northwestern Public Service Company for firm power supply? A. Yes.

Q. And did you report to your board on June 30, 1936, that as a result of a survey made by him of the property of Northern Power & Light Company, C. E. Lakin concurred in your opinion as President that the use of the interconnection facilities of Northwestern Public Service Company, at an annual charge of $20,000 per annum, under a five year contract, effective from January 1, 1936, and terminable on 18 months notice by either party, would be advantageous to Northern Power & Light Company even without firm power? A. Yes.

Mr. Benson: Q. Now, Mr. White did you make that report orally? A. Yes.

A portion of the deposition of Samuel W. White is omitted because it appears ein plaintiff's case from page 473, lines 5 to 36, inclusive, of the record herein.

By Mr. Stafford:

Q. What recommendations and conclusions did Sargent & Lundy make?

A. They stated as the result of their examination of the properties, they were in the process of writing a report, which would be available in a few days, and outlined the contents of that report as it would appear when completed.

Q. My prior question was whether you could tell us what the conclusions and recommendations were by Sargent & Lundy, to which I understood you replied "yes", and I then asked you what those conclusions and recommendations were? If you recall them.

A. I believe there was much the same differentiation established subsequently between an oral and a written report, and I have just attempted to give the nature of the oral report.

Q. Was that oral report given to you on June 27, 1936?

A. That date is approximately correct because it was immediately prior to my departure for Philadelphia, for my directors' meeting.

Q. Well, on or about that date that oral report was given to you, in a conversation, do you recall who was present at that conversation?

A. I believe that conversation is of record in my correspondence and—

Q. Do you want to refresh your recollection?

A. I would have to refresh my recollection by referring to it.

Q. Tell us what you recall, as refreshed by reference to your letter.

A. At a luncheon meeting a day or two prior to June 27th, the oral report to which I referred was made to Mr. James H. Buell of Middle West Service Company, Mr. Gazin of Middle West Service Company, and myself. The report was made by two representatives of Sargent &

Lundy, of which I can recall the name of only one, Mr. Skog.

Q. Mr. Skog, you say, is with Sargent & Lundy? A. Yes.

Defendant's Exhibit 235, which is also referred to as Defendant's Exhibit 13 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 235.

June 27, 1936.

Mr. F. E. Kruesi, President,
c/o Northwestern Public Service Co.,
385 N. Pine Street,
Grand Island, Neb.

Dear Frank:

Mr. Buell, Mr. Gazin and I had lunch with two of the members of Sargent & Lundy, a day or two ago, and they indicated that their report on the generating capacity of North Dakota Power & Light Co. will be completed within the next few days. Apparently, they propose to recommend the installation of 3,000 kilowatts additional capacity at Bismarck. They feel that this would be preferable to an additional boiler at Beulah. They indicated that their report will show the cost of the 3,000 kilowatt installation as $340,000, and the cost of another boiler at Beulah at $140,000. They point out, however, that the Beulah boiler would merely provide more kilowatt hours while the Bismarck installation would mean more capacity—and capacity is needed.

If you and Mr. Strike decide in due course that you want to accept their recommendation and proceed immediately with the work at Bismarck, the financing of the addition will be something of a problem. As I survey the situation, I think we can finance it all right out of current cash, now on hand and to be garnered in from other companies in the UPU System, during the next eight or nine months. In order to do so, however, we are going to have to nurse our resources carefully and defer capital or maintenance expenditures, which we would really like to

make, if it were not for the Bismarck development. I, therefore, urge upon you and Mr. Strike the necessity for conserving the cash resources of the Dakota Group in order that your requirements from the balance of the UPU System, for the Bismarck work, may be minimized.

I have no idea that this urge is a new thought to either of you, for I know that you are watching your expenditures carefully even when we are flush in cash, but it did occur to me that a frank statement of our potentialities would enable you to decide more intelligently upon the actual necessity, or advisability, of miscellaneous improvements or additions, as they come up for consideration from time to time.

Very truly yours,

President.

copy to:—
Mr. C. J. Strike,
c/o Northwestern P/S Co.,
Huron, So. Dakota.

(Read from deposition.)

Q. Mr. White, did you discuss the Sargent & Lundy report with the board of directors of United Public Utilities Corporation? A. Yes.

Q. Do you recall when?

A. I discussed, at the meeting of June 30, 1936, the oral report which had been made to me, as previously testified, indicating the representations that had been made to me as to what the written report would show.

Q. Mr. White, you have previously identified the original minutes of the regular meeting of the directors of United Public Utilities Corporation, held June 30, 1936. Pursuant to stipulation of counsel, I will now read from the sixth page of those minutes, the first full paragraph, as follows:

"The president reported that Messrs. Sargent & Lundy, engineers, had made a survey of the capacity of the North Dakota Power & Light Company to meet the demands of its customers for electricity, and pending com-

pletion of their written report had reported verbally that they will recommend the installation of an additional 3,000 k. w. generating unit with new boiler at Bismarck at a [probably] cost of $340,000. In addition a survey had been made by C. E. Lakin, who concurred with the president in the opinion that a serious shortage of reserve generating capacity exists and that embarrassment to the company may develop at any time by failure of one or more of the generators, and that such embarrassment will certainly develop in the reasonably near future through increasing load of the system. After a full discussion the president was directed to recommend to this subsidiary that a decision upon such an expenditure be postponed pending receipt of the Sargent & Lundy final report and the exploration of other possible sources of dependable power."

Mr. Stafford: I now offer that portion of the minutes of the meeting of June 30, 1936, in evidence.

The Court: Received.

Q. Mr. White, did you as president, report to your board of directors of the United Public Utilities Corporation on June 30, 1936, that Sargent & Lundy made a survey of the capacity of the North Dakota Company, and that pending completion of their written report had reported verbally that they will recommend the installation of an additional 3,000 k. w. generating unit with new boiler at Bismarck, probably costing $340,000? A. Yes.

Q. And did you also report to your board of directors at the same meeting that a survey had been made by Mr. C. E. Lakin, who concurred with you as president in the opinion that there was a serious shortage of reserve generating capacity, and that embarrassment to the company might develop because of the failure [or] one or more generators, that [iw] would certainly develop in the near future through increasing load? Did you make such report?

A. I made a part of those representations and Mr. Lakin made others.

Q. Do you recall, Mr. White, that at that meeting, Mr. Lakin was present? A. Yes.

Q. And did he make representations or reports to the board of directors at that meeting? A. Yes.

Q. And did those reports bear upon his survey, or survey made by him, and his opinion as to the shortage of reserve generating capacity? A. Yes.

Q. Do you recall what action the board of directors took in response to your reports and examination by Mr. Lakin? A. Yes.

Q. Will you please state your recollection of the action taken?

A. They recommended that a decision on the proposal to spend an amount estimated at $340,000 for the addition to the system be postponed until the written report of Sargent & Lundy was received.

Q. That is your present recollection of the recommendation they made? A. Yes.

Q. Mr. White, do you recall whether or not any improvements were made in 1936 on the properties of the North Dakota Power & Light Company?

A. There were no major improvements.

Q. Do you recall whether any improvements were made during the year at the [Buelah] plant of the North Dakota Power & Light Company?

A. The construction of an additional boiler at [Buelah] was authorized later in the summer.

Q. Of 1936? A. Of 1936.

Q. And you say that construction was authorized. By whom was it authorized, Mr. White? You are testifying from a memorandum before you?

A. I am refreshing my recollection. An extract of my correspondence file.

Q. Who prepared that extract, Mr. White? A. I did.

Q. (Read as follows:) You say that construction was authorized. By whom was it authorized, Mr. White?

A. By me, upon authorization from my board of directors.

Q. You say "my" board of directors. To whom do you refer?

A. The board of directors of the United Public Utilities Corporation.

Q. Do you recall when the matter was authorized by the board of directors of United Public Utilities Corporation?

A. Yes.
Q. When was that, Mr. White?
A. On August 28, 1936.

Mr. Stafford: I am reading from the eighth page of the minutes just previously described:

"The president submitted copies of a memorandum of Mr. Vennard of Middle West Service Company relating to inter-company energy sales of Northern Power & Light Company (Northern Company, North Dakota Power & Light Company [North Dakota Company]), two subsidiaries of the corporation, and Northwestern Public Service Company (Northwestern Company, a subsidiary of The Middle West Corporation, showing that neither of the subsidiaries of the corporation is in a position to deliver firm power to Northwestern Company, nor is Northwestern Company in a position to deliver firm power to them, but nevertheless some arrangement for interchange of energy between the companies would effect the greatest economy. The president reported that in line with the findings of this memorandum a contract was about to be signed between Northern Company and Northwestern Company providing for interchange sales of such surplus and emergency power as each may be able to deliver from time to time and be needed by the other, at a rate (subject to later adjustment) of 5 mills per k. w. h.

"The president reported that the 1936 drought in the Dakotas had in the past 30 days become the worst on record, and that its effect combined with the effect of the drought of preceding years would materially diminish the need of the two subsidiaries in those states for increased generating capacity, but that there remained the need for greater assurance of continuous operation of the generating capacity already installed.

"He then submitted a memorandum dated August 14, 1936, addressed to president F. E. Kruesi of North Dakota Power & Light Company, by vice-president Strike, in which he and other operating officials of the company, after reviewing the report dated June 26, 1936, of Messrs. Sargent & Lundy, engineers, recommend the immediate installing at the [Buelah] stations of the company of an additional 750 horse power boiler and the making of the changes in the walls and piping system of that station

necessary to the installation. This installation would increase the dependability of a station in which the company already has a large investment, increase its estimated annual output by about 7,760,000 k. w. h. and decrease its estimated operating and maintenance expenses by about $28,000 per annum; and for the present make unnecessary a much larger expenditure by the company for additional generating capacity elsewhere, at a time when it is unusually difficult to predict the future load and its location upon the system.

"After full discussion, and on motion duly made and seconded, the following resolution was unanimously adopted:

"Resolved that the board of directors of the United Public Utilities Corporation, the owner of the securities of North Dakota Power & Light Company, express their concurrence in the recommendation contained in the memorandum of August 14, 1936, for the installation of a new boiler in the [Buelah] station of that company, together with the necessary changes in the walls and piping system of that station incidental to the installation, at a total cost estimated at $150,000."

Mr. Stafford: I will now offer in evidence the portion of the minutes of the regular meeting of the directors of the United Public Utilities Corporation of August 28, 1936, which I have just read.

The Court: Received.

Defendant's Exhibit 236, which is also referred to as Defendant's Exhibit 14 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 236.

Memorandum Relating to Inter-Company Energy Sales of Northwestern Public Service Company (Northwestern Company), Northern Power and Light Company (Northern Company) and North Dakota Power and Light Company (North Dakota Company).

It is the purpose of this memorandum to give an opinion as to the equitable distribution of charges pertaining to:

1. Interconnection Facilities.
2. Firm Capacity.
3. Energy Interchange.

1. Interconnection Facilities:

The transmission lines in question were built by Northwestern Company primarily for the purpose of protecting the service of Northern Company. However, both Northwestern Company and Northern Company benefit to some extent through the connections in that each company can and does furnish emergency power to the other. Northwestern Company benefits by having more reserve capacity to call upon than it would have were the interconnections not in existence. Both Northern Company and North Dakota Company now need additional capacity. Preparations are now being made to provide this additional capacity at Beulah and Bismarck. When this additional capacity is provided, Northwestern Company will obtain greater benefits from the interconnection.

Northwestern Company is not now in position to furnish firm power capacity to Northern Power, as it does not have sufficient excess capacity to sell firm power; consequently, it is not in position to quote Northern Company for the firm power capacity that Northern Company needs. Also, it is more economical for the additional capacity to be provided at Beulah and Bismarck, the latter two being nearer the fuel supply.

Consequently, neither company has firm capacity to furnish the other. Neither company obligates itself, or desires to so obligate itself to furnish the other any firm power [capacity]. Each company does and desires to continue to furnish the other emergency power without any definite commitment as to the amount.

It is believed, therefore, that the two companies share equally in the benefits of the transmission line interconnections. A 50% apportionment of the transmission line fixed charges and operating expenses would, therefore, be equitable. This will be especially so when the additional capacity is provided at Beulah and Bismarck.

2. Firm Capacity:

Northwestern Company now has a peak load of 14,000 kilowatts. Northwestern's effective power capacity is 17,100 kilowatts. The full rated capacity of all generating stations is 21,000 kilowatts but it is doubtful whether the plants could be called upon to produce this full amount under all conditions. The Company's largest generating unit is 5,000 kilowatts. Deducting this from 17,100 kilowatts of power capacity, leaves a safe carrying capacity of 12,000 kilowatts. In other words, only by operating its plant above the 17,100 kilowatts capacity could Northwestern Company carry its load in case the large unit fails, were it not for the interconnections. Consequently, Northwestern Company is not in a position to offer firm power capacity to Northern Company. Consequently, Northwestern Company should not charge Northern Company for any firm power capacity. This shows also that Northwestern Company benefits through the interconnection facilities. It must be remembered, however, that North Dakota Company and Northern Company are also short of capacity and should go forward with the provision for added capacity at Beulah and Bismarck.

In the interchange agreement between the companies, consequently, neither company should offer to provide any firm capacity to the other. The interchange agreement should provide for the interchange of surplus energy and emergency power only. The term "emergency power" here means that power which either company, upon receiving due notice from the other company, can and does furnish the other company for short periods of time during an emergency caused by the failure or breakdown of any of the facilities of the other company. Neither company guarantees such emergency power but furnishes such power only to the extent that it, in its judgment, has the power to furnish. No capacity charge should be made by either company to the other for such power.

3. Energy Interchange.

For the purpose of providing the greatest economies, the three systems should be operated as though they were owned by one company. That is, the energy should be

generated, first, in the lowest production cost plant and, second, in the next lowest and so on. At present, the Beulah station has the lowest production cost; next would be Aberdeen and Mitchell stations; next would be the Mobridge Station and the Diesel engines and, finally the Bismarck and Dickinson plants. In practice, they are now so operated.

The North Dakota Company and the Northern Company cannot generate sufficient energy at Beulah to meet all of their requirements. Consequently, such companies must either generate the additional energy at the relatively high production cost plants at Mobridge, Bismarck and Dickinson, or else absorb energy from the Aberdeen plant of Northwestern Company. As the Aberdeen production cost is less than the production cost of Bismarck, Mobridge and Dickinson, Northern Company and North Dakota Company can save money by curtailing operations on these high production cost plants in favor of absorbing Aberdeen energy. Such savings should be divided equally between Northwestern Company and the other companies. For example—suppose that Aberdeen production cost is five mills as compared to eight mills on the higher production cost plants. Northwestern Company would then sell energy at six and a half mills in order to divide this difference on a 50% basis. These figures may not exactly correspond to the production costs involved but when they are determined they should be divided on a 50% basis after losses have been taken into account. This would not upset the economical operation of the three systems, as Northern Company would still have the incentive to draw upon the Aberdeen energy as such energy would cost less than the Bismarck, Mobridge or Dickinson energy. In determining these energy rates, proper consideration must be given to incremental production costs as well as average production costs, so that only the real savings would be divided.

At times, Northwestern Company is normally in a position to absorb surplus energy generated at Beulah. It is economical from the standpoint of the three companies that it should do so, as the Beulah production cost is less than the Aberdeen production cost. Here, again, whatever

difference exists between the two production costs, after proper allowances for losses, should be divided on a 50% basis. In determining this division, proper consideration must be taken into account for the fact that the Beulah generation is by the North Dakota Company, which in turn sells the energy to Northern Company, which in turn transmits and sells the energy to Northwestern Company. Consequently this division in energy costs should take into account the various losses and operating expenses in transmitting such energy of the companies making such transmission, so that there will be an equitable division of the difference in the two production costs.

In determining these Beulah production costs, consideration should be given the fair and competitive cost of coal delivered to the Beulah System.

It is probable that an equitable distribution of these production costs between the respective companies on a 50% division of the savings, may result in an energy rate of —●— mills from the Northern Company to Northwestern Company.

This energy interchange should be considered surplus energy as differentiated from either firm energy or dump energy. Firm energy is that energy which one company is obligated to furnish and this interchange contemplates no such obligation. Dump energy is that energy which the seller wants to deliver and which the [purchase] must absorb. Surplus energy is that energy which the seller wants to furnish and the purchaser has the option of either absorbing or not. The energy rates should be so arranged that the purchasing company will want to absorb such energy, because it will be cheaper than its higher production cost plants.

Q. I will ask you, Mr. White, whether or not that is a copy of the memorandum referred to in the portion of the minutes which I just read, the memorandum of Mr. Vennard of the Middle West Service Company, which was submitted to the directors of United Public Utilities Cor-

poration. Can you refresh yourself by reference to your minutes? A. It is.

Q. Mr. White, on August 28, 1936, did you submit copies of Defendant's Exhibit 14 for identification to the members of the board of directors of the United Public Utilities Corporation? A. Yes sir.

(Read from deposition.)

Mr. Stafford: Q. Mr. White, referring again now to the minutes of the meeting of August 28, 1936, of the U. P. U. Corporation directors, do you recall at the present time that you reported at that meeting anything concerning the contract between Northern Company and Northwestern Public Service Company? A. Yes.

Q. Will you please tell us what you reported to the board with reference to that subject matter at that time?

A. I told them that a contract was about to be signed between the Northern Company and the Northwestern Company providing for interchange sales of such surplus and emergency power as each may be able to deliver from time to time and be needed by the other, at a rate, (subject to later adjustment) of 5 mills per k. w. h.

Q. Do you have a present recollection that that is what you reported? A. Yes.

Q. At that time? A. Yes.

Q. Now, Mr. White, I will show you a document marked Defendant's Exhibit 15 for identification, which is Plaintiff's Exhibit 68 (R. p. 499 supra), consisting of four pages, purporting to be a carbon copy of a document addressed to F. E. Kruesi, subject matter, "Additional generating capacity location United Public Utilities, Dakota subsidiaries" dated August 14, 1936. Will you please examine that document and after you have examined it tell me whether or not that is a document which you produced for me from your files, at my request? A. It is.

Q. And I also ask you with reference to the same document whether or not that is a true copy of the memorandum dated August 14, 1936, referred to in the minutes of the meeting of the directors of United Public Utilities Corporation of August 28, 1936, as having been submitted to the board at that meeting? A. Yes, it is.

Q. That is a true copy? A. Yes.

(Read from deposition.)

Mr. Stafford: Q. Mr. White, you have previously testified that it is your recollection, and we have offered "in evidence your letter in which you offered objection to the 1936 interconnection contract in the form which it took, on or about April 22, 1936, is that correct"? A. Yes.

Q. And I note from the minutes of the meeting of the board of directors of United Public Utilities Corporation of August 28, 1936, which we were discussing just before the noon recess, that you had reported it to your board at that time, that a contract between Northern Power & Light and Northwestern Public Service Company, calling for interchange of energy at the 5 mill rate and for interconnection was about to be entered into. Is there any particular circumstance that you recall, between April or May, 1936, and August of 1936, which may have impelled you to change your mind so that the contract which was objectionable in May was now acceptable to you?

A. Yes. I had gone out, all over the property, Mr. Lakin had gone with me, and he stayed on the property for several days after I came back, and had told me of his findings with respect to the desirability of additional power supply system on—power supply on the southern end of our system, being the system of the Northern Power & Light Company, with the result that I was no longer hesitant about the desirability from Northern's point of view of such an arrangement, and the only reservation I then had was as to the wording of the contract.

Q. At that time, that is, August, 1936, specifically August 28, the date of that meeting, based upon your inspections of the properties that you have just told us about, and Mr. Lakin's report, and your general familiarity were you satisfied that the rate of $20,000 a year for the use of the interconnection facilities was a fair and reasonable rate as far as the North Dakota and Northern Power & Light Companies were concerned?

A. I was satisfied, but the contract was only with Northern Power & Light Company. North Dakota Company was not involved in the contract.

Q. That contract, Exhibit B to the complaint in this case also provided for a continuation of the five mill rate for the interchange of energy. Will you tell us whether

or not you were, on August 28, 1936, satisfied that that arrangement was fair and equitable insofar as Northern Power & Light was concerned?

A. I was satisfied that the five mill rate, which was subject to change by mutual agreement, was a fair, equitable and desirable arrangement for Northern Power & Light Company to have.

Q. At that time you were president of United Public Utilities Corporation, which owned all of the stock of Northern Power & Light Company? A. That's correct.

Q. Referring once more, Mr. White, to the question of the boiler, the new boiler at the [Buelah] plant of North Dakota, of which there has been previous testimony this morning, did you have any correspondence with Mr. Kruesi concerning the installation of that boiler at [Buelah], that you recall?

A. I will have to refer to my correspondence, to answer that question.

Defendant's Exhibit 237, which is also referred to as Defendant's Exhibit 16 in White's deposition, was received in evidence. It reads in part as follows:

Defendant's Exhibit 237.

August 11, 1936.

Mr. Samuel W. White,
United Public Utilities Company,
Chicago, Illinois.

Dear Sam:

I am not sure that you are back from your vacation but as soon as you are I wish to take up with you the matter of the installation of additional capacity in the North Dakota Power & Light Company. Perhaps this can be done by letter but if not I will arrange to come in to Chicago for the purpose.

At the time you left it appeared that we should install both additional boiler capacity and additional generating capacity and that it should be installed at Bismarck. In view of the seriousness of the drought situation, which means that we probably will not get the increased load previously anticipated in either the North Dakota, North-

ern or Northwestern Public Service Company during the next year or two, and owing to the undesirability of putting any further substantial investment into the Bismarck plant for various reasons already discussed with you, we are now all of the opinion that the only substantial expenditure we should make at this time is for additional boiler capacity and that it should be installed at Beulah.

Accordingly I have so instructed Sargent & Lundy and they now have bids in from suppliers on a new boiler for Beulah. This will require a total expenditure of some $150,000 and we wish your approval of our going ahead on this basis.

I will shortly submit to you the report and financial estimate which you previously requested. All are agreed that the investment for a new boiler at Beulah will show very substantial earnings.

The purpose of this letter is to ask you to let me know as soon as possible after your return if you are satisfied that the boiler should go in at Beulah and are agreeable that we go right ahead in the matter.

Sincerely,

F. E. KRUESI.

FEK:vlb
CC-EAO

Defendant's Exhibit 238, which is also referred to as Defendant's Exhibit 17 in White's deposition, was received in evidence. It reads in part as follows:

Defendant's Exhibit 238.

August 19, 1936.

Mr. Samuel W. White, President,
United Public Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Sam:

I was very glad to receive your telegram of this date and to note that August 25th will be satisfactory for our meeting in Chicago.

• • • • • • •

At that time the various bids on equipment can be gone over so that if you approve the installation of the boiler at Beulah, we will have selected the equipment and can place the orders as soon as you have secured the final endorsement of your Board.

Very truly yours,
F. E. KRUESI.

FEK:vlb
CC-JHB
EAO

Defendant's Exhibit 239, which is also referred to as Defendant's Exhibit 18 in White's deposition, was received in evidence. It reads in part as follows:

Defendant's Exhibit 239.

Western Union

Straight Wire.

August 28, 1936.

Mr. Frank E. Kruesi, President,
385 North Pine Street,
Grand Island, Nebraska.

Our Board Approves New Boiler At Beulah Regards.

SAMUEL W. WHITE.

Collect.

(Read from deposition.)

Mr. Stafford: Q. Mr. White, who was counsel for United Public Utilities Corporation during the year 1936?

A. Evans, Bayard & Frick, 1335 Land Title Building, Philadelphia, Pennsylvania.

Q. Did you deal with any particular individual in that firm, or associate? A. Yes.

Q. Regarding United Public Utility Corporation matters? A. Yes.

Q. Who was that?

A. Our matters were handled by Mr. Francis H. Scheetz, a member of that firm.

Q. Now, referring to the 1936 interconnection contract, which is Exhibit B to the contract in this action, did you submit any draft of that contract during its evolution, to Mr. Scheetz? A. Yes.

Q. For what purpose did you submit the draft to Mr. Scheetz?

A. To satisfy myself that the form of the agreement was proper from the standpoint of Northern Power & Light Company.

Q. Do you recall about what time you submitted the drafts to Mr. Scheetz?

A. No, but I—no. It was about the middle of August, 1936.

Q. That's close enough.

A. I will correct that and say that it was either the 14th or 15th.

Q. Did Mr. Scheetz communicate to you any opinion or criticism with regard to the drafts of the contract which you submitted to him? A. Yes.

Q. I will show you a document marked Defendant's Exhibit 19 for identification, purporting to be a letter on the letterhead of the law office of Evans, Bayard & Frick, dated August 21, 1936, addressed to "Dear Sam" consisting of three pages. Directing your attention to the third page, I will ask you if you recognize the signature thereon? A. Yes.

Q. Whose signature is it? A. Francis H. Scheetz.

Q. Did you receive this letter from Mr. Scheetz on or about the date it bears? A. Yes.

Q. Will you look at it and tell me whether it is in the same condition as it was when you received it? A. Yes.

Q. I direct your attention to another document marked Defendant's Exhibit 19-A for identification, which consists of seven pages, which is attached to Defendant's Exhibit 19 for identification, and ask you if you can tell me what that document is?

A. That is a preliminary draft of the form of agreement which I had submitted to him for comment.

Q. You mean that 19-A is what you had submitted to Mr. Scheetz, or is 19-A the preliminary draft prepared by Mr. Scheetz?

A. No. This is the draft which I had submitted to him for comment.

Defendant's Exhibit 241, which is also referred to as Defendant's Exhibit 19-A in White's deposition, was received in evidence. It consists of the aforesaid draft of the 1936 contract, which is substantially the same as the contract as finally executed (Exhibit B to the Complaint).

Q. Directing your attention to page 3 of Defendant's Exhibit 19-A for identification, I direct your attention particularly to the pencil interlineations in handwriting, and I will ask you to tell me if you know whose handwriting that is?

A. The interlineation on that page is in the handwriting of Mr. Scheetz.

Q. That is the interlineation appearing in Article IV?

A. Yes.

Q. How about the interlineation— A. And V.

Q. And page 4, I will ask you the same question with reference to the interlineations in Article VI, in subparagraphs 1 and 2? A. That's mine.

Q. In both instances? A. Yes.

Q. Page 6, Exhibit 19-A for identification, Article IX, I will ask you if you know who put on the question mark in the reference to the word "other"? A. I do not.

Q. Mr. White, did you produce for me both Defendant's Exhibits 19 and 19-A for identification from your files, at my request? A. Yes sir.

Mr. Stafford: We offer in evidence Defendant's Exhibit 240, which is a negative photostat of the document marked Defendant's Exhibit 19, returned with and as a part of the deposition of Samuel W. White, and purports to be an original letter dated August 21, 1936.

Mr. Fellows: Objected to as irrelevant and immaterial; no foundation laid; it is merely an opinion by counsel; hearsay; opinion by counsel in Philadelphia to Mr. White containing legal conclusion, to the effect that the interconnection contract which was proposed, and which interconnection contract never was executed as the inter-

connection contract. It was merely a proposal which was interlined and changed. Serves only to incumber the record.

Mr. Stafford: This is a letter from counsel to U. P. U. the sole stockholder. It is pleaded in the answer, that this contract was submitted to legal representatives of both companies. It is direct evidence in support of that allegation.

The Court: The fact that the proposition was submitted to counsel of both companies might be material, but their opinion is not material.

Mr. Stafford: We are offering it for the purpose that it was submitted and he did do work on it and sent it back to Mr. White.

Mr. Fellows: The absurdity of this thing is indicated by one sentence. He uses one word where another does as well. "My best judgment is that sales of either party to other party to the contract are not sales in interstate commerce." Then he cites cases on another feature of the thing. The contract that was proposed never became the contract between the parties.

The Court: We are going to have an enormous record the best we can do. I see no purpose in loading it with immaterial matter.

Mr. Woods: It is evidence to show knowledge and consideration of this situation and submitted on the theory that the holding company had knowledge of this situation, investigated it and went over it and shows exactly what they did in consideration of it.

The Court: You have the testimony of Mr. White as to what they did which is a lot more convincing evidence than some attorney's opinion on a legal proposition. I think it is immaterial.

Mr. Woods: It is a writing made at that time showing what was done.

The Court: I still maintain it is immaterial. Objection sustained.

Mr. Woods: In order that the record may be complete and for the purpose of an offer of proof, we ask this be included in the record as an offer of proof for the purpose of showing knowledge and actions of Mr. White and Mr. Scheetz, counsel for United Public Utilities Corporation at the time involved, being about August 21, 1936, in connection with their consideration and action taken upon the proposed contract which was one of the preliminaries to the execution of a similar contract developed out of this.

Mr. Fellows: We make the same objection to that offer as to the exhibit itself.

The Court: I want counsel to have a record as consistent with the facts as possible, so the offer of proof is overruled.

(Read from deposition.)

Q. Mr. White, the 1936 interconnection contract, Exhibit B to the complaint, bears the date October 7, 1936. Was that contract executed on or about that date, if you know?

A. Yes.

Q. And did you know of its execution and approve the same? A. Yes.

(Read from deposition.)

Q. Mr. White, I have here in my hand a copy of the complaint in this suit which was served upon the defendant, Northwestern Public Service Company, a corporation, and I am referring to Exhibit B annexed to and forming a part of said complaint. This Exhibit B is the 1936 contract, dated October 7, 1936, and signed by the parties who signed it, a photostat copy, and I want to call your attention particularly to the provisions of Article V, which read:

"Northwestern Company will pay to Northern Company for surplus energy during each billing period a sum equivalent to .5 cents per kilowatt hour."

Also: "Northern Company will pay to Northwestern Company for surplus energy during each billing period a sum equivalent to .5 cents per kilowatt hour." You were familiar, I take it, with the provisions of that con-

tract, judging by your previous testimony, as of October 7, 1936, were you? A. Yes.

Q. I will ask you now, Mr. White, whether or not you were satisfied, as president of United Public Utilities Corporation, which in turn owned all the stock of Northern Power & Light Company, as to those provisions and the rate therein provided for?

Mr. Benson: Which ones are those?

Mr. Stafford: That's five mills.

A. Yes, I was satisfied.

Q. Were you satisfied that that rate was fair, just and proper insofar as Northern Power & Light Company was concerned? A. Yes, I was.

Q. Now, Mr. White, calling your attention also to Article VI, in the same contract, the provision in the first paragraph which provides:

"As Northern Company's share of the fixed charges, maintenance and operating expenses relating to the interconnection facilities enumerated above, Northern Company agrees to pay Northwestern Company, beginning January 1, 1936, the sum of $1,666.66 a month. This charge is over and above all energy charges provided under Article V above."

It is also provided therein that:

"Upon the termination of this contract by either party, Northern Company will pay Northwestern Company, in addition to all other charges hereinbefore enumerated, a sum equivalent to one half the actual cost to Northwestern Company to remove and dismantle the interconnection facilities enumerated above and to return all material to the store-room of Northwestern Company in Aberdeen, South Dakota."

Also in the same Article the third paragraph provides that Northern Company has no obligation to pay Northwestern Company for any part of the construction cost of those facilities or for the use thereof for any period prior to January 1, 1936. Were you familiar with those provisions in the contract, on or about October 7, 1936?

A. Yes.

Q. Did you at that time, as president of United Public Utilities Corporation, the owner of all the stock of North-

ern Power & Light Company, consider the charge provided in Article VI of $1,666.66 a month as a fair and reasonable and proper charge insofar as Northern Power & Light was concerned? A. Yes.

Q. Were you also satisfied with the other provision of Article VI, the one relating to upon termination the obligation of Northern to pay one-half of the dismantling and removal charges, and the other provision, which exonerated Northern from paying for the use of the facilities for any period prior to January 1, 1936? A. Yes.

Q. I have asked you whether you were so satisfied in your capacity as president of United Public Utilities Corporation. I will ask you the same question, whether you were so satisfied as to the rate of $1,666.66 a month, the dismantling and removal charge provision to pay Northwestern and also with the five mill energy interchange rate. Were you satisfied that they were proper, fair and reasonable charges in your capacity as director of United Public Utilities Corporation? A. Yes.

Q. And you were also at the time a director of Northern Power & Light Company? A. Yes.

Q. Were you satisfied as to each of the aforementioned charges, in your capacity as director of Northern Power & Light Company? A. Yes.

Q. Now, I refer you to Exhibit D to the same complaint in this action, which is a contract made and entered into July 1, 1939, between Northwestern Public Service Company and Dakota Public Service Company, and directing your attention to Article XII, which provides that 1939 contract cancels and supersedes the interconnection contract dated October 7, 1936, Exhibit B of the complaint, I will ask you now, Mr. White, if during the entire period from October 7, 1936, to and including July 1, 1939, during all the time that the 1936 contract was in force, you were satisfied that the rates and the charges therein provided for to be paid by Northern Power & Light Company were fair, reasonable and proper from the standpoint of Northern Power & Light Company? A. Yes.

Q. Were you so satisfied in your capacity as president and a director of United Public Utilities Corporation?

A. Yes.

Q. And were you so satisfied as a director of Northern Power & Light Company during that period? A. Yes.

Q. And were you a director of Northern Power & Light Company during that period? A. Yes.

Q. And president and a director of United Public Utilities Corporation? A. Yes.

Q. Mr. White, did you instruct the management or officers of Northern Power & Light Company to execute this contract on behalf of Northern Power & Light Company? A. Yes.

Q. You previously testified, have you not, that you had approved the contract? A. Yes.

Q. Did you so instruct the officers to execute that contract, and approve the contract itself in the exercise of an informed and independent judgment? A. Yes.

By Mr. Robinson:

Q. Mr. White, in your capacity as president of the United Public Utilities Corporation, did you have occasion during the year 1937 and particularly during the month of June of that year, to give consideration to the problem of the capacity of Northern Power & Light Company and the North Dakota Power & Light Company, the generating capacity of those companies? A. Yes.

Q. Did you have occasion to bring to the attention of the board of directors of United Public Utilities Corporation the problems of the generating capacity confronting those subsidiaries? A. Yes.

Q. Mr White, I show you what purports to be the original minutes of a meeting of the board of directors of United Public Utilities Corporation, held at room 1335 Land Title Building, Philadelphia, Pennsylvania, on June 24, 1937, at 10 o'clock a. m. Eastern Daylight Saving Time, and ask you whether or not this represents the original minutes of the meeting of that corporation, held on that day? A. It does. It is the original minutes.

Q. I will now read the first paragraph from Page 3, of a regular meeting of the board of directors of United Public Utilities Corporation, which Mr. White has just testified were the original minutes of the meeting held June 24, 1937.

"A recent survey of the available generating capacity of the Dakota properties indicates an insufficient margin of the effective capacity over probable demand.

"A lengthy discussion followed of the ability of those subsidiaries adequately to serve their customers should the demand for current in the state exceed the estimated demand or breakdowns occur in the chief generating units of either subsidiaries of the corporation or of Northwestern Public Service Company from which subsidiaries of the corporation have in the past been able to obtain substantial amounts of power during peak loads under a 'dump power' contract."

The above quoted portion of the minutes was received in evidence.

(Read from deposition.)

Q. Mr. White, did United Public Utilities Corporation own any properties in the state of North or South Dakota at this time other than Northern Power & Light, North Dakota Power & Light and Knife River Coal Mining Company? A. No.

Q. Mr. White, the minutes of the meeting of June 24, 1937, which you have just identified, indicate that a lengthy discussion of the ability of these subsidiaries to serve their customers, under certain circumstances might result, and that such fact was brought forth in view of a recent survey. I want to ask you whether or not, in the conducting of the meetings of the board of directors of United Public Utilities Corporation you were in the habit of preparing an agenda which would cover the items to be discussed in such meetings? A. Yes.

Q. Mr. White, as president of United Public Utilities Corporation, did you maintain the practice of preparing an agenda for the matters to be discussed by the board of directors of that corporation at the meeting held by that corporation? A. Yes.

Q. Was that a regular practice? A. Yes.

Q. Did you prepare such agenda for the meeting of the board of directors of United Public Utilities Corporation held June 24, 1937, at 10 o'clock A. M., Eastern Daylight Saving Time, at room 1335 Land Title Building, Philadelphia, Pennsylvania? A. Yes.

Defendant's Exhibit 242, which is also referred to as Defendant's Exhibit 22 in White's deposition, was received in evidence. It is as follows:

Defendant's Exhibit 242.

Agenda:

Directors Meeting At Philadelphia, Pa.

June 24, 1937.

Directors:

Present: Messrs. Barroll, Nichols,
Erhard, Welsh,
Kynett, White.

Present by Invitation.

Mr. F. H. Scheetz,
General Counsel.

Absent: Mr. N. P. Zech

* * * * * * *

5. Recent survey of available generating capacity on Dakota properties shows serious shortage. Fall peak load in 1936 was 9715 k. w. and effective capacity was only 9990 k. w., giving effecting reserve of only 275 k. w. The maximum rated capacity of all plants including small high-cost standbys, is 11,460 k. w., so that even if it were practicable to use everyone of these plants on the peak load, the reserve was only 1745 k. w., or about 18%.

If the 3500 k. w. unit at Beulah should go out on the peak, the effective capacity would be reduced to 6490 k. w., leaving a shortage of 3275 k. w. of effective capacity and reducing the minimum available rated capacity to 7960 k. w. or 1755 k. w. less than the peak load. Under normal operations, Northwestern Public Service Co. is sending 2200 k. w. north on the winter peak loads for about 4 hours and is sending 500 k. w. north on the spring peak loads.

* * * * * * *

Q. Mr. White, I show you Defendant's Exhibit 22 for identification, consisting of four pages, and purporting to be an agenda for the directors' meeting at Philadelphia, Pennsylvania, June 24, 1937, and ask you whether or not that document was furnished to us at our request, from your files? A. It was.

(Read from deposition.)

Q. Mr. White, I again show you Item 5 of Defendant's Exhibit 22 for identification, just Item 5.

A. Yes, all right.

Q. And ask you whether the matters set forth therein were discussed by the board of directors on that date, at its directors' meeting on June 24, 1937? A. Yes.

Q. Mr. White, did the directors and general counsel of United Public Utilities Corporation ever take a trip over the properties of the three subsidiaries of that corporation, located in North and South Dakota, that is, Northern Power & Light Company, North Dakota Power & Light Company and Knife River Coal Mining Company? A. Yes.

Q. Do you recall on or about what date such trip and such inspection was made?

A. October 2nd to 9th, 1937.

Q. Do you recall the points, that is, the parts of the properties located in North and South Dakota that you and the other members of the board and your general counsel visited on that occasion? A. Yes.

Q. Mr. White, would you tell us just what properties and what inspections were made by the board of directors and their general counsel on the occasion of that trip; just what properties were visited and what inspections were made?

A. I have in my files a detailed itinerary of that trip, which I will need to refresh my recollection.

Q. Mr. White, I show you Defendant's Exhibit 23 for identification, consisting of a cover and three pages containing typewritten material on both sides, and purporting to be an itinerary of a trip over the Dakota properties of United Public Utilities Corporation, and ask you whether you have ever seen that before? A. I have.

Defendant's Exhibit 243, which is also referred to as Defendant's Exhibit 23 in White's deposition, was re-

ceived in evidence. It shows that on the trip referred to in the preceding testimony the directors and general counsel of United Public Utilities Corporation visited and inspected the generating plant of defendant and the interconnection substation and facilities and the system dispatcher's office at Aberdeen, South Dakota, after 3:50 P. M. on October 3rd; drove over the properties out to Mobridge, South Dakota, to the division office of the Northern Power and Light Company; visited the Mobridge plant on October 4th and took a trip over a part of Northern Power and Light Company's transmission system via Bowdle, Eureka, Wishek and Steele, arriving at Bismarck, North Dakota, at approximately 3:30 P. M. October 4th, and there visited the generating plant of North Dakota Power & Light Company and visited the State Capitol Building and drove around Bismarck and Mandan, North Dakota, prior to 7:30 P. M. on the same day; on October 5th proceeded to Beulah, North Dakota, and there visited the main generating plant of North Dakota Power & Light Company and also visited and inspected both the underground and outside operations of Knife River Coal Mining Company prior to 3:00 P. M. on October 5th and left for Dickinson, North Dakota, at approximately 3:00 o'clock on said day, and on October 6th visited the power plant at Dickinson, North Dakota, another division office of North Dakota Power & Light Company, leaving Dickinson at 9:30 A. M. on October 6th for the Black Hills of South Dakota and then drove to Huron, South Dakota, arriving at midnight October 7th; and concluded their inspection trip by a visit to the general offices of defendant, North Dakota Power & Light Company, Northern Power and Light Company and Knife River Coal Mining Company at Huron, (where they had lunch at 11:30 A. M.) and by a visit to defendant's branch office at Webster, leaving there approximately at 4:50 P. M. October 8th.

Q. Was defendant's Exhibit 23 for identification prepared at your direction? A. No. It—

Mr. Benson: Q. Is that the trip you took? That is an itinerary of your trip? A. That's the itinerary.

(Read from Deposition.)

Q. Mr. White, Defendant's Exhibit 23 for identification refers to a visit to the general offices of Northwestern Public Service Company, North Dakota Power & Light Company, Northern Power & Light Company and Knife River Coal Mining Company, at Huron, South Dakota. Will you state, please, what if anything occurred on the occasion of your visit to that office?

A. The visit consisted in the main of individual conversations between directors and the several members of the general management staff in that office.

Q. Conversations concerning what subject, Mr. White?

Mr. Benson; Q. Were you present at all of them? A. No.

Mr. Robinson: Q. Conversations at which you were present, please? A. I cannot detail such conversations.

Defendant's Exhibit 244, which is also referred to as Defendant's Exhibit 24 in White's deposition, was identified and produced by White. It was offered in evidence, whereupon the following occurred:

"Mr. Fellows: If that offer is limited for the purpose of showing the information contained in the exhibits, we have no objection. If it purports to be proof of any facts contained in it, we object to its general admission on the ground it is incompetent; no foundation laid; there are purported facts in there and no showing by whom it was prepared.

Mr. Stafford: It is agreeable to us to limit the offer for the purpose that this was the document which came out of Mr. White's files and which had come to his attention.

The Court: So limited it will be received."

Exhibit 244 reads in part as follows:

Survey of Power Requirements.

Northwestern Public Service Company.

Northern Power and Light Company.

North Dakota Power and Light Company.

The systems of North Dakota Power & Light Company, Northern Power and Light Company and the South Dakota system of Northwestern Public Service Company have been operated as a single interconnected system since 1931. The three companies have been under the same management since 1929 and late in 1930 Northwestern Public Service Company made an investment of approximately $330,000 for interconnection facilities with Northern Power and Light Company.

The U. P. U. group has very little generating capacity on the south end of the system and service was very poor. As a result a number of municipal agitations had developed and in order to clear up these situations it was necessary to improve service by installing additional generating capacity, or by means of interconnection facilities with Northwestern Public Service Company. At that time it was more or less understood that the U. P. U. properties would be merged with Northwestern Public Service Company and in view of this plan it was decided to interconnect the two groups. Such interconnection gave Northern Power and Light Company an additional power supply at three separate points and would also permit utilizing the low price energy at Beulah to a fuller extent. In view of the fact that Northern Power and Light Company did not have sufficient cash to make these improvements the entire expenditure was made by Northwestern Public Service Company. Since that time the requirements for the entire system have been generated in the power plants having the lowest unit costs, regardless of Company ownership.

The rates for energy transferred between companies have been on a straight energy basis to distribute the savings in operating costs between companies on an equitable basis,

but up to this time no consideration has been given to the proper apportionment of fixed charges on generating capacity between the two groups. Since January 1, 1936, Northern Power and Light Company has paid Northwestern Public Service Company $20,000 a year, representing fixed charges on one-half of the investment in interconnection facilities between the two companies. Prior to that time Northwestern Public Service Company stood all of the fixed charges on this investment.

Under the present method of operation the Beulah station is operated at a high load factor. As the load of the U. P. U. system has increased a higher percentage of the output of this station has been required for the north end of the system and while a substantial number of kilowatt-hours are transferred from Northern to Northwestern, all of this energy is transferred during off peak periods. Following is a typical one day operating cycle showing kilowatts received or delivered between Northern Power and Light Company and Northwestern Public Service Company.

Kilowatts Received or Delivered by Northern Power and Light Company During Typical Day's Operation.

	Summer—August		Winter—December	
	Received	Delivered	Received	Delivered
12 Midnite	0	900	0	1800
1 A. M.	0	1400	0	1200
2 "	0	1600	0	1300
3 "	0	1700	0	1400
4 "	0	1800	0	1100
5 "	0	1800	0	900
6 "	0	1500	0	1200
7 "	0	900	0	1900
8 "	0	700	0	1300
9 "	0	200	0	500
10 "	500	0	0	400
11 "	300	0	0	200
12 Noon	400	0	0	100
1 P. M.	400	0	0	500
2 "	200	0	0	800
3 "	0	0	0	800
4 "	100	0	0	1100
5 "	100	0	0	600
6 "	100	0	900	0
7 "	0	100	900	0
8 "	0	100	300	0
9 "	800	0	300	0
10 "	600	0	0	300
11 "	0	300	0	1100
12 Midnite	0	900	0	1800

The U. P. U. system has very little reserve generating capacity and as shown by the above tabulation it is normally necessary for Northwestern Public Service Company to feed into the south end of the system during peak hours.

Purpose of Survey.

There are certain advantages and economies under the present method of operation beneficial to all companies and if these benefits are equitably distributed between the two groups the present method of operation is justified. We are satisfied that the present rate for interchange power provides an equitable distribution of the savings in operating costs by reason of operating the systems of both companies as a single interconnected system, but no consideration has been given to the proper apportionment of fixed charges on generating capacity. One of the purposes of this report is to establish an equitable distribution of fixed charges on generating facilities to the respective groups.

It might be practical for one group to provide the investment to protect the other group for a reasonable period of time, but if this is carried too far it might result in serious complications in the future on account of the difference in ownership. Insofar as is practical a balance of investment should be maintained between the two groups. If this balance is thrown out of line temporarily by one group making an investment that will be used by both, the fixed charges should be apportioned on an equitable basis.

Capacity of Present System.

	Capacity in Kilowatts			
	Summer Operation		Winter Operation	
	Effective	Maximum	Effective	Maximum
Northwestern Public Service Company				
Station				
Aberdeen	(A) 4000	(A) 4700	(D) 6500	(E) 8000
Redfield	(A) 800	(A) 800	(C) 800	(D) 900
Mitchell	(A) 6000	(A) 6500	(F) 7500	(F) 8400
Huron	(A) 1250	(A) 1300	(B) 1300	(B) 1330
Yankton	(A) 1560	(A) 1600	(B) 1740	(B) 1770
Webster	(B) 700	(B) 750	(B) 700	(B) 750
Armour	(B) 900	(B) 980	(B) 900	(B) 980
Highmore	(A) 130	(A) 140	(B) 140	(B) 150
Faulkton	(A) 90	(A) 100	(B) 90	(B) 110
Total N. W. P. S. Co...	15430	16870	19670	22390
North Dakota Power & Light Co.				
Beulah	(A) 5400	(A) 6000	(B) 6200	(B) 7000
Bismarck	(A) 1200	(A) 1400	(G) 1350	(G) 1650
Mandan	(G) 200	(G) 400	(G) 400	(G) 450
Dickinson	(G) 850	(G) 1000	(B) 950	(B) 1050
Mott	(A) 200	(A) 220	(B) 220	(B) 230
Total N. D. P. & L. Co..	7850	9020	9120	10380
Northern Power & Light Co.				
Mobridge	(A) 800	(A) 900	(B) 1200	(B) 1400
Ellendale	(G) 300	(G) 400	(G) 300	(G) 400
Lemmon	(A) 200	(A) 220	(B) 220	(B) 235
Gettysburg	(B) 130	(B) 160	(B) 130	(B) 140
Total N. P. & L. Co....	1430	1680	1850	2175
Total N. W. P. S. Co...	15430	16870	19670	22390
Total U. P. U. System.	9280	10700	10970	12555
Total System	24710	27570	30640	34945

Limiting Factors

(A) Cooling Water
(B) Capacity of Station
(C) 1 Boiler
(D) 2 Boilers
(E) 3 Boilers
(F) 4 Boilers
(G) Boiler Capacity

Estimated System Peaks and Generating Capacity Required.

From a standpoint of practical operation we need the following generating capacity.

(A) To take care of system peak.

(B) Plus 5000 KW reserve in the event the largest unit is out of service.

(C) Plus reserve of 15% of the system peak—

The interconnected system has 18 generating stations and approximately 3000 miles of transmission line. Some of the plants are very small and in case of emergency it is very difficult to get some of these small units on the line. This requirement is based upon the maximum capacity of the system. While it is possible to generate the maximum capacity shown for each individual plant under favorable conditions, in actual operation we cannot depend upon every unit generating its maximum capacity and staying on the line. If effective capacity were used as basis a much smaller reserve would be required.

On the above basis, the following generating capacity will be required to take care of anticipated peaks for the period from 1938 to 1942, inclusive.

	Summer Operation			Winter Operation		
	Peak Load Kilowatts	Capacity Required With Reserves	Additional Capacity Needed to Take Care of Requirements	Peak Load Kilowatts	Capacity Required With Reserves	Additional Capacity Needed to Take Care of Requirements
1937....	21,150	29,900	2,330	24,425	33,700	1,245
1938....	22,500	31,500	4,000	25,900	35,500	555
1939....	24,000	33,200	5,630	27,600	37,500	2,555
1940....	25,600	35,100	7,530	29,400	39,600	4,655
1941....	27,300	37,100	9,530	31,300	41,800	6,855
1942....	29,100	39,200	11,630	33,300	44,200	9,255

The 1937 peak shown in the above tabulation was the actual peak for the year 1937 which occurred in December. Future peaks were estimated on the basis of a 6% increase

in demands with no increase in load factor. We do not feel that there is any reason for anticipating much, if any, improvement in our present load factor as the bulk of our increased output will be in the residential classification.

We have a comparatively high saturation on refrigerators and we anticipate that a substantial part of our future development will be in ranges and better lighting to customers in the higher income brackets and in lighting to the poorly developed customers. This business will not improve the load factor.

It will be noticed that insofar as the relationship between peaks and capacity is concerned, our effective peaks are actually occurring in the summer months. Last winter we had effective capacity of 1.245 kilowatts in excess of the capacity needed to carry the system peak with necessary reserve, but this summer there was a deficiency of 2.330 kilowatts on the same basis.

Proposed Plan of Providing for Additional Generating Capacity Required.

In making this forecast we must decide whether future development will be toward centralization of generating facilities in comparatively large plants, or decentralization with the thought in mind of protecting important load centers with smaller plants located at strategic locations, or a combination of both.

Consideration must also be given to the characteristics of our present system, including location, size and condition of the present generating stations as well as the transmission system.

Consideration must also be given to keeping a balance of investment between the two systems and to financial conditions of the respective companies and to the prospects of future development.

There are strong arguments in favor of developing a fairly large station at a location with an ample water sup-

ply and comparatively cheap fuel. A plant of this kind would stabilize the system and would simplify the operations.

One of the arguments against this plan is the problem of finding a location that is exactly suitable. If a large portion of the system's generating capacity is located at one point we must depend upon the transmission system to utilize the output. We are serving a sparsely settled territory with a comparatively few good towns widely scattered and a great many small towns. These good towns insist upon reliable service 24 hours a day and our past experience with our type of construction has proven that transmission line service is not entirely dependable.

A typical illustration of this was our experience in Webster a few years ago when this town and a number of other towns were out of service for a week during a sleet storm. In order to assure Webster that we would not have a reoccurrence it was necessary to install a diesel plant. We have had a number of other similar experiences and just last winter a number of our towns were without service from 2 days to over a week.

Towns of over 1000 population can provide their own plants with rates that compare favorably with ours and except as we can offer them comparable service there is a danger of losing some of these good towns.

Concentration of power in a large station near water and good fuel would necessitate a more substantial transmission system with greater capacity in order to utilize the output of the plant in load centers of the system. In our opinion the total cost of power with fixed charges included would be higher than with smaller units added to the present system for some years to come.

A large generating station means a heavy investment to be provided at one time and it would take several years to grow into this investment. Under this plan we would have a substantial excess of reserve equipment for the first few years on which we would not be able to earn a return. If our load increases as we anticipate this equip-

ment would be eventually utilized but with present unstable conditions it is impossible to forecast with any degree of accuracy what the future has in store for us. For the past five or six years we have suffered from unusual drouth conditions and there has been very little wealth produced in the territory. During this period the government has provided a substantial amount of relief in one form or another and we have been able to get along. At the present time there is a tendency on the part of the government to cut down on relief expenditures and while we feel confident that normal weather conditions will return there is no use in gambling too much on the future.

After carefully considering this matter from all angles, we recommend that the immediate needs of the system be taken care of by adding a few small units to our present system. This investment can be made piecemeal as the load increases and unless such a plan is carried too far our plans for a comparatively large plant sometime in the future to stabilize the system and to obtain low unit costs will not have to be abandoned.

On this basis we recommend the following additions:

	Investment	Summer Operation		Winter Operation	
		Capacity Required	Maximum Capacity Provided	Capacity Required	Maximum Capacity Provided
End of 1937		29,900	27,570	33,700	34,945
1938					
Cooling Tower at Aberdeen	14,000		1,000		
New Steam Ends for Aberdeen Turbine	60,000		1,250		1,250
2 New Boilers & Accessories in Bismarck Plant	140,000				800
End of 1938	214,000	31,500	29,820	35,500	36,995
1939					
1-1000 KW Diesel gas engine at Dickinson	125,000		1,000		1,000
Cooling Tower at Mitchell	14,000		1,000		
End of 1939	139,000	33,200	31,820	37,500	37,995
1940					
1-1500 KW Turbine & Boiler at Mobridge	130,000		1,500		1,500
1-1000 KW Diesel Plant at Scotland	125,000		1,000		1,000
End of 1940	255,000	35,100	34,320	39,600	40,495
1941					
1-1500 KW Diesel Gas Engine at Mandan	150,000		1,500		1,500
End of 1941	150,000	37,100	35,820	41,800	41,995
Total Investment	758,000				

The above plan will take care of our anticipated requirements for the next four years at a minimum expenditure and we believe that these additions will fit in well with any system which may be proposed for the future.

Under the heading of "Explanation of Proposed Additions" follows a detailed explanation of the foregoing proposed additions.

Allocation of Investment Costs Between Groups.

Insofar as is practical we believe that a balance of investment should be maintained between the two groups

but in the event that one group makes an investment that will be used temporarily by both, the fixed charges should be apportioned on an equitable basis.

We believe the fairest basis of apportioning these fixed charges is on the basis of demands. Each group contributes a certain percentage of the total system peak and should contribute that same percentage of the generating equipment necessary to carry these demands.

On this basis we have made the following calculation which shows the charge or credit for generating capacity furnished by one group to the other.

	System Peak December 1937	% of Total
U. P. U. Group	10,620	41%
N. W. P. S. Co.	15,280	59%
Total	25,900	100%

Allocation of Capacity to U. P. U. Group:

	Total System Capacity Including Proposed Additions	U. P. U. Group Proportion 41%	U. P. U. Capacity Including Proposed Additions	Difference
1938	36,995	15,168	13,355	1,813
1939	37,995	15,578	14,355	1,223
1940	40,495	16,603	15,855	748
1941	41,995	17,217	17,355	138

If the construction program as outlined is carried out the U. P. U. group will owe Northwestern Public Service Company fixed charges until 1940 when the investment is brought in line with a small credit in favor of the U. P. U. group. The 1938 charge is based upon the 1937 peak and includes the proposed additions to be made during the year 1938.

We believe a fair basis would be to assume an investment of $110 per kilowatt and to charge 12% on this investment.

On this basis the fixed charges to be collected by Northwestern Public Service Company from the U. P. U. group will be as follows:

	Kilowatts of Capacity Provided	Investment at $110 per Kilowatt	Annual Fixed Charges at 12%
1938	1800	198,000	23,760
1939	1200	132,000	15,840
1940	750	82,500	9,900

We suggest that the fixed charges for the year 1938 be on the above basis and that a similar calculation be made each year in the future to determine the proper allocation of fixed charges.

The U. P. U. group cannot render dependable service in the south end of their system with present generating facilities. Northwestern Public Service Company has surplus generating capacity that is available at three separate points (Ipswich, Ellendale and Gettysburg) through present interconnection facilities and we feel that Northern Power and Light Company is better off purchasing their requirements in accordance with the above plan than they would be by immediately providing for their own requirements with additional generating equipment.

Results of Operating With Systems Interconnected.

Net KWH Generated

	North Dakota Power & Light Company	Northern Power & Light Company	Northwestern Public Service Company	Total	
1930	22,422,901	3,282,959	37,241,025	62,946,885	
1931	27,098,736	2,349,768	36,817,980	66,286,484	
1932	28,050,786	1,582,873	33,439,965	63,073,624	
1933	29,630,180	1,226,393	34,636,244	65,492,817	
1934	30,474,912	2,205,562	37,114,393	69,794,867	
1935	34,722,029	3,725,338	40,621,155	79,118,522	
1936	34,764,503	4,691,944	49,295,565	88,752,012	
1937	38,349,756	4,655,719	48,746,417	91,751,892	
Cost per Kilowatt-hour in Mills					% Reduction Since 1930
1930	7.68	26.01	10.55	10.33	
1931	6.23	27.84	10.37	9.30	10.0%
1932	5.82	35.41	9.72	8.63	16.4%
1933	5.84	35.84	9.33	8.25	20.1%
1934	6.35	20.32	9.05	8.23	20.3%
1935	5.70	14.86	9.33	8.00	22.5%
1936	6.36	12.90	8.86	8.10	22.5%
1937	5.66	12.21	8.80	7.66	25.8%

We believe that the above tabulation proves that there are substantial savings under the present method of operation. We also feel that our present energy rate for interchange power provides an equitable distribution of these savings between the two groups. We have tried to take everything into consideration in our proposal for additional capacity for this report represents our best judgment in this matter. We feel that the basis proposed for allocating fixed charges on investment between the two groups will give a fair and equitable distribution and if the matter is handled on this or some similar basis both groups will save in investment charges as well as in operating expenses, as less reserve equipment is needed for the combined system than would be the case if each system was operated independently of the other. This method also permits the more efficient plants to operate at better load factors thus making a savings in unit costs.

Engineering Exhibits.

We are attaching hereto the following exhibits prepared by our Engineering Department as a part of this report:

Exhibit "A"—Electric and Steam Equipment Capacities by Stations—Northwestern Public Service Company.

Exhibit "B"—Electric and Steam Equipment Capacities by Stations—North Dakota Power & Light Company.

Exhibit "C"—Electric and Steam Equipment Capacities by Stations—Northern Power and Light Company.

Exhibit "D"—Summary of Steam & Diesel Generating Stations—All Companies.

Exhibit "E"—Comparison of Generation and Costs Year 1930 and Year 1936.

The survey contains a detailed analysis of the cash required for the proposed improvements showing a total of $262,500.00 for North Dakota Power & Light Company and $135,500.00 for Northern Power and Light Company; and

also showing the "Estimated Cash Available for Interest and Dividends After Financing Proposed Construction Program" of a total over the four year period, 1938 through 1941, of $476,300.00 for North Dakota Power & Light Company and $197,400.00 over the period for Northern Power and Light Company.

Conclusion.

The recommendations contained in this report represent the best judgment of everyone in this office. Insofar as the allocation of fixed charges on investment is concerned we have tried to take a fair and impartial viewpoint.

We believe we are in a position to do this as in the operation of the properties we have not recognized the difference in ownership as being a factor and it has been our intention to operate the properties in exactly the same manner as though the entire property belonged to one company.

Exhibit E.

Comparison of Generation and Costs
Year 1930 and 1936

Station		Year 1930 Winter Effective Capacity	Year 1930 K. W. H. Generated	Year 1930 Cost	Year 1930 Cost in K. W. H. Mills	Year 1936 Winter Effective Capacity	Year 1936 K. W. H. Generated	Year 1936 Cost	Year 1936 Cost in K. W. H.
North Dakota Pr. & Lt. Co.									
Beulah	Steam	5,400	18,875,940	90,503	4.79	6,200	29,107,638	129,515	4.45
Bismarck	"	1,850	3,304,324	55,014	16.65	1,350	4,331,870	56,398	13.02
Mandan	"	300	117,970	13,937	118.14	400	139,852	12,980	92.82
Dickinson	"	300	124,667	13,105	105.12	300	....	7,769	....
Dickinson	Oil	....	....	....	....	650	1,131,306	11,228	9.92
Mott	"	70	348	(Red) 263	....	220	53,837	2,003	37.21
General Office		....	....	....	....	....	....	1,266	....
Total N. D. Pr. & Lt. Co.		7,920	22,422,553	172,822	7.71	9,120	34,764,503	221,159	6.36
Northern Power & Light Co.									
Mobridge	Steam	1,500	2,837,077	59,373	20.84	1,200	4,674,200	49,270	10.54
Ellendale	"	200	275,322	13,412	48.73	300	35,225 (red)	7,865	....
Gettysburg	Oil	130	1,331	826	245.39	130	7,483	914	....
Lemmon	"	200	24,821	1,142	46.02	220	45,486	1,645	36.17
Hazelton	"	....	76,978	5,083	66.19	....	....	....	....
Ipswich	"	....	5,350	566	105.90	....	....	....	....
McLaughlin	"	....	....	....	....	....	....	....	....
General Office		....	....	....	....	....	....	833	....
Total No. Power & Lt. Co.		2,030	3,220,779	79,902	24.80	1,850	4,691,944	60,527	12.90
Northwestern Public Service Co.									
Aberdeen	Steam	5,000	16,522,700	148,339	8.98	6,500	21,376,200	164,349	7.69
Mitchell	"	6,500	17,981,200	168,083	9.35	7,500	22,667,400	189,884	8.38
Huron	"	200	70	100	....	200	....	....	....
Huron	Oil	1,100	787,230	14,219	18.06	1,100	1,456,580	19,216	13.19
Redfield	Steam	450	566,871	31,097	54.86	800	119,353	18,164	152.18
Watertown	"	1,000	77,380	7,305	94.40	....	....	....	....
Yankton	"	360	2,240	2,591	....	200	....	....	....
"	Oil	840	1,270,520	19,497	15.34	1,540	2,699,960	25,651	9.50
Highmore	"	140	18,229	560	30.72	140	9,787	2,071	....
Armour (Old Plant)	Oil	100	....	197	....	....	....	....	....
Armour (New Plant)	Oil	....	....	....	....	300	424,880	5,635	13.26
Faulkton	"	35	24,585	1,063	42.83	90	4,460	1,026	....
Webster	"	....	....	....	....	700	536,945	6,694	12.47
General Office		....	....	....	....	....	....	4,521	....
Total N. W. P. S. Co.		15,725	37,251,025	393,041	10.55	19,670	49,295,565	437,211	8.86
Total Interconnect. System		25,675	62,894,357	645,765	10.26	30,640	88,752,012	718,897	8.10

The above costs are net after apportionment to steam heat department.

Exhibit F.

Proposed Improvements to Transmission System. U. P. U. Group.

		New Investment		Material	——Retirements——		Net Increase	Total
North Dakota Power & Light Co.	Year	Total	Cash Required	From Stock	Equipment Retired	Removal Cost	in Fixed Capital	Cash Required
Rebuild Line Glenn Ullin to Richardton	1938	24,500	19,000	$ 5,500	18,500	2,000	6,000	21,000
Miscel. Specific Renewals & Replacements	"	25,000	25,000	.....	10,000	.....	15,000	25,000
Permanent Work Orders	"	35,000	35,000	.....	.....	.....	35,000	35,000
Total 1938		84,500	79,000	5,500	28,500	2,000	56,000	81,000
Rebuild Line Richardton to Dickinson	1939	50,000	40,000	10,000	36,000	3,000	14,000	43,000
Miscel. Specific Renewals & Replacements	"	25,000	25,000	.....	10,000	.....	15,000	25,000
Permanent Work Orders	"	35,000	35,000	.....	.....	.....	35,000	35,000
Total 1939		110,000	100,000	10,000	46,000	3,000	64,000	103,000
Rebuild Line Beulah to Glenn Ullin	1940	60,000	50,000	10,000	45,000	3,500	15,000	53,500
Miscel. Specific Renewals & Replacements	"	25,000	25,000	.....	10,000	.....	15,000	25,000
Permanent Work Orders	"	35,000	35,000	.....	.....	.....	35,000	35,000
Total 1940		120,000	110,000	10,000	55,000	3,500	65,000	113,500
Total North Dakota Power & Light Co.		314,500	289,000	25,500	129,500	8,500	185,000	297,500
Northern Power & Light Company								
Rebuild Line Ipswich to Bowdle	1938	60,000	60,000	.....	50,000	5,000	10,000	65,000
Miscel. Specific Renewals & Replacements	"	25,000	25,000	.....	10,000	.....	15,000	25,000
Permanent Work Orders	"	30,000	30,000	.....	10,000	.....	20,000	30,000
Total 1938		115,000	115,000	.....	70,000	5,000	45,000	120,000
Rebuild Line McIntosh to Lemmon	1939	5,500	5,500	.....	2,000	500	3,500	6,000
Rebuild Line Selby to Bowdle	"	42,000	42,000	.....	35,000	2,500	7,000	44,500
Miscel. Specific Renewals & Replacements	"	25,000	25,000	.....	10,000	.....	15,000	25,000
Permanent Work Orders	"	30,000	30,000	.....	10,000	.....	20,000	30,000
Total 1939		102,500	102,500	.....	57,000	3,000	45,500	105,500
Miscellaneous Specific Renewals & Replacements	1940	25,000	25,000	.....	10,000	.....	15,000	25,000
Permanent Work Orders	"	30,000	30,000	.....	10,000	.....	20,000	30,000
Total 1940		55,000	55,000	.....	20,000	.....	35,000	55,000
Total Northern Power & Light Company		272,500	272,500	.....	147,000	8,000	125,500	280,500
Total U. P. U. Group		587,000	561,500	25,500	276,500	16,500	310,500	578,000

Q. Mr. White, I ask you to look at Exhibit 24 for identification, purporting to be a copy of a survey of power requirements, and ask you who prepared that exhibit, if you know?

A. To the best of my knowledge it was prepared by or under the direction of Mr. C. J. Strike.

Q. And is that the Mr. C. J. Strike that you have testified was an officer and director of Northern Power & Light Company and North Dakota Power & Light Company?

A. Yes.

Defendant's Exhibit 244-A, which is also referred to as Defendant's Exhibit 24-A in White's deposition, was received in evidence. It consists of a handwritten index to the document received in evidence as Defendant's Exhibit 244.

Q. I will ask you who prepared Defendant's Exhibit 24-A for identification, if you know?

A. That was prepared by Mr. McClanahan of my office, of the Chicago office of the United Public Utilities Corporation.

Q. Mr. White, again directing your attention to Defendant's Exhibit 24 for identification, will you tell me from whom you received that document?

A. I received one copy of it from Mr. Strike.

Q. Mr. White, I again direct your attention to Defendant's Exhibit 24 for identification, and ask you whether you know whether this is a copy of that exhibit which was prepared by Mr. Strike? A. Yes.

Q. Mr. White, could you tell us on or about what date you received the copy of Defendant's Exhibit 24 for identification from Mr. Strike?

A. During the last two months of 1937.

(Read from deposition.)

Q. Mr. White, I show you what purport to be the minutes, the original minutes of a regular meeting of the Board of Directors of United Public Utilities Corporation, held at 1335 Land Title Building, on December 21, 1937, in Philadelphia, Pennsylvania, at 10 a. m. Eastern stand-

ard time and ask you whether this is the original minutes of that meeting? A. It is.

Mr. Robinson: Subject to counsel's right to object, pursuant to the stipulation, I will now read the first full paragraph appearing on page 3 of the minutes of the regular meeting of the board of directors of United Public Utilities Corporation, held at 1335 Land Title Building, Philadelphia, Pennsylvania, on December 31, 1937, at 10 o'clock A. M., Eastern Standard Time.

> "The president exhibited a copy of a report from officials of North Dakota Power & Light Company, Northern Power & Light Company, subsidiaries of the corporation, and Northwestern Public Service Company, all of which are interconnected, recommending a construction program for the next five years to increase generating capacity and improve the transmission system. The report contemplates that this program will meet the increasing demand for energy, as it is expected to develop in the interconnected system, and will distribute the cost among the three companies in proportion to their respective needs. This report was discussed at length by the board, and the president was instructed to furnish copies to members of the board for further study."

The aforesaid portion of the minutes was received in evidence.

(Read from deposition.)

Q. Mr. White, did you exhibit a copy of a report which you received from officials of North Dakota Power & Light Company, Northern Power & Light Company, subsidiaries of United Public Utilities Corporation, and Northwestern Public Service Company, recommending a construction program for the next five years, to increase the generating capacity and improve the transmission system, at the regular meeting of the board of directors of United Public Utilities Corporation held on December 21, 1937, at 1335 Land Title Building, Philadelphia? A. Yes.

Q. Mr. White, is Defendant's Exhibit 24 for identification a copy of a report which you submitted to the board of directors of United Public Utilities Corporation at the regular meeting held December 21, 1937? A. Yes.

Q. Was that report which you exhibited to the board on that date discussed at length by the board? A. Yes.

Q. And were you, as president of United Public Utilities Corporation, instructed by the board of directors of that corporation on that date to furnish copies of that report to members of the board for further study? A. Yes.

Q. And did you deliver copies to the members of the board? A. Yes.

Defendant's Exhibit 245, which is also referred to as Defendant's Exhibit 25 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 245.

Inter-Company Charges.

January 10, 8

F. E. F esi—S. W. White.
C. J trike.

Some weeks past I prepared a survey of power requirements for the inter-connected system in the two Dakotas which report was turned over to Mr. Buell for engineering study. This report gave the analysis of present demands and present capacities by companies and outlines a prospective program for the ensuing five years. This program may of course, be varied as judgment or conditions may dictate. On the other hand, there is one fundamental principle which I believe we are obliged to face definitely at this time which I wish to outline as follows:

As you will appreciate, this office is representing both groups of properties and as such, we are obliged to deal equitably and fairly in all decisions between the two groups. Under the original plan, there was no understanding and during the past few years we have adopted the following plan.

A. The expenses of the Huron office are allocated on a basis of gross.

B. Fixed charges on *inter-connection* facilities between the two groups are borne fifty-fifty between the companies.

In referring to companies, of course, I mean, the U. P. U. group in the Dakotas and Northwestern Public Service Company.

We now have the final consideration of system capacity and the report above referred to covers the same in detail. The U. P. U. group with 41% of the system peak, should, of course, furnish 41% of the system capacity, including the necessary reserve. By considering both companies as one unit, we, of course, are able to get by with less system reserve. On this basis, in the year of 1938 the U. P. U. group should purchase from Northwestern Public Service Company 1800 Kilowatts of capacity, which considered at $110.00 per Kilowatt and 12% fixed charges would mean an annual charge of $23,760.00. This is all set forth on Page 11 of the report above referred to.

In the interest of equity between the two groups, this charge should be put into effect as of January 1st and in making the budgets for the year of 1938, we reflected the same.

If there is any question relative to our judgment in this matter, or if any one desires a conference, or further information please advise.

Yours very truly,

CJS—B C. J. STRIKE.

Defendant's Exhibit 246, which is also referred to as Defendant's Exhibit 25-A in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 246.

January 17, 8

Power Requirements.

Dakota Companies.

C. J. Strike:
F. E. Kruesi.

Replying to your letter of January 10th, regarding the survey of power requirements of the Northwestern Public Service Company, Northern Power & Light Company and North Dakota Power & Light Company, which you made. I have gone over your survey and believe it to be right

in principle. Several questions have arisen in my mind with regard to the details.

I understand that Mr. Buell has been studying this survey and has in the course of preparation a report which he expects to have ready the latter part of this week. It would seem to me to be best as soon as his report is ready that Mr. Stokke and you come in, and that we should ask to meet with Mr. White to discuss the whole matter and try to arrive at some conclusions for the 1938 program at least. It will fit in with Mr. White's plan if this is done not later than the early part of next week.

As soon as Mr. Buell is ready, he will communicate with you and arrange for a meeting date convenient to all.

F. E. KRUESI.

FEK:db

cc-SWW
JHB

(Read from deposition.)

Q. Mr. White, did you have a meeting with Mr. Strike, Mr. Stokke and Mr. Kruesi some time after January 17, 1938, at which you discussed the question of the power requirements of the North Dakota Power & Light Company and the Northern Power & Light Company?

A. I had such a meeting shortly after January 10th, which may have been after January 17th.

Q. Mr. White, I show you Defendant's Exhibit 25-A for identification. Directing your attention to the date thereon and the information appearing in the second paragraph thereof, I will ask you whether that refreshes your recollection as to the possible date upon which that meeting was held?

A. Yes. It would be after the 17th.

Q. Of January, 1938? A. Correct.

Q. Mr. White, do you know a Mr. Buell? A. Yes.

Q. Do you recall whether at that meeting you discussed the question of whether Mr. Buell was giving study to the survey that had been made by the men in the field? A. Yes.

Q. Now, Mr. White, just who is Mr. Buell?

A. Mr. James H. Buell is an engineer, who is now about 65 years old, and has spent the greater portion of his business career in the public utility business. At the time of the discussion just referred to, and continuing on up to the present time, he has been associated with Middle West Service Company as head of their engineering department.

Q. Prior to the date of the discussion to which you have just testified, that is, sometime shortly after January 17, 1938, did you have any business connections with Mr. Buell, or any business dealings? A. Yes.

Q. How long prior to that date would you say you had had business dealings with Mr. Buell?

A. Since the beginning of my receivership.

Q. By the way, is Mr. H. J. Buell, the one who is often referred to as Major Buell? A. Yes.

Q. Then you have had business dealings with Mr. Buell since shortly after April 15 of 1932 in the electrical utility field? A. That's correct.

Q. Has Mr. Buell performed any services for you or any of the companies in which you are interested, during that period? A. Yes.

Q. Has he performed very many services for your companies during that period? A. Yes.

Mr. Robinson: I will now read from page 6 of the minutes of a regular meeting of the board of directors of United Public Utilities Corporation held at 1335 Land Title Building, Philadelphia, on January 20, 1938, the paragraph designated "(e)":

"North Dakota Power & Light Company—

Northern Power & Light Company.

Discussion was had of plans for increasing the generating capacities of these subsidiaries, but action was deferred pending a report from Major Buell and further study."

I now offer in evidence that portion of the minutes which I have just read, both generally and for the purpose of indicating that the board of directors of United Public Utilities Corporation determined to delay action

concerning an increase in the generating capacities of the Dakota subsidiaries pending a report from Major Buell.

Mr. Fellows: No objection.

The Court: Received.

(Read from deposition.)

Mr. Robinson: Pursuant to stipulation I will now read from the 12th page of the organization meeting of the board of directors of United Public Utilities Corporation, held at Room 1335 Land Title Building, Philadelphia, on March 9, 1938.

I will read first from page 11, as follows:

"The president made the following report on subsidiaries of the Corporation."

I will now read from Page 12 of those minutes:

"(c) North Dakota Power & Light Company and Northern Power & Light Company.

"The appraisal of the properties of these subsidiaries being made by the North Dakota Railroad Commission is nearing completion.

"New power exchange contracts are being negotiated by these subsidiaries with Northwestern Public Service Company in line with recommendations made in the report entitled 'Survey of Power Requirements'. Intercompany payments are now being made consistent with the recommendations pending execution of the contracts."

I will now offer in evidence that portion of the minutes of the organization meeting of the board of directors of United Public Utilities Corporation, held at room 1335 Land Title Building, Philadelphia, Pennsylvania, on the 9th day of March, 1938, which I have just read.

Mr. Benson: I would like to ask the witness a question.

Q. What was this survey of power requirements referred to in that memorandum, in the minutes that he was reading? Is that a document that has been identified here before?

A. That is the title of the document prepared by Mr. C. J. Strike.

Mr. Robinson: Exhibit 24.

Defendant's Exhibits 247, 247-A and 247-B were offered in evidence.

Mr. Fellows: We object to the instruments for the reason there is no proper foundation laid; incompetent; contains a mass of conclusions and opinions and assumptions by James H. Buell, who is not present himself for cross examination as to the veracity or reliability of his statements; irrelevant and immaterial. We have no objection if its purpose is limited simply to the fact that the witness, White, received this instrument, but so far as any of its conclusions and statements contained in it, we object.

Mr. Stafford: So far as the opportunity to cross examine, the deposition of Mr. White was taken upon stipulation in which either party could take the deposition of any witness they desired. James H. Buell was in Chicago at the same time. We were there two or three weeks. If they had wanted to examine Mr. Buell they could do it. We are offering this to show that these documents were given to Mr. White and show who gave them. I am offering them for the purpose of showing the information appearing in them was brought to his attention.

The Court: With that limitation they will be received. As to counsel's objection as to the statements of the man making the reports, and his conclusions, I think that would be incompetent. If you limit your offer to the fact that that is information Mr. White had, that is one of the things he considered, it will be received.

Defendant's Exhibit 247.

Middle West Service Company
Chicago

For Company Business Only

Date May 2, 1938

Subject Interchange Capacity Agreement

Location North and South Dakota Properties

To C. J. Strike-S. W. White

From James H. Buell

Companies Participating.

1—Northwestern Public Service Company—"Northwestern."

2—North Dakota Power & Light Company—"North Dakota."

3—Northern Power & Light Company—"Northern."

The attached agreement prepared for the above companies proposes to combine or "pool" their generating capacities and transmission facilities. The immediate as well as ultimate purpose is to obtain a greater employment of now existing or future facilities. It is an economically sound and sensible procedure since by so doing the overall investment is lower than the sum total required of each company acting independently.

The prime requisite to such an agreement is that it shall be beneficial to each of the companies at its inception and so continue thereafter during its life. To accomplish this certain premises, conditions and stipulations are essential. Briefly stated these are as follows:

Item - 1. Power plant capacities of the three companies when combined must result in a *lower* total of installed and effective generating capacity than that total which would obtain if each company provided adequate capacity for its own individual system requirements.

Item - 2. The combination of pooling of such generating facilities must be adequate not only to serve the maximum

individual requirements of each company at any time but also the maximum combined system demand of all these companies at any time. The exchange or interchange of such capacities must be practical, flexible and reliable.

Item - 3. Determination of capacities at unit ratings of generating facilities making up the total plant capacity of each company shall be on an agreed or accepted basis. Blocks of power purchased from other utility companies or municipalities may be included upon assurance of reliability.

Item - 4. Blocks of power sold to utilities other than those within the power pool must be deducted from the plant capacities of that company participating. This is likewise true of blocks of power sold to municipalities. Reason for this is self evident since these blocks of power are prior obligations and they have a public interest. They cannot be entered into the power pool until such sale contract is terminated. Such blocks of power, if any, should be recorded in a supplement to the proposed agreement.

Item - 5. Each of the participating companies must obligate itself not to install or add generating capacity without the consent of the other two signatories of this proposed agreement unless such added capacity is not to be included for common use.

Item - 6. The agreement must set forth as a matter of record the present individual and combined plant capacities for each participating company. It must also record the individual and thereafter the combined system demand of the three companies in order to determine the ratio of system demand to combined generating capacity. This establishes the reserve capacity and its relation to system demand.

Item - 7. Since it is the essence of the contract to combine or pool the generating capacities of the three companies it follows that whatever excess capacity may obtain shall be apportioned among the three companies in ratio directly proportioned to the individual requirement of each company. The result should be such that each company carries the same percentage of reserve capacity

either by actual ownership or by purchase from the available excess. Payment or compensation for the full and free use of this reserve must be likewise apportioned or proportioned.

Item - 8. This agreement is primarily for the exchange of capacity. Energy can and may flow incident to the exchange of reserve capacity. It is fundamental that capacity shall be available when needed. Flow of energy should be covered by separate or supplementary agreement since costs of such energy will vary between the companies.

Discussion of the foregoing features follow.

In so doing "Company generating capacities" and "maximum system demand" as described in the proposed agreement and prepared therefrom are accepted for this discussion. Any modification or change subsequently made in any values need not disturb the analysis to follow which has for its purpose only that of verifying the arrangement as an equitable one.

Item - 1. The summary below sets forth the present relation of "Company generating capacities" to "Company system maximum demands" in order to show the present reserve for each company as well as for the group combined. Data in tabulations is as of December, 1937.

Present Relation Plant Capacities to System Maximum Demand.

	Company Plant Capacities Kilowatts	Company Maximum Demands Kilowatts	Company Reserve Capacity Kilowatts	%
a–Northwestern	19,670 kw	14,175 kw	5,495 kw	39.7
b–North Dakota	9,120 "	7,175 "	1,945 "	27.1
c–Northern	1,850 "	3,125 "	1,275 "	
Total	30,640 kw	24,475 kw	6,165 kw	25.17

The reserve plant capacity for the entire group is 6,165 kw or 25.17% in excess of the interconnected system maximum demand giving effect to deficiency of "Northern" of 1,275 kw.

Now follows a comparison of system loads and plant capacities wherein each company is treated individually

and to show surplus or deficits for each company in event it depended solely on its own generating facilities.

Relation Plant Capacities—Largest Unit Down.

	Company Plant Capacities	Largest Unit	Company Net Effect. Capacity	System Peak	Surplus or Deficit
a–Northwestern	19,670 kw	5,000 kw	14,670 kw	14,175 kw	495 kw
b–North Dakota	9,120 "	3,500 "	5,620 "	7,175 "	1,555 "
c–Northern	1,850 "	1,200 "	650 "	3,125 "	2,475 "
Total	30,640 kw		20,940 kw	24,475 kw	3,535 kw

It will be seen that "Northwestern" has a surplus of 495 kw whereas "North Dakota" and "Northern" have deficits of 1,555 kw and 2475 kw respectively.

The foregoing establishes the fact that the systems grouped or interconnected have an adequate reserve when so combined. Separated and considered individually there is a deficit of 3,535 kilowatts. Providing that amount of capacity only, would be meaningless since there would be no reserve capacity. Adding sufficient capacity to meet these deficits and give 20% reserve for each company would require 8000 kilowatts of new capacity. Pooling system capacities therefore saves the investment incident to adding 8000 kw in three units by each of the above three companies. Evaluated this represents $900,000.00 at the very least.

Item - 2. This has been fully established since the three systems have been and are now operated as one group. Interchange of capacity is practical, flexible and provides a reliability that would not obtain without this interconnection.

Item - 3. The plant ratings are accepted for this discussion. No power is obtained by any of the companies from any sources other than that within their own interconnected systems. This feature is subject to review by the Committee on Operations.

Item 4. None of the operating companies has wholesale contracts to sell nor do they purchase from utilities or municipal plants outside this group. This feature is also

one for review and decision by the "Committee on Operation."

Item - 5. This is incorporated in agreement. It is of mutual interest to each of the companies that there shall be adequate reserve capacity and no more.

Item - 6. This is set forth in detail and made a part of contract. These values will change from year to year. Agreement on these values must be unanimous.

Item - 7. The manner in which the contract provides for the apportionment of excess capacity will be seen to be entirely equitable and moreover is adaptable for future additions of capacity at the time such additions are made by any of the companies. The apportionment of excess capacity to be made for the year 1938 as such excess capacity now obtains is shown later on by way of explanation. Projection is then made for the year 1940 to see working application of contract provision, increased plant capacities and increased system maximum demand.

Item - 8. Sale or purchase of energy incident to the exchange of capacity, or without relation thereto, has so many variables that same should be covered by separate contract. Sale of energy must treat with surplus and emergency capacity in addition to excess capacity.

Billing Basis—The objective is that each company shall have full and free use of the excess capacity available from any one or both of the other companies. This, in turn, calls for an equitable distribution of charges for such excess capacity that may be actually used or made available for protection only.

The apportionment of excess generating capacity must be such that after distribution or apportionment each company shall have the same ratio of reserve capacity to its system maximum demand as obtained for the three companies combined. The billing basis proposed compensates these companies which have excess capacity to sell and imposes an obligation on those companies receiving or buying such excess capacity to pay for same.

Relation of plant capacities to system peaks as of December, 1937, is again set forth below, in order to show existing reserves and basis for billing for the year 1938.

Present Relation Company Plant Capacities to Company System Maximum Demand.

	Company Plant Capac. Kilowatts	Company System Max. Demands Kw.	Reserve Capacity Kilowatts	Per Cent
a–Northwestern	19,670 kw	14,175 kw	5,495 kw	39.7 %
b–North Dakota	9,120 "	7,175 "	1,945 "	27.1 "
c–Northern	1,850 "	3,125 "	1,275 "	
Interconnected Totals	30,640 kw	24,475 kw	6,165 kw	25.19%

The "interconnected reserve capacity" is 6,165 kilowatts which is 25.19% of the interconnected system maximum demand of 24,475 kilowatts. The intent of this contract is to apportion the reserve of 6,165 kw. among the three companies so that each company proportion or percentage is the same, namely 25.19%. This is established as follows:

	Company Max. Demand	%			Plant Capacities After Apportionment
Northwestern	14,175 kw	× 25.2 =	3,568 kw	+ 14,175 =	17,743 kw
North Dakota	7,175 "	× 25.2 =	1,809 "	7,175 =	8,984 "
Northern	3,125 "	× 25.2 =	788 "	3,125 =	3,913 "
Interconnected System	24,475 kw	× 25.2 =	6,165	24,475 =	30,640 "

The Company excess reserve and deficiency capacities are then established as follows:

	Company Plant Capacities	Company Capacities After Apportioning Reserve	Company Excess Deficiency Capacities
Northwestern	19,670 kw	17,743 kw	1,927 kw
North Dakota	9,120 "	8,984 "	136 "
Northern	1,850 "	3,913 "	2,063 "
	30,640 kw	30,640 kw	0

"Northern" has a deficiency of reserve capacity of 2,063 kw and thereby will establish a firm demand on "Northwestern" for the year 1938 for 1,927 kw and "North Dakota" for 136 kw. If it were an isolated or independent

company it would have to install 2,400 kw probably in three units with no reserve after loss of largest unit. As it is, under this contract, it buys 2,063 kw and has a reserve of 25.2%.

During the year 1938, "Northwestern" will add 1000 kilowatts to its plant capacity at Aberdeen and let it be assumed "North Dakota" installs 3,500 kilowatts additional in Bismarck in the year 1939, "Northern" adds no additional capacity.

Let it be assumed system maximum demands be increased during the interim. The company generating capacities, maximum demands, reserve and excess capacities in which the billing base will be established for the year 1940, will be in the following order:

Assumed Status 1940	Company Plant Capacities	Company Maximum Demands	Company Reserve Capacities	% Company Reserve Capacity
Northwestern	20,670 kw	16,758 kw	3,912	23.4 %
North Dakota	12,620 "	8,822 "	3,798	43.2 %
Northern	1,850 "	3,820 "	1,970	51.5 %
Interconnected Totals	35,140 kw	29,400 kw	5,740	19.52%

Apportioning the reserve capacity of 5,740 so that each company has the same percentage for the system namely, 19.52%, the following obtains.

Assumed Status 1940	Company Maximum Demand	Reserve Capacity 19.52%	Plant Gen. Capacity Requirements	Actual Generating Capacity	Excess or Deficit
Northwestern	16,758 kw	3,272 kw	20,030 kw	20,670 kw	640 kw
North Dakota	8,822 "	1,720 "	10,542 "	12,620 "	2,078 "
Northern	3,820 "	748 "	4,568 "	1,850 "	2,718 "
	29,400 kw	5,740 kw	35,140 kw	35,140 kw	0

In this instance "Northern" has a deficit of 2,718 kw by virtue which it establishes a firm demand on "North Dakota" for 2,078 kw and "Northwestern" for 640 kw.

All of the foregoing has been prepared solely for the purpose of analysis and explanation. Therein is indicated that the arrangement proposed is equitable and practical.

The figures used are no criterion for that period. They were used for illustration only.

The arrangement in the form in which I have prepared it follows the customary arrangement usual to contracts of this nature.

JHB:MB JAMES H. BUELL.
CC FEK
RDS
EV
SWW

(Read from deposition).

Q. Mr. White, did you have dittoed copies prepared of Defendant's Exhibit 26 for identification?

A. Let me see the original. Yes.

Q. Do you recall the purpose for which you prepared such copies? A. Yes.

Q. What was that purpose, please?

A. To give each member of my board of directors a copy.

Q. And did you give each member of your board of directors a copy? A. Yes.

Defendant's Exhibit 247-A which is also referred to as Defendant's Exhibit 26-A in White's deposition, was produced and identified by White and was received in evidence. It reads in part as follows:

Defendant's Exhibit 247-A.

May 3. 8

Interchange Capacity,
Dakota Properties,
C. J. Strike,
James H. Buell.

I thank you sincerely for your letter of April 23rd, which I have not acknowledged previously owing to my absence from the Chicago office.

Please understand that I have been working on this whole proposition persistently and industriously; also as fast as I could focus the attention of all other parties con-

cerned. Mr. White and I have spent considerable time on discussing details. At this writing I have rewritten the contract and it is now in the hands of the Legal Department and Mr. Vennard for revisions and approval.

The contract as prepared follows the arrangements which obtain for the companies in the power pool of the Chicago area. I endeavored to be specific and to follow this arrangement since by so doing, if this contract comes under the jurisdiction of the Federal Power Commission, which we think it will, we will be in a better position to obtain the approval of that body.

Referring again to your letter of April 23rd, please let us dispose of each of the items discussed therein, in the following order:

Maximum System Demand—I feel that you have sufficient information in your records of last December to establish the thirty minute demand. The main thing is that you state demand figures which you think are as nearly representative, accurate and equitable as possible for your staff to determine. This year you will put in the necessary meters and the contract term for the year 1939 will be based on demand charges that are substantiated from exact meter records.

Summarizing this item I feel that the thirty minute period is more equitable and on a sounder basis for an agreement such as this rather than a fifteen minute demand.

Committee on Operations—It is highly advisable that each company be represented on this committee by someone who is responsible and capable of passing upon company generating capacity system demands and tying same in [which] the interconnected system generating capacities and maximum demands in order to ascertain how the excess reserve capacity shall be apportioned.

Accordingly, I recommend for this committee that Mr. E. K. Albert be appointed for the Northwestern Public Service Company, Mr. N. S. Patterson for the Northern Power and Light Company and Mr. F. B. Porter, for the North Dakota Power and Light Company. If you desire to

make any changes and substitute others therefore, please do not hesitate to do so. I do wish that each company be represented on this committee by a [bonda] fide employee of that company.

[Directions for the method of preparation and the contents of Exhibits A, B, C and D, constituting the annual supplements to the Reserve Capacity Agreements, were set forth in detail.]

In conclusion, please follow the wording of the contract which I have prepared and in which you will note that I have made no use of the term effective generating capacity. In a pool contract, any rated generating capacity agreed upon by the Committee on Operations becomes firm capacity. Effective capacity is that which remains when the largest unit is out of service. In a pool contract such as we are preparing, that condition does not obtain. All of the company capacities are pooled and that which is in excess of the system demands is reserve capacity.

In conclusion, may I say that you are in error in feeling that the question is becoming more complicated. The endeavor is certainly not to make it complicated but instead comprehensive. In order to do so and answer all questions that have been raised in this office or which may be raised by the Federal Power Commission, I have made certain inquiries which have been properly and adequately answered by Mr. Albert.

It is better to have data and information of this nature in advance since that establishes the fact that the entire transaction has been given the analysis and investigation it deserves.

JAMES H. BUELL.

JHB:MB
CC FKK
SWW
RDS
EV

Defendant's Exhibit 247-B, which is also referred to as Defendant's Exhibit 26-B in White's deposition, was produced and identified by White. It was received in evidence

for the purpose of showing the information appearing therein and that the same was brought to White's attention and considered by him. It is the agreement referred to in Defendant's Exhibit 247 and is substantially the same as the 1938 Interchange Capacity Agreement (Exhibit C to the Complaint).

Q. Mr. White, after receiving Defendant's Exhibit 26 for identification, Defendant's Exhibit 26-A for identification, and Defendant's Exhibit 26-B for identification, did you study those documents? A. Yes.

Q. What study did you make of those documents?

A. Well, I read them carefully and had discussions with Major Buell regarding the reasons, or their propriety, or the necessity of parts.

Q. By "parts," do you mean parts of the document?

A. Parts of the document.

Q. You have testified that you have received those documents on or about the date they bear. After those dates, namely May 2, 3 or 4, 1938, did you give [an] consideration and study to those memoranda and the drafts of contracts? A. Yes.

Q. Did you request or direct others to give such study and consideration to the same documents? A. Yes.

Defendant's Exhibit 248, which is also referred to as Defendant's Exhibit 42 in White's deposition, was identified and produced by White. It was received in evidence and reads as follows:

Defendant's Exhibit 248.

United Public Utilities Corporation
20 North Wacker Drive,
Chicago, Illinois.

May 27, 1938.

Mr. F. E. Kruesi, President,
Middle West Service Co.,
Chicago, Illinois.

Dear Frank:

I understand from Major Buell that the last draft of the Capacity Interchange Agreement between Northwestern

Public Service Co. and Northern Power and Light Co. is somewhere in the mill.

After we have secured the benefit of suggestions and corrections from those in the Middle West Service Co., whose ideas will be helpful and the approval of the legal side from Mr. Ralph Stevenson, I would like to refer the final draft to our General Counsel, Mr. Scheetz, and then I suppose our real trouble will begin in securing the approval of Federal Power Commission. At best it looks like a torturous procedure before we complete the job and I would suggest that we complete the preliminary steps as soon as possible.

Very truly yours,

.....

President.

Q. Now, I ask you to refer to the letter and see whether that refreshes your recollection as to what other people you directed these matters to be studied and considered and worked on? A. It does.

Q. And who are they, please?

A. Well, for examination from the legal point of view, it was referred to both Mr. Ralph Stevenson of the legal department of Middle West Service Company, and to Mr. Scheetz, who is general counsel.

Q. Did you say Mr. Stevenson was counsel for Middle West? A. Service Company, yes.

Q. Go ahead.

A. In the meantime this subject then was discussed at considerable length with my [association,] Mr. Peale, who had the title of treasurer of my company.

Q. By "my" company, you mean United Public Utilities Corporation? A. Yes.

(Read from deposition.)

Mr. Stafford: At this time, pursuant to stipulation previously entered into at these hearings regarding the offering into evidence of portions of the minutes of the meeting of the directors of United Public Utilities Corporation, which minutes have been previously authenticated and identified by another witness, Mr. Francis H. Scheetz, I will read

from the minutes of a regular meeting of that board of directors, held in Philadelphia on June 15, 1938, reading from the fifth page of those minutes:

> "The president furnished to members of the Board copies of a memorandum dated May 2, 1938, of the interchange capacity agreement by the three participating companies, Northwestern Public Service Company, North Dakota Power & Light Company, and Northern Power & Light Company, with the statement that the provisions of this agreement are substantially in accord with 'Survey of Power Requirements', copies of which were submitted to the board in January, 1938."

The foregoing portion of the minutes was received in evidence.

Q. Mr. White, did you at any time refer to the board of directors of United Public Utilities Corporation the memorandum prepared by Mr. Buell, which is identified as Defendant's Exhibit 26 for identification? A. Yes.

Q. Do you recall at what meeting of the directors you submitted that memorandum?

A. I gave each director a copy of the memorandum at the directors' meeting held on June 15, 1938.

Q. Did you make any statement to the directors at that time with regard to the provisions of the proposed interchange capacity agreement, that you recall? A. Yes.

Q. Will you please state what it was?

A. I told them it was generally along the lines of the survey of power requirements, copies of which, by their instructions I had mailed to each director shortly after the last meeting, which had been held in December of 1937. By the "last" meeting I don't mean the last meeting prior to June 15th, but the last meeting in 1937.

Q. As a matter of fact, that meeting was in January, 1938, wasn't it, Mr. White? Would it refresh your recollection by referring to the minutes of the June 15th meeting?

A. No. At a meeting held in December, 1937, I had with me a copy of the survey on power requirements which we discussed at that meeting, and as a result of that discussion the directors asked me to prepare and send to

each director a copy of that survey, and upon my return to the office I had the survey manifolded and sent it to each director by mail.

Q. Mr. White, what was your reaction to the Buell recommendation in the memo of May 2, 1938, and the form of agreement which Mr. Buell had prepared?

A. I felt the proposal was equitably conceived and mutually desirable from the standpoint of the companies which were proposed for participation in the pooling of the generating capacities.

Q. You have previously testified this morning that you desired to have the matter submitted to the U. P. U. counsel, Mr. Scheetz, and also to get the legal approval of Mr. Stevenson on behalf of Middle West Service Company. Do you know whether or not the matters were submitted to those gentlemen? A. Yes, they were.

Q. Let me ask you this: Did Mr. Scheetz approve the contract?

Mr. Benson: Q. Did you get a written form of approval from Mr. Scheetz?

A. I do not recall whether I got a written form of approval from Mr. Scheetz.

Q. Do you recall whether you got—

A. (Continuing) —or from Mr. Stevenson.

Mr. Benson: I see. Just a moment. You answered my question.

Mr. Stafford: Q. Going back to mine, do you recall whether or not Mr. Scheetz approved the contract?

Mr. Benson: Do you remember that, and the communication if any you had from Scheetz or Stevenson?

A. No, I don't remember. I do know that—

Mr. Stafford: Q. Did you have any conversations with Mr. Scheetz about the matter? A. Yes.

Q. Do you recall when and where?

A. I had conversations on the subject of the contract, particularly at the directors' meeting on June 15, 1938, at which Mr. Scheetz was present and participated in the general discussion of the directors and the explanation to the directors of the character and the intent of the contract.

Q. Any other conversations with Mr. Scheetz on this subject matter, that you recall?

A. Not that I can specifically recall.

Q. Did you have any conversations with Mr. Scheetz regarding this contract, in Chicago, during the month of November, 1938, that you recall?

A. Unless there is something in my correspondence files to refresh my recollection of such a discussion, I cannot recall it at this moment.

Q. But you do recall Mr. Scheetz discussed the matter with you fully at the June 15, 1938, meeting?

A. I do recall that there was a general discussion in which all of the directors participated and—

Mr. Benson: You have answered the question.

A. (Continuing) —both Mr. Scheetz and I participated in that discussion.

Q. I understand from your prior testimony that Mr. Scheetz did approve the contract as counsel for the U. P. U. Corporation? A. Yes.

Q. Do you know whether or not that contract of 1938, the interchange capacity contract, Exhibit C to the complaint, was executed by officers acting on behalf of Northern Power & Light Company? A. Yes.

Q. Do you recall the approximate date of execution?

A. In the first ten days of December.

Q. What year? A. 1938.

Q. I direct your attention, Mr. White, to Exhibit C to the complaint in this suit, which is a copy, photostatic copy of the interchange capacity agreement, dated January 1st, 1938, between Northwestern Public Service Company, North Dakota Power & Light Company and Northern Power & Light Company. You are familiar with this contract, Mr. White? A. Reasonably.

Q. Well, this is the contract that was executed in December, the first ten days of December, 1938? A. Yes.

Q. I direct your attention to the provisions of Article VIII, Section 1, which provides: "Subject to the terms and conditions of this agreement each company will furnish its proportion of the 'reserve capacity' required for the interconnected system, or in lieu thereof, the company or companies with a deficiency of reserve capacity will pay the

other company or companies having an excess reserve capacity a demand charge of $13 and 20 cents per kilowatt of firm demand per year." You are familiar with that charge? A. Yes.

Q. You were familiar with that during 1938 and the period that you have been testifying about? A. Yes.

Q. Were you satisfied, Mr. White, as president of United Public Utilities Corporation, and as a director of both North Dakota Power & Light Company and Northern Power & Light Company, and as a director of United Public Utilities Corporation, the owner of all the stock of both of those subsidiaries, that that was a fair arrangement and a fair charge from the standpoint of the two Dakota subsidiaries?

A. I was satisfied that that provision was fair and desirable from the standpoint of the companies I represented.

Q. And the board of directors of United Public Utilities Corporation had [approve] this contract, had they not?

A. Yes.

Q. And I take it the same answer would obtain: Were they also satisfied that that was the fair, reasonable and proper charge or arrangement in so far as the two Dakota subsidiaries were concerned, in so far as you know?

A. So far as I know, they were entirely satisfied, and the record so indicates.

Q. But the directors of the United Public Utilities Corporation did approve this agreement which contained this charge? A. They did.

Q. I direct your attention to the provisions of the contract relative to firm demand. The term is used in Section 1 of Article VIII, I just referred to, and it is again used in Section 2 of Article VII. What did you know, if anything, Mr. White, as to the ability of Northwestern Public Service Company at that time to provide firm power to Northern Power & Light Company or to North Dakota Power & Light Company?

A. I had been advised by engineers in whom I had confidence that Northern Power & Light Company was not in a position to contract for the sale of firm power.

Q. Northern Power & Light or Northwestern Public Service? You mean to contract for the sale of firm power or for the purchase of firm power, or both?

A. Well, Northern Power & Light Company was certainly in a position to contract for the purchase of firm power.

Q. Did you understand that under this agreement, this arrangement embodied therein, that Northern Power & Light was getting firm power commitments from Northwestern Public Service Company or from North Dakota Power & Light?

I am not asking you to interpret the contract. I am just asking you whether you recall anything about that subject matter?

A. Yes, I recall a great deal about it. I did not understand that the company member of this pool with an excess of reserve generating capacity was definitely contracting to furnish firm power, but I did understand that the actual generating capacity of Northwestern Public Service Company would under all then foreseeable conditions make available to Northern all of its requirements at the time of its peak demand, which could not be supplied either from its own generating stations or from the excess capacity of North Dakota Power & Light Company.

Q. During the period from May, 1938, to and including December, 1938, the 1936 contract between Northern Power & Light Company and Northwestern Public Service Company, Exhibit B to the complaint, was in full force and effect, was it not? That is the interconnection contract?

A. Yes.

Q. Do you know whether or not the companies were making the payments called for under that contract?

A. Northern Power & Light was making the payments called for under that contract.

Q. Well, that is with reference to the transmission line charges you are referring to?

A. The payments under the interconnection contract.

Q. How about the five mill energy interchange?

A. Payments for the interchange energy were being made.

Q. Well, Mr. White, during this period of 1938, which I have previously fixed, namely, from May, 1938 to and including December, 1938, was any change made in those charges either for interconnection facilities or for the energy interchange rate? A. No.

Q. Were you satisfied that those rates provided by the 1936 contract, and in force, as you have just described them to us, were fair and reasonable and satisfactory to you as president of U. P. U. Corporation, as a director of that company, and as a director of both North Dakota Power & Light Company and of Northern Power & Light Company? A. Yes.

Q. You have testified, Mr. White, that you approved the 1938 contract, Exhibit C to the complaint, and that your board of directors of U. P. U. corporation also approved it. Now, taking yourself personally, was your approval the result of your own independent judgment and thinking or was it influenced by domination or control of you by persons in the Northwestern Public Service Company organization?

A. It was in no wise a result of domination of any company, group or person. It was the result of my own independent thinking.

Q. Mr. White, the complaint in this case alleges, and I think without contradiction, that North Dakota Power & Light Company and Northern Power & Light Company were merged effective July 1, 1939, so that Northern Power & Light Company was merged into the North Dakota Company, and the name of the surviving corporation changed to Dakota Public Service Company. Do you recall the merger of those two subsidiaries? A. Yes.

Q. And was it accomplished effective July 1, 1939?

A. Yes.

Q. The complaint also annexes as exhibits D and E. two contracts executed between Dakota Public Service Company and Northwestern Public Service Company, one relating to the interconnection facilities and the interchange of energy charge, and the other relating to the intercapacity exchange arrangement. Do you recall how those contracts came to be prepared and executed between the companies?

A. Do you mean by that the original suggestion from which the—

Q. Yes. On July 1, 1939, there was in existence the 1936 contract and the 1938 contract. Now, the complaint charges subsequent to July 1, 1939, a contract, new contracts were executed. I want to know what you know or recall about how that matter came about?

A. Pardon me. I had misunderstood your question. Following the merger of Northern Power & Light Company into North Dakota Power & Light Company, with a change of name to Dakota Public Service Company, I wrote a letter to Mr. Sanborn on August 3, 1939, suggesting to him that the capacity interchange contract be redrafted into a two party contract, between Northwestern and Dakota Public Service Company, with the new company.

Defendant's Exhibit 249, which is also referred to as Defendant's Exhibit 43 in White's deposition, was identified and produced by White. It was received in evidence and reads as follows:

Defendant's Exhibit 249.

August 3, 1939.

Mr. A. B. Sanborn, President,
Dakota Public Service Co.,
Huron, South Dakota.

Dear Beck:

Enclosed, find two copies of Supervision Contract of Middle West Service Company with Dakota Public [Service] Company, effective as of July 1, 1939, both of which copies have been executed by Middle West Service Company.

When you have executed copies, please return one copy to Mr. C. V. Dinges, Jr., Treasurer, Middle West Service Company. This contract will supplant the existing contracts of Middle West, in identical form, with Northern Power & Light Co., and North Dakota Power and Light Co.

By the terms of the merger agreement, these previous contracts are, of course, assumed by Dakota Public Service Company, but I think it is better to clear the record by signing up a new contract.

Incidentally, don't you think it would be a good idea to redraft the capacity interchange contract with Northwest-

ern Public Service Company, so that it will be a two-party contract. Such procedure will certainly simplify future descriptions of the arrangement when reporting to regulatory bodies.

Very truly yours,

.....

President.

[The original exhibit shows in the left margin the initials "C. P."]

Encl. 2.

Copy of Management Contract between Dakota P/S Co. and Middle West will be found in Contract File—(kept current)—and marked "Dakota Public Service Co. Supervision Contract with Middle West Serv. Co."

Q. This "C. P." in the margin, what is that?

A. That indicates that Mr. Peale of my office had read the carbon copy before it was filed.

Q. Was it his habit to initial carbon copies of your correspondence, indicating those he had read?

A. Yes, and many of the exhibits that have been introduced out of my files will bear his initials in pencil, "C. P."

(Read from deposition:)

Q. Prior to July 1, 1939, Mr. White were there any contracts in existence between Northern Power & Light Company or North Dakota Power & Light Company and Middle West Service Company? A. Yes.

Q. Subsequent to July 1, 1939, were those contracts superseded by new contracts between Middle West Service Company and Dakota Public Service Company effective as of July 1, 1939? A. Yes.

Q. Did you send copies of the new contracts with Dakota Public Service Company to Mr. Sanborn for execution by him, together with your letter of August 3, 1939, being Defendant's Exhibit 43 for identification? A. I did.

Q. Did Mr. Sanborn attend to the execution of those contracts, do you know? A. Yes.

Mr. Benson: What contracts did you [sent] to Mr. Sanborn with this Exhibit 43?

A. I sent him copies of the supervision contract between Middle West Service Company and Dakota Public Service Company, which had been prepared by Middle West Service Company and submitted to me for approval.

Q. Those were the only contracts you sent with the August 3rd letter? A. That's correct.

Mr. Stafford: Q. Did Mr. Sanborn make any reply to your letter of August 3, 1939? A. Yes.

Defendant's Exhibit 250, which is also referred to as Defendant's Exhibit 44 in White's deposition, was produced and identified by White. It was received in evidence and reads as follows:

Defendant's Exhibit 250.

Dakota Public Service Company,
General Offices,
Huron, South Dakota.

August 8, 1939.

Mr. Samuel W. White, President
United Public Utilities Corporation
20 North Wacker Drive
Chicago, Illinois

Dear Sam:

I wish to think you for your letter of August 3rd enclosing supervision contract for Dakota Public Service Company with the Middle West Service Company. I am executing the contracts today and sending one to the treasurer of the Middle West Service Company.

We have had in mind for some time the necessity of redrafting the interchange capacity contract and the transmission contract into a two party agreement between Northwestern Public Service Company and Dakota Public

Service Company. We will get this cleaned up as quickly as we can get at it.

You will note that we have deposited by check $200,000 excess funds in the Peoples-Pittsburgh Trust Company, Pittsburgh, Pa., in accordance with your request. I agree that where there is no risk involved 1% is better than nothing.

Yours sincerely,

A. B. SANBORN,
President.

ABS/f

(Read from deposition:)

Q. Do you know how the year 1939 contracts were drafted, put into final form for execution? By that I mean, do you know who worked on that? A. Yes.

Q. Will you tell us, please, your best recollection?

A. They were drafted in the office of—the joint office of Dakota Public Service Company and Northwestern Public Service Company, as per my request.

Q. Did you submit these drafts or cause them to be submitted to any attorneys in the process of their preparation?

A. They were submitted to Mr. Scheetz by me, the general counsel of the United Public Utilities Corporation.

Q. That is, they were submitted by you to Mr. Scheetz?

A. That's correct.

Q. And do you know whether or not Mr. Scheetz submitted them to any other lawyers or conferred with them about the drafts? A. Not to my present recollection.

Q. Referring to Defendant's Exhibit 43 for identification, being your letter of August 3, 1939, to Mr. Sanborn, in which you state to him, incidentally, doesn't he think it would be a good idea to redraft the capacity interchange contract with Northwestern so it would be a two party contract? Do you recall at the present moment what purpose if any you had in mind in suggesting the redrafting of these documents?

A. Merely the simplification, to put them in the form of a contract with Dakota Public Service Company instead

of allowing them to become effective,—instead of—strike that. Instead of depending on the succession of liability under the merger agreement, to make the previously existing contracts binding.

Q. Did you have in mind by executing the two 1939 agreements effecting any change in the rates or charges called for by the 1936 contract and the 1938 contract?

A. No.

Q. As a matter of fact, Mr. White, no such changes were accomplished or provided for by the two 1939 agreements, were they? A. No, they were not.

Q. You are familiar with the two 1939 contracts, being Exhibit D to the complaint. That is the one which is denominated "Interconnection contract", and the other being Exhibit E to the complaint, being denominated "Interchange capacity agreement", both being dated July 1, 1939, by and between Northwestern Public Service Company and Dakota Public Service Company? A. I am.

Q. And there were in fact no changes made in the rates which we have previously gone over in your testimony, prescribed in the 1936 contract and in the 1938 contract?

A. There were no changes. Might I supplement that last answer by making it read: There were no changes in the prices.

Q. Well, you can do so if you will tell me what you mean by the "prices"?

A. I mean that there were no changes in any of the important terms of the contract, but I do know that we had in mind at that time—

Q. Specifically I had in mind: Were there any changes in the five mill energy interchange rate? Was there any change?

A. I want my answer to read: That there were no changes in the five mill interchange rate nor in the monthly payments under the interconnection agreement.

Q. That is the $1,666.66 monthly charge?

A. That is correct.

Q. All right.

A. Nor in the amount of $1.10 a month for each kilowatt deficiency for the company having a deficiency below the average amount of generating reserve under the agreement.

Q. Just a minute. That $1.10 per month, that is also

known as the $13.20 per kilowatt of firm demand per year charge? A. That's correct.

Q. Were you satisfied, at the time of the execution of the 1939 contracts, Exhibits D and E to the complaint, as president of the United Public Utilities Corporation, and a director of that company, and as a director of the Dakota Public Service Company, as to whether or not the five mill energy interchange rate, the $20,000 per year payment for the interconnection facilities, and the $13.20 per kilowatt of firm demand per year charge were fair, reasonable and proper from the standpoint of Dakota Public Service Company? A. Yes.

Q. And did you consider those charges which I have just previously enumerated, to be fair, reasonable and proper as far as Dakota Public Service Company was concerned? A. I did.

Q. And you did so consider them to be fair, reasonable and proper in the capacities that I have previously described to you, namely, as president of U. P. U.— A. I did.

Q. (Continuing) —director of U. P. U., and a director of Dakota Public Service Company? A. I did.

Q. You were a director of Dakota Public Service Company at that time? A. Yes.

Q. The complaint in this suit also annexes and incorporates another contract, being described as Exhibit F to the complaint, dated July 1, 1941, between Northwestern Public Service Company and Dakota Public Service Company. Did you have anything to do with the negotiations of that contract, Mr. White? A. Of the 1941 contract?

Q. Yes. A. Yes.

Q. Did you have discussions with other persons concerning the same? A. Yes.

Q. One discussion or several discussions? A. Several.

Q. Well, can you go back and recall for us the first discussion concerning the subject matter of the 1941 contract? A. The first discussion I had—

Q. Can you do so? A. Yes.

Q. When was that first discussion? I want to know when? A. Early in 1941.

Q. With whom? A. Mr. Sanborn.

Q. Where, if you recall? A. In Chicago, in my office.

Q. That is, at 20 North Wacker Drive? A. Yes.

Q. Was anybody else present at that discussion? A. No.

Q. Now, will you please relate for us the substance of what Mr. Sanborn said to you and what you said to Mr. Sanborn, regarding the 1941 contract, on that occasion?

A. Mr. Sanborn told me that the combined systems were [accumulative] substantial demands for energy with respect to their generating facilities, and that additional capacity would have to be provided in the interconnected system; that Northwestern Public Service Company was willing to plan an addition to the north end of their system, but that it would be necessary for Dakota Public Service Company to agree to any addition under the 1939 agreement.

Q. Wait. There are two agreements in 1939. Which one do you refer to?

A. I refer to the capacity interchange agreement. In order to justify Northwestern in building such an addition, he pointed out that Northwestern might very properly build an addition to its system at Huron as being closer to the center of the Northwestern system, but since there was a shortage of generating capacity on the southern end of Dakota Public Service, the Northwestern might be justified in building its proposed addition at Aberdeen, for the benefit of the combined systems, if Dakota Public Service Company would be willing to give some protection to Northwestern's investment by making the 1939 agreement for interchange of capacity non-cancellable for at least ten years.

Q. You have heard the question and the answer read. Is there anything further that you wish to add at this time?

A. I might add that in those initial discussions, Mr. Sanborn was proposing that Northwestern would add 5,000 kilowatts to their generating capacity.

Q. That was in the initial conversations you are telling us about, with Mr. Sanborn? A. Yes.

Q. Now, did you take up the question of the proposed term arrangement which Mr. Sanborn was asking for if he went ahead and located his proposed additional capacity at the north end of the Northwestern System? Did you take that matter up with the United Public Utilities Corporation directors? A. Not immediately.

Q. Well, I am not trying to fix the time. I am asking whether you did or did not take it up with the directors?

A. Yes.

Q. All right. You say "not immediately". Is there something that intervened between the time of the conversation you just described with Mr. Sanborn in Chicago and when you took the matter up with the U. P. U. directors? A. Yes.

Q. What did take place during that intervening period?

A. A new study was made of the [probably] future requirements for additional generating capacity in the interconnected system.

Q. Who made that study, Mr. White, if you know?

A. That was made by Mr. Sanborn's organization in the joint management of Dakota Public Service Company and Northwestern Public Service Company.

Q. Was that with or without your knowledge and approval?

A. It was with my knowledge and approval that such a study should be made.

Q. Did you have any other intervening factor that occurred between the time of the conversation with Mr. Sanborn and the time you brought this matter up with the board?

A. Yes, there were some other discussions of the same subject, and subsequently the original proposal of 5,000 kilowatts additional capacity was changed to provide for the installation of 7500 kilowatts of capacity at Aberdeen.

Q. Do you recall the reason why there was a change in the proposed addition from 5,000 kilowatts to 7500 kilowatts? A. Yes.

Q. Will you please state what that reason was?

A. Mr. Sanborn felt that the probable increases in Northwestern's demands would warrant the installation of 7500 kilowatts additional capacity instead of 5,000, because the average initial cost of a 7500 kilowatt increase would be lower, and that the extra 2500 so provided, 2500 kilowatts so provided would be needed within a comparatively short time, say two or three years.

Mr. Stafford: At this time, pursuant to stipulation of counsel regarding the introduction of portions of minutes of United Public Utilities Corporation directors' meetings, I read into the record from the minutes of the or-

ganization meeting of the directors of that company, held in Jersey City, New Jersey, on April 30, 1941. I am reading from the 8th page of those minutes, said minutes having previously been identified and authenticated by another witness, as follows:

> "A proposed 10 year contract for pooling of electric generating capacity and interchange of energy between Dakota Public Service Company and Northwestern Public Service Company was discussed.
>
> "Upon motion duly made, seconded and unanimously adopted, the management was instructed to recommend to Dakota Public Service Company that such a long term contract be negotiated in order to assure that company of an adequate source of energy to meet its increasing requirements."

The foregoing portion of the minutes was received in evidence.

Q. Now, Mr. White, were you present at that organization meeting of the board of directors of U. P. U. corporation on April 30, 1941? A. Yes.

Q. Do you recall whether or not at that meeting the proposed term contract between Dakota Public Service and Northwestern Public Service was discussed by those directors? A. It was discussed.

Q. You recall that it was? A. Yes.

Q. Do you have any recollection as to what instructions, if any, were given to the management of U. P. U. Corporation with regard to their proposed contract?

A. The directors of the United Public Utilities Corporation passed a resolution instructing the management to recommend to Dakota Public Service Company that such a contract be negotiated.

Q. Do you know, Mr. White, whether such negotiations were had looking towards the accomplishment of that type of contract? Were there such negotiations? A. Yes.

Q. Did you have any part in them, personally? A. Yes.

Q. Who did you have negotiations with, concerning that matter, if you recall?

A. Mr. Sandstedt, Mr. Sanborn, Mr. Kruesi and Mr. Buell.

Q. Mr. Sandstedt at that time was vice president and treasurer of Dakota Public Service Company? A. Yes.

Q. And Mr. Sanborn, was he an officer of that company also? A. Yes.

Q. What office did he hold?

A. He was president of Dakota Public Service Company.

Q. What was Mr. Kruesi's position at that time?

A. He was president of Middle West Service Company.

Q. And Mr. Buell?

A. Was engineer for Middle West Service Company.

Q. He is the same Mr. Buell that you have testified about previously? A. Yes.

Q. I notice Mr. Sandstedt's letter, which is Plaintiff's Exhibit 66 (R. p. 493, supra), is dated June 26, 1941. Did you have occasion to go over or inspect the Dakota properties prior to that date? A. Yes.

Q. And do you recall the approximate date of the visit?

A. Well, it was prior to June 17th, 1941.

Q. Some time in May or early June? The exact date is not material for my question. I just want you to fix it approximately? A. It was not long prior to June 17th.

Q. Who, if anybody, accompanies you on that trip, Mr. White?

A. Mr. Lakin, Mr. Kruesi and Mr. Buell from Chicago. Mr. Sanborn, Mr. Sandstedt, Mr. Stokke and one or two [other] from Huron.

Q. Mr. Lakin was then a director of United Public Utilities Corporation, and president of its Indiana-Ohio subsidiaries, was he? A. Yes.

Q. You have already identified Mr. Kruesi? A. Yes.

Q. And Mr. Buell, Mr. Sandstedt and Mr. Sanborn?

A. Yes.

Q. Who was Mr. Stokke at that time?

A. Mr. Stokke was an engineer, in charge of power plant operations in Dakota Public Service Company and Northwestern Public Service Company.

Q. You did make that inspection trip at that time. Do I understand you correct, that you did? A. Yes.

Q. Did you visit all of the properties?

A. I visited all the—visited most of the properties of Dakota Public Service Company and part of the Northwestern properties.

Q. I take it you visited Aberdeen?

A. Aberdeen, Huron.

Q. And Huron? A. Yes.

Q. Was there any particular purpose for making that inspection trip? A. Yes.

Q. I know that you previously testified you had made several inspection trips. I wondered if this one had any particular purpose?

A. This one was both a regular inspection trip, such as I have been accustomed to making from time to time, and it was also for general review of the operating system out there, with respect to two subjects in particular, namely the—first, the operation of the interconnected system, and second, the possibility, to which I was giving consideration at that time, of recommending to my board the purchase by Dakota Public Service Company of the common stock of Northwestern Public Service Company.

Q. You mentioned you had discussions with Mr. Buell regarding this proposed term contract. Do you know whether or not Mr. Buell prepared any memoranda or drafts of agreement concerning the subject matter of your discussion, namely, the proposed term contract?

A. I don't recall that he did. Oh, draft of a contract?

Q. Yes. I think I included that in my question: If I didn't I intended to include drafts of this proposed contract. A. I don't recall—

Mr. Benson: Are you refreshing your recollection from a memoranda?

A. I was trying to, and I find nothing thereon with respect to it.

Defendant's Exhibit 251, which is also referred to as Defendant's Exhibit 46 in White's deposition, was produced and identified by White. It was received in evidence and consists of 12 pages, the first one of which reads as follows:

Mr. White:

Will you kindly look this over with comments, suggestions and corrections.

JHB.

The next 10 pages are a carbon copy of a draft of the 1941 Agreement (part of Exhibit F to the Complaint). The last page is a proposed supplement regarding reserve capacity data for the calendar year 1941 on a one hour basis.

Defendant's Exhibit 252, which is also referred to as Defendant's Exhibit 47 in White's deposition, was produced and identified by White. It was received in evidence and reads as follows:

NORTHWESTERN PUBLIC SERVICE COMPANY ----- "Northwestern"

DAKOTA PUBLIC SERVICE COMPANY ---------- "Dakota"

THIS AGREEMENT made and entered into this ___ day of _____ 1941, by and between Northwestern Public Service Company, a corporation organized under the laws of Delaware, hereinafter referred to as "Northwestern" and Dakota Public Service Company, likewise organized under the laws of Delaware, hereinafter referred to as "Dakota."

WITNESSETH:

WHEREAS, "Northwestern" is engaged in the business of producing and selling electrical energy within the geographical area of the eastern half of the State of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto, marked "Exhibit A", and hereby made a part hereof; and

WHEREAS, "Dakota" is engaged in the business of producing and selling electrical energy within the geographical area located in the southern half of North Dakota and the north central part of South Dakota, such territorial limits as they exist at the date hereof being so designated and shown on the plat attached hereto marked "Exhibit A" and hereby made a part hereof.

WHEREAS, both companies desire to interchange electric power and energy in order to utilize existing power plants to their maximum capacity and to provide emergency service, one to the other, and,

WHEREAS, "Northwestern" has heretofore, at its own cost and expense, constructed certain interconnection facilities with the transmission system of "Dakota" which facilities are more specifically described as follows:

Item 1. A certain portion of Aberdeen's interconnected substation and control equipment used exclusively for interconnection with "Dakota" located within the corporate limits of the city of Aberdeen, South Dakota.

Item 2. A certain Gettysburg substation, located at Gettysburg, South Dakota, used exclusively for interconnection with "Dakota" and serving Gettysburg, a Dakota property.

Item 3. Certain twenty-two/thirty-eight kilovolt transmission lines from Aberdeen, South Dakota to Barnard, South Dakota and from Aberdeen, South Dakota to Ipswich, South Dakota, totaling fifty (50) miles more or less for interconnection with "Dakota"

Item 4. A certain thirty-three kilovolt transmission line from Highmore, South Dakota to Gettysburg, South Dakota, a distance of sixty-two (62) miles more or less for interconnection at Gettysburg with "Dakota" and,

WHEREAS, the transmission systems of the said companies are now interconnected as shown on the plat attached hereto marked "Exhibit A", and made a part hereof and such systems are now operated as an interconnected system, and

WHEREAS, it is the desire of the two companies to interchange electric power and energy in order to utilize existing power plants to their maximum capacity and to make full and substantial use of the interconnection of their respective transmission systems for the interchange

Defendant's Exhibit 252.

of electrical energy and/or reserve and/or spare capacity in their combined systems as such reserve or spare capacity may obtain in their respective generating stations and may from time to time be available; it being recognised that economy of supply is to be realised by both companies when either of them is entitled to draw upon the reserve or spare capacity of the other, whether for use in general light and power business or for the purpose of having available such reserve capacity during emergencies or during the overhauling of equipment or whenever other need may arise; it being further recognised that it is to the interest not only of the companies themselves but of the public, that their respective systems shall be developed with such proper harmonious cooperation as will tend to prevent avoidable expenditures and thereby tend to minimise the cost of producing and supplying electrical energy; and it being further recognised that if two neighboring supply companies are adequately interconnected it is not necessary for either of them to own and maintain as large an amount of reserve or spare capacity as though each company was separate and isolated from the other; and

WHEREAS, it is now the desire of each of the parties hereto that under and pursuant to the agreement such as this is intended to be, a flexible and equitable basis be established for the apportionment of charges covering the interchange or use of said reserve or spare generating capacity as may now or hereafter obtain either incident to the actual exchange of such capacity or its employment for stand-by purposes all in order that the two companies may be operated at the highest efficiency and the lowest practicable cost,

NOW THEREFORE, in consideration of the premises of One Dollar and other good and valuable considerations in hand paid by each of the parties to the other, the receipt of which payment is hereby by each of the parties confessed, and in consideration of the mutual covenants and conditions hereinafter set forth, and of the benefits expected to be derived herefrom, the parties hereby agree as follows:

ARTICLE I - DEFINITIONS

Section 1 - The term, "points of delivery" means the various points where the transmission lines of "Northwestern" meet the transmission lines of "Dakota."

RENUMBER

Section 2 - The term, "firm power" means that power which either company is obligated to furnish the other and for which the company receiving such firm power is obligated to pay whether it takes it or not.

Section 3 - The term, "surplus energy" means that energy which either company may, in its judgment, have available from time to time and desires to furnish and sell to the other company and which energy the other company desires to take, and for which it agrees to pay.

Section 4 - The term, "emergency power" means that ENERGY which either company, upon receiving due notice from the other company, can and does furnish the other company ~~for a short period of time~~ during an emergency caused by the failure or break-down of any of the facilities of the other party.

Section 5 - The term "billing period" means that period between successive meter readings taken for the purpose of power and energy billing which reading will be taken as nearly as practicable on the 25th day of each ~~current~~ month.

Section 6 - The term "station generating capacity" with respect to any generating station owned, leased, or otherwise controlled by either of the parties hereto, shall mean the rated capacity in kilowatts of such station; or the number of kilowatts of ~~electrical energy~~ CAPACITY which such station can ~~continuously~~ to the interconnected system continuously (except for periods of ~~routine~~ repair and inspection), whichever is lower; ~~and provided further or such rating may be qualified or defined in~~ Section 1 of Article IV hereinafter.

Subject to Section 1 of Article IV

Section 7 - The term "Company generating capacity" with respect to either party hereto shall mean the sum total in kilowatts of all the several station generating capacities, as above defined and described.

Section 8 - The term "Company system maximum demand" with respect to either party ~~hereto~~ (as hereinafter designated) shall be the coincident demands (in kilowatts) made upon the system of such party during that one hour in ~~such month~~ in which the combined coincident system demands of both parties IN THE AGGREGATE were greater than in any other hour previously recorded ~~in any other month~~ during the calendar year.

Section 9 - The term "Company reserve capacity" with respect to either party shall mean the excess (in kilowatts) of the Company generating capacity of such party over and above the Company system maximum demand (in kilowatts) of such party during the calendar year.

Section 10 - The term "per cent Company reserve capacity" with respect to either party shall mean the percentage which the Company reserve capacity of such party bears to the "Company system maximum demand" of such party.

Section 11 - The term "per cent interconnected system reserve capacity" shall mean the percentage which the reserve capacity of both parties hereto bears to the sum of the "Company system maximum demands" of both parties hereto.

Section 12 - The term "required reserve" with respect to either party shall mean the amount (in kilowatts) obtained by multiplying the "Company system maximum demand" by the "per cent interconnected system reserve capacity" ~~of both parties hereto~~ OF SUCH PARTY

Section 13 - The term "Company excess reserve capacity" with respect to either party shall mean the amount (in kilowatts) by which the "Company reserve capacity" of such party exceeds the "required reserve."

Section 14 - The word "term" unless otherwise indicated by the context shall include not only the original term of the agreement but also any and every period of extension effected under the provisions hereof.

ARTICLE II - TERM

Section 1 - This agreement will become effective on July 1, 1941, and will continue thereafter for a period of ten (10) years, and thereafter unless and until specifically terminated by written notice from either party to the other party of its intention or desire to terminate this agreement and such notice of termination shall precede the intended and desired date of termination by not less than eighteen (18) months.

ARTICLE III - GENERAL AGREEMENT - VOLTAGE & FREQUENCY

Section 1 - Voltage and Frequency - Power and energy to be delivered or interchanged hereunder between the parties hereto will be of a character commonly known as three phase, alternating current at approximately 60 cycles and at approximately 22,000/33,000 and/or 33,000 volts pressure or at any higher voltage as such voltage or pressure may now exist or may be hereafter mutually agreed upon at the points of interconnection between the transmission systems of the two companies.

ARTICLE IV - GENERAL AGREEMENT - RESERVE CAPACITY CHARGE

Section 1 - General Provisions - Subject to the terms and conditions of this agreement either party having a "deficiency in reserve capacity" shall ~~purchase capacity to effect such deficiency~~ from the party having "Company excess reserve capacity" in accordance with and subject to the terms and provisions hereinafter set forth.

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Defendant's Exhibit 252.

"Section 13- The term "Company Receivables" or "Gross Receivables" with respect to either party shall mean the amount (or balance) which the "Gross Receivables" of such party under the "Company Receivables Agreement".

(a) Operating Committee - The terms and conditions of this agreement including the determination of "Company generating capacity," "Company system maximum peak demand," "Company reserve capacity," the "per cent Company reserve capacity" and the "required reserve," shall be ascertained by an Operating Committee consisting of two members, one member to be appointed by each of the parties hereto. In case the members of this Committee are unable to reach an agreement on any provision of this contract they will select a third party who shall be mutually agreeable and the decision of this third party shall be considered final and binding upon the parties hereto.

(b) Station Generating Capacity - The rated capacity (in kilowatts) of any generating station owned, loaned, leased and/or otherwise controlled by either party hereto as defined in Section 6 of Article I shall, in general, be the sum of the manufacturers' name plate rating at 0.8 power factor of all generating units therein, except those supplying power for station auxiliaries and/or not available for the supply of energy elsewhere or whose use is impractical or uneconomical. In case the Operating Committee shall determine, however, after full investigation and by unanimous agreement that a generating station should be rated on some basis other than the sum of the manufacturers' name plate rating, such other rating shall be used for the purpose of this agreement.

For the purpose of this agreement and until such time as there has been a change in station or company generating capacity that may warrant a change in rating of any individual station or of the total company capacity, it is agreed by the parties hereto that the "station generating capacity" and the "Company generating capacity" of each party shall be as hereinafter set forth:

NORTHWESTERN PUBLIC SERVICE COMPANY		DAKOTA PUBLIC SERVICE COMPANY	
Station	Station Generating Capacity Rating (Kilowatts)	Station	Station Generating Capacity Rating (Kilowatts)
Aberdeen	6,250 Kw	Beulah	6,000 Kw
Webster	760 "	Bismarck	5,250 "
Redfield	900 "	Dickinson	700 "
Faulkton	110 "	Mott	230 "
Huron	1,130 "	Mobridge	1,000 "
Highmore	140 "	Ellendale	400 "
Mitchell	7,500 "	Lemmon	235 "
Armour	980 "	Gettysburg	140 "
Yankton	2,520 "		
Company Generating Capacity	20,290 Kw	Company Generating Capacity	13,955 Kw

At any time when there shall have been a change ~~in the aforementioned conditions~~ which may call for a new rating, the rating previously established for any generating station capacity and/or Company generating capacity may be brought up for revision by the Operating Committee. Capacity of any generating equipment which is temporarily out of service for repair or maintenance work shall not be deducted from the rating of the generating station capacity during such temporary outage.

(c) Additional Capacity - When, in the opinion of the parties hereto, the interconnected system coincident demand increases to a point that the systems combined ~~in their aggregate~~ do not have adequate reserve facilities to supply system load requirements and/or to assure reliable service, then, and in such event, the parties hereto shall agree on the installation of additional capacity. The location of such additional capacity shall be by mutual agreement as to the most feasible and practical location; the amount and nature of such additional capacity ~~to be installed~~ and by which party ~~or both~~; taking into consideration the service requirements of each company in order that, ~~with the installation, completed the existing and additional capacity and service~~ requirements will have been ~~provided in the most efficient and economical manner. Thereupon the~~ most efficiently handled for the interconnected system

the interconnected

it shall be installed

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Defendant's Exhibit 252.

when such additional generating capacity becomes available to the interconnected system, the "station generating capacity" and "Company generating capacity" for either or both parties shall be adjusted for future billing purposes.

No ~~plant improvements, additions or betterments~~ additions to station generating capacity by either party will be considered for billing purposes except as both of the parties hereto have approved such ~~extension, improvement or betterment and mutually agreed on the increase in "station generating capacity" such agreement or consent shall~~ be in writing.

Section 2 - Determination of "Company ~~Excess~~ Reserve Capacity" and "Company Deficiency in Reserve Capacity."

(a) "Company ~~excess~~ reserve capacity" and "Company deficiency in reserve capacity" are subject to ~~revision~~ determined each year and may be re-determined ~~oftener~~ if a revision is warranted by the installation or removal of equipment that increases or decreases the "Company generating capacity" of either of the parties hereto.

In December of each year the Operating Committee shall determine the "Company system maximum demand" as well as the "Company generating capacity" for each of the parties hereto and ~~will~~ shall assemble and prepare an exhibit in form similar to Exhibit "B" for the year 1941, attached hereto. This exhibit ~~to be~~ marked "Exhibit B" ~~will be~~ shall be signed by each member of the Operating Committee and shall become the basis for billing under this agreement for the ensuing year, or until such time as interim adjustment is warranted by a change in station generating capacity of either party hereto.

It shall be the duty of the Operating Committee to ascertain from the combined "Company generating capacities" and the combined "Company system maximum demand" the combined "Company reserve capacities" in order to determine the "required reserve" and the amount which the company having "Excess Company ~~generating~~ capacity" shall stand ready to supply to the company having a "Deficiency in Company ~~generating~~ capacity" ~~in order that both companies shall carry the same proportion of "required reserve".~~

In case of a deficiency in "required reserve" such deficiency ~~will~~ shall be determined by deducting the "Company reserve capacity" from the "required reserve" for the party having a deficiency, but ~~in no event shall~~ the "required reserve" in kilowatts for billing purposes exceed 25% of the "Company system demand." ~~In event the "required reserve" as determined above is in excess of 25% of the "Company system demand" for the party having a deficiency in reserve capacity, the "required reserve" shall be adjusted to 25% of the maximum demand for billing purposes.~~

(b) The "Company system maximum demand" of either party hereto, as defined in Section 5 of Article I hereof, shall be ascertained by the Operating Committee ~~and shall be the net total output in kilowatt hours during the one hour of company system demand which shall be coincident for the combined systems and which shall be greater than any other hour for the year, as defined in Section 5 of Article I hereof. The hour shall be understood to be the normal integrated hour - as from 5:00 to 6:00 P.M. or 6:00 to 7:00 P.M. The "Company maximum demand" so obtained shall include (1) the energy produced by the generating stations of such party and (2) the energy purchased by such party from all sources during such hour of maximum demand.~~

The time and date when such "Company system demands" are ascertained shall be shown on Exhibit "B".

(c) Either Company having a "deficiency of reserve capacity" as ~~set forth~~ determined under Section 2(a) of Article IV hereof shall be deemed to have established demand for firm power hereunder ~~respectively~~ upon the other party hereto ~~having excess reserve capacity~~ for the number of kilowatts constituting such deficiency. Such company having a "deficiency in reserve capacity" shall pay to the supplying company ~~for the total number of kilowatts of firm power so deemed to be established (whether actually availed of and used or not)~~ a "reserve capacity charge" at the rate hereinafter specified in Article V.

(d) Unless otherwise mutually agreed, it shall be the duty of the company having an excess of reserve capacity to maintain such capacity in readiness to furnish and supply the company having a deficiency reserve capacity, up to the amount of firm power so agreed to have been established.

(e)

It is further understood and agreed that in the event the company having a "deficiency in reserve capacity" shall have temporarily an increase in such deficiency which may be greater than the "required reserve" to which it is entitled and for which it is obligated to pay the other party, it will endeavor to supply such additional capacity as it may to the extent of its ability.

ARTICLE V - RESERVE CAPACITY CHARGE

Subject to the terms and conditions of this agreement the company with a "deficiency in reserve capacity" as provided in Section 2 of Article IV hereof will pay the other company having "excess reserve capacity" for the total amount of "required reserve" as determined in Section 2 of Article IV hereof, a firm power charge of Thirteen Dollars and Twenty Cents ($13.20) per kilowatt of firm power per year. One twelfth of such firm power charge for such "required reserve" shall be due and payable by the company having a "deficiency in reserve capacity" to the company having an "excess reserve capacity" at the expiration of each calendar month during the term of this contract, all as herein prescribed.

ARTICLE VI - CENTRAL AGREEMENT - ENERGY CHARGES

Section 1 - Subject to the terms and conditions of this agreement each company will sell such surplus energy to the other and each company will furnish one to the other such emergency power and energy as one company may need and the other company may have available as further described in Section 3 hereinafter, as available and required.

Section 2 - It is further recognized that energy will be exchanged between the parties hereto in the event either party may actually take such firm power in the exercise of such use as it may make of the "required reserve" to which it is entitled.

Section 3 - Emergency Power & Energy - In the event of total or partial failure of the facilities for generation or transmission of electric power of either party, the other party agrees to use all reasonable effort and all facilities at its command (after the requirements of the other customers of the party delivering such power have been met) to furnish power and energy to the party reserving such power for short periods of time and to the extent of such failure or interruption and only for such periods of time as may be required to restore such facilities, by the exercise of every reasonable effort on the part of the party possessed of such facilities, to their normal operating condition..

ARTICLE VII - RATES

ENERGY CHARGES

Section 1 - "Northwestern" will pay to "Dakota" for such firm and surplus energy furnished and delivered by the "Dakota" Company during each billing period a sum equivalent to five tenths (0.5) cents per kilowatt hour. "Dakota" will pay to "Northwestern" for all firm and surplus energy furnished and delivered by "Northwestern" to "Dakota" during such billing period a sum equivalent to five tenths (0.5) cents per kilowatt hour.

ALL ENERGY DELIVERED UNDER THIS AGREEMENT SHALL BE BILLED AND PAID FOR AT THE RATE OF

It is understood between the parties hereto that fuel prices and generating efficiencies may change, making necessary an adjustment in the energy rates contained in this Section.

In January of each year the parties hereto will review production costs and if necessary redetermine the rates for the above energy to be charged, contained herein. Such revision, if any, will be made by supplements to this contract. It is understood that billing under the rates contained herein will become effective _____. The first review will then be made in January 1942 and each January thereafter.

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TRANSFER THIS TO PAGE 6

IN ADDITION TO THE ENERGY CHARGE BY AGREEMENT EMERGENCY POWER MAY BE SURCHARGED WITH THE

Section 3 - Billing for ~~such emergency power and energy will be on the basis of the energy charge as provided in Section 1 of Article VII above, plus whatever additional expense the delivering party may incur~~ in placing in operation and operating high priced plants ~~and facilities~~. It is the intent that the delivering company will not make a profit on such emergency power but will be reimbursed for all added expense that ~~such party~~ may incur during such emergency.

FOR THE PURPOSE OF SUPPLYING SUCH EMERGENCY POWER.

THE DELIVERING COMPANY AND ON ACCOUNT OF

~~Section 4. No service will be emergency service, however, unless~~ due notice has been given by the party in need of emergency power to the other party and the other party agrees to furnish such emergency power.

ARTICLE VIII - TRANSMISSION LINE CHARGES

INCURRED BY NORTHWESTERN IN ITS

Section 1 - As "Dakota's" share of the fixed charges, maintenance and operating expenses ~~relating to the~~ interconnection facilities enumerated above, "Dakota" agrees to pay "Northwestern" beginning July 1, 1941, the sum of $1,666.66 a month. This charge is over and above all ~~energy~~ OTHER charges provided ~~in Section 1 of Article VII and firm power charge for "required reserves" as set forth in Article V hereof~~. HEREIN.

Section 2 - Upon the termination of this Contract by either party, "Dakota" will pay "Northwestern" in addition to all other charges hereinbefore enumerated a sum equivalent to one-half the actual cost to "Northwestern" to remove and dismantle the interconnection facilities ~~enumerated above and to return all material to the storeroom of "Northwestern"~~ in Aberdeen, South Dakota.

"Dakota" has no obligation to pay "Northwestern" for any part of the construction cost of the interconnection facilities enumerated above or for the use of such facilities for any period prior to January 1, 1936.

ARTICLE IX - METERING

Suitable standard 33 kilovolt and/or 22,000/38,000 volt metering equipment agreeable to both parties ~~shall~~ be installed, owned and maintained by "Northwestern" at the point~~s~~ of ~~delivery~~ (or as near thereto as practicable). Meters ~~shall~~ be of such number, type and arrangement as will show separately the amounts of ~~power and~~ energy ~~supplied at each~~ DELIVERED location. Metering equipment will be tested at intervals not exceeding sixty (60) days with a representative of each party present. If, ~~as the result of such tests,~~ the metering equipment is found to be inaccurate, it ~~will~~ be restored to a condition of accuracy. If accuracy exceeds 2%, the readings of the meters ~~taken~~ during the period thirty (30) days ~~preceding (or during such shorter period as may have intervened since a periodic test)~~ will be corrected and payments adjusted accordingly, ~~prior to which period no correction of such readings will be made~~.

AT EACH

SHALL

"Dakota" may at its own expense install and maintain ~~additional~~ DUPLICATE metering equipment at the point~~s~~ of delivery for the purpose of checking the meters installed and maintained by "Northwestern" and the readings thereof.

If the meters installed by "Northwestern" wholly fail to register the ~~power and energy~~ during any period of time, for any reason whatsoever, ~~the amount of power and energy delivered during such period will be measured by means of meters installed by "Dakota"~~, and if "Dakota" has not installed meters, or if its meters have wholly failed to register during this period of time, the amounts of ~~power or~~ energy ~~so~~ delivered will be estimated according to the amounts previously delivered under substantially similar conditions.

Readings of meters installed by Dakota shall be controlling

1250 kw

"BEULAH PREMIUM LIGNITE"
KNIFE RIVER COAL MINING COMPANY
BISMARCK, N. D.
PHONE 48

~~Beginning~~ ~~month~~ ~~thereafter~~ and continuing
~~each calendar month~~ ~~will pay~~ ~~the sum~~
~~Beginning~~ and Continuing monthly thereafter
beginning next monthly
payments will be $ 473.96

"WAXTREAT" Insulated Fireproof Wallboard Used for Every Purpose

"BEULAH PREMIUM LIGNITE"
KNIFE RIVER COAL MINING COMPANY
BISMARCK, N. D.
PHONE 48

the State shall pay the first eleven
installments ~~beginning~~ ~~on the~~ ~~day~~ ~~of~~
beginning ~~on the~~ day of ~~each~~ ~~month~~ ~~thereafter~~
~~in each year~~ ~~until~~ ~~the~~ ~~entire~~ ~~amount~~ ~~of~~ ~~the~~
~~purchase price~~ ~~of~~ ~~the~~ ~~premises~~ ~~described~~ ~~herein~~
~~shall be paid~~ ~~in full~~ ~~to~~ ~~the~~ ~~Company~~ ~~as~~
~~follows~~ ~~to wit~~ pay the sum
of $ 166.66 per Mo. beginning
Jan 1, 1936 and continuing each
the payment due ____ 19__ and
the further sum of $ ____ on ____
~~the~~ ~~day~~ ~~of~~ ~~each~~ ~~month~~ ~~thereafter~~
~~in each year~~ ~~until~~ ~~the~~ ~~entire~~ ~~amount~~ ~~of~~ ~~the~~
~~purchase price~~ ~~of~~ ~~the~~ ~~premises~~ ~~described~~ ~~herein~~
~~shall be paid~~ ~~in full~~ ~~to~~ ~~the~~ ~~Company~~

ARTICLE X - CONTINUITY OF SERVICE

Each of the parties hereto will exercise reasonable diligence and care to avoid interruptions in delivery of ~~power~~ energy hereunder but will not be liable for any damage or loss which may be occasioned by any failure or interruptions caused by fires, strikes, riots, floods, lightning, storms, acts of God, civil disturbances, action of Public Authority, litigation, break-downs, or causes beyond reasonable control.

Either of the parties may take equipment out of service for ~~to make~~ necessary repairs or to make changes in equipment or to install new equipment or ~~any of those~~ purposes, but only for such time as may be unavoidable. REASONABLY NECESSARY.

It is understood and agreed that each of the parties hereto will use reasonable diligence and care in maintaining ~~and operating the Company generating capacity of its respective system provided for herein, to the end that it will perpetuate approximately~~ its full rated capacity as determined and agreed upon by the Operating Committee. EACH OF ITS GENERATING STATIONS AT

ARTICLE XI - LIABILITY

Each party hereto ~~will~~ save and keep the other harmless from any and all loss, cost, damage or expense, ~~and/or~~ including attorney fees for, or by reason of, any claim for injury to its own employees at any location, and to persons or property occasioned by the electric power or equipment owned or operated by it, however caused. Neither party hereto, assumes any responsibility for the equipment of the other party.

ARTICLE XII - BILLS AND PAYMENT

Succeeding the meter reading date

~~In the event of billing hereunder such~~ bills ~~will~~ be rendered each month as nearly as practical on or before the 5th day of the ~~succeeding~~ calendar month and will be payable within ten days from the date thereof.

energy either charge

If either party fails to perform any of its obligations under this contract, including prompt payment of monthly bills, the other party may suspend delivery of ~~power~~ hereunder and will not be liable in any manner for loss or damage arising from such suspension. No such suspension will interfere with the enforcement by the parties hereto of any other legal right or remedy or relieve the delinquent company from liability to pay the "reserve capacity" during any such suspension. No delay by the parties hereto in enforcing any of their rights hereunder will be deemed a waiver of such rights.

ARTICLE XIII - CONCLUSION

This contract will inure to and be binding upon the parties hereto, their successors and assigns.

It is understood and agreed that this agreement cancels and supersedes the Interchange Capacity Agreement, dated July 1, 1939, and the Interconnection Contract, dated July 1, 1939, between the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed by their duly authorized officers and impressed with their respective corporate seals the date and year first above written.

NORTHWESTERN PUBLIC SERVICE COMPANY

By_____
President

ATTEST:

_____
Secretary

DAKOTA PUBLIC SERVICE COMPANY

By_____
Vice-President

ATTEST:

_____
Secretary

Defendant's Exhibit 252.

Defendant's Exhibit 253, which is also referred to as Defendant's Exhibit 48 in White's deposition, was produced and identified by White. It was received in evidence and consists of 4 pages, the first one of which reads as follows:

Mr. White:

Herewith is a copy of the changes which I have made in my copy of the contract.

J. H. BUELL.

The last 3 pages set forth or incorporate changes made by Buell in his copy of Defendant's Exhibit 251.

Q. Have you looked at the documents? A. Yes.

Q. And do they refresh your recollection as to whether or not you did receive from Mr. Buell any memoranda or drafts of agreements relative to this proposed term contract between Northwestern and the Dakota Public Service Company? A. Yes.

Q. Did you receive any such memoranda and drafts?

A. Yes.

Q. And are those exhibits 46, 47 and 48 for identification, the drafts and memoranda which you did receive from Mr. Buell? A. Yes.

Q. Now, with reference to Defendant's Exhibit 46 for identification, I call your attention to the white sheet attached to the first page, which bears some handwritten material which reads "Mr. White, will you kindly look this over with comments, suggestions and corrections," and signed by the initials "J. H. B." Do you know whose handwriting that is? A. Yes.

Q. Whose is it, please?

A. James H. Buell's handwriting.

Q. Was this piece of paper with writing on it attached to the balance of Defendant's Exhibit 46 for identification when you received it from Mr. Buell?

A. To the best of my knowledge, yes.

Q. Do you recall the approximate time when you received this draft from Mr. Buell? A. No.

Q. Do you know whether or not this particular draft was prepared by Mr. Buell? A. No.

Q. By "No" you mean you do not know?

A. I do not know.

Q. But you know you did receive it, don't you? A. Yes.

Q. Now, with reference to Defendant's Exhibit 47 for identification, from whom did you receive this document, if you recall? From Mr. Buell?

A. No. From Mr. Sandstedt.

Q. Approximately when, if you can recall for us?

A. I couldn't name the date.

White identified all of the handwritten material appearing in Defendant's Exhibit 252 as having been made by him except the pencilled memoranda attached to page 3 reading "Section 13—The term 'Company deficiency in required reserve' with respect to either party shall mean the amount (in kilowatts) by which the 'required reserve' of such party exceeds the 'Company reserve capacity'.", and the 2 sheets appended to page 7 of the exhibit, each bearing on the left end the following printed legend: " 'Beulah Premium Lignite', Knife River Coal Mining Company, Phone 44, Bismarck, N. D."

(Read from deposition.)

Q. Well, how did you come to make all these extensive interlineations on this memorandum? Was that all done at one time or over a period of time?

A. Part of them were put on by me when I was working it over alone, and others were put on in working over the agreement in company with Mr. Sandstedt.

Q. When you say "working over,"—excuse me.

A. (Continuing) Those notations that are in handwritings I cannot identify. I cannot say when and under what circumstances those notations were put on.

Q. When you say "working over it alone" where you have reference to the location, do you mean in Chicago, or Huron, or both places? A. I mean in Chicago.

Q. How about when you were working with Mr. Sandstedt? A. In Chicago.

Q. In Chicago also? A. Yes.

Q. These documents marked respectively Defendant's

Exhibits 46, 47 and 48 for identification, which you have previously testified, were received by you. Were they received by you and considered by you prior to the preparation of the final draft of the 1941 contract between Northwestern Public Service Company and Dakota Public Service Company? A. Yes.

Q. In other words, these show your own work upon the draft, the work done, performed prior to the preparation of the final contract? A. That's correct.

Q. During the fall of 1941 did you at any time have a conversation with Mr. Sandstedt regarding the subject matter of the proposed term contract between Northwestern Public Service Company and Dakota Public Service?

A. Yes.

Q. Do you recall when that conversation occurred?

A. Yes.

Q. Well, when was it, please?

A. Early in September of 1941, at my cottage at Detroit Lakes, Minnesota.

Q. Who was at that conversation besides you and Mr. Sandstedt, if anybody?

A. Mr. Karl Goldsmith, of Pierre, South Dakota.

Q. Who was Mr. Goldsmith, please?

A. Mr. Goldsmith was an attorney who represented both Dakota Public Service Company and Northwestern Public Service Company.

Q. You say represented Dakota Public Service Company? A. Yes.

Q. Was that with your knowledge and approval?

A. Yes.

Q. And you knew of the matters and things in which he represented that company, and the service he performed, in a general way? A. Yes.

Q. Now, will you please describe for us as closely as you can recall it, the substance of that conversation between you, Mr. Goldsmith and Mr. Sandstedt?

A. Mr. Sandstedt, Mr. Goldsmith and I spent an entire afternoon, starting immediately after luncheon and continuing to dinner time, in which we went over a draft of a proposed contract between Dakota Public Service Company and Northwestern Public Service Company for the interchange of capacity, interchange of energy, and the use

of interconnection facilities, and we went over that draft word by word, paragraph by paragraph, with the previously declared intention of putting that agreement into final form.

Q. Is Defendant's Exhibit 47 for identification the draft which you gentlemen worked over at Detroit Lakes in September, 1941, or was the draft which you then [work] over one which was prepared subsequent to Defendant's Exhibit 47 for identification, and which incorporated therein the various interlineations appearing on that exhibit? Can you answer that question?

A. Having failed to find in my files a correct draft of an agreement which I was under the impression I had, I am now unable to state definitely whether the contract to which you refer as Defendant's Exhibit—

Q. 47 for identification.

A. (Continuing) —47 for identification, is a draft over which I had worked with Mr. Sandstedt before our conference at Detroit Lakes, or whether it is the draft that we worked over at Detroit Lakes.

Q. Well, it is either the draft that you worked over with Mr. Sandstedt, and also by yourself, prior to the meeting at Detroit Lakes, or it is the draft which you actually worked upon at that time with Mr. Sandstedt and Mr. Goldsmith? A. That I am prepared to subscribe to.

Q. Now, as the result of the conversations you had at Detroit Lakes, was there a further draft of contract prepared? A. Yes.

Q. And was it at that point satisfactory to you?

A. I don't recall whether the very next draft was in completely satisfactory form or whether the next draft had to go through some additional revision before the final contract was evolved.

Q. Were there any specific provisions or points which you particularly desire to have in that 1941 contract?

A. Yes.

Q. Do you recall which ones they were, or before that I will ask you: Were any of those provisions incorporated in the contract as finally written and executed? A. Yes.

Q. Will you tell us about those provisions, please?

A. There were two important points that I had insisted on. One was the provision that if Dakota was to consent

to the construction of a 7500 kilowatt addition, Dakota should not have to pay for a deficiency in its reserve capacity beyond the point where the reserve system capacity exceeded 25 per cent, even though the system reserve capacity might actually be a much larger per centage. The second point that I caused to be written into that 1941 agreement was a reconsideration back to 1936 of the basis of the $20,000 annual charge for use of interconnection facilities. In the 1936 contract, interconnection contract, which was superseded in 1939—

Q. By the 1939 interconnection contract, is that right?

A. By the 1939 interconnection contract, which was drawn to reflect the effect of the merger, it was provided that Northern Power & Light or Dakota Public Service, as the case might be, should pay an annual charge of $20,000 a year for the use of the interconnection facilities. When Northwestern asked for a ten year term on the 1941 agreement, I insisted that on the formula of 3½ per cent for taxes, maintenance and renewals, and 5 per cent annual interest on the investment in the interconnection facilities, all balance of the $20,000 a year payable under the interconnection contract, or previously paid, subsequent to January 1, 1936, should be applied to the amortization of the 50 per cent portion of the cost of those facilities, allocated to Northern Power & Light Company, or Dakota Public Service Company as the case might be.

Q. In short, you had two particular points that you were insisting on, if I understand your testimony correctly, namely, a limitation of 25 per cent of the company system demand in calculating the reserves, and the changing of the $20,000 a year annual payment for interconnection facilities to an amortization basis so as to pay off one half of the cost of those facilities over a period of time, and from that time on just to pay a maintenance and operating charge? A. That's right.

Q. Now, were those two points on which you insisted incorporated in the contract as finally executed? A. Yes.

Q. I am now looking at a photostatic copy of the 1941 contract, which is Exhibit F to the complaint, and I am looking particularly at Section 2 of Article IV, on page 5, and I note that in the fourth paragraph is provided that: "In case of a 'company deficiency in required reserve

capacity' such deficiency shall be determined by deducting the 'company reserve capacity' from the 'required reserve' for the party having a deficiency, but for billing purposes the '[require] reserve' in kilowatts shall in no event exceed 25% of the 'company system demand.'" Is that one of the provisions that reflects the first of the points which you insisted on, which you just described to us? A. Yes.

Q. Now, also, Mr. White, directing your attention to Section 2 of Article IV, subsection (d) also appearing on page 5, which provides that "Unless otherwise mutually agreed, the company having a 'company excess reserve capacity' agrees hereunder to maintain such capacity in readiness to furnish and supply power to the company having a 'company deficiency in required reserve capacity' up to the amount of such excess (not to exceed 25%)." Does that provision also reflect the point which you insisted upon and which you say was incorporated in the contract?

A. That paragraph 2 (d) was a result of my insistence that the fourth paragraph of Section 2—

Mr. Stafford: Subsection (a).

A. (Continuing) —of subsection (a) be inserted in the contract, and it says in effect that if a deficiency—

Q. Now, referring to Section 3 of Article V, which appears on page 6 of the contract, entitled, "Transmission Line Charges", it provides for payment by Dakota of the sum of $1,666.66 per month commencing January 1, 1936, and continuing through the payment due June 1, 1950, and an additional sum of $1,348.82 on July 1, 1950; and commencing August 1, 1950, and thereafter to the balance of the term, monthly payments of $442.53. Does that provision reflect the other point upon which you have testified to that you insisted upon being incorporated? A. Yes.

Q. Did you personally work on the preparation of this provision of the contract? A. Yes.

Q. With that point in mind? A. Yes.

Q. Mr. White, this Section 3 to which we have just referred, provides that Dakota agrees therein to pay to Northwestern a monthly sum of $1,666.66 commencing January 1, 1936. Do you know whether or not Northwestern has been paid by the Dakota subsidiaries, namely, Northern

Power & Light Company from 1936 to July 1, 1939, and by Dakota Public Service Company from July 1, 1939 to and including July 1, 1941, those monthly charges at that rate?

A. I have.

Q. Do you know whether or not credit was given to Dakota Public Service Company because of such payment on its contractual undertaking expressed in Section 3 of the 1941 contract? A. They did.

Q. Was the 1941 contract submitted to Mr. Scheetz, as counsel for United Public Utilities Corporation, prior to its execution? A. Yes.

Q. Did you submit it to Mr. Scheetz? A. Yes.

Q. Do you recall, Mr. White, when the 1941 contract between Dakota Public Service Company and the Northwestern Public Service Company was executed?

A. January 28, 1942.

Q. Do you recall any particular occurrence or circumstance which delayed the actual execution to the date subsequent to the effective date? The effective date of the contract is July 1, 1941. A. Yes.

Q. Now, will you describe that for us, please?

A. One was a verbal understanding between Mr. Sandstedt and myself, that Northwestern Public Service Company was warranted in proceeding to contract for the purchase of generating equipment for Aberdeen on the basis of my assurance that Dakota Public Service Company would agree to a ten year term for a contract of which only the wording remained to be worked out on a mutually agreeable basis and—

Q. Well, specifically—excuse me.

A. (Continuing) —on the strength of that verbal assurance, there was no need for rush in completing the final written document. The second item in the delay was that The Middle West Corporation was negotiating with Central Electric & Telephone Company for the sale to Central Electric & Telephone Company of common stock of Northwestern Public Service Company.

Q. Were those negotiations pending at or about this period during 1941, until the fall of 1941? A. Yes.

Q. Those are the two items which occur to you presently entering into the delay in the actual execution?

A. That's right.

Defendant's Exhibit 254, which is also referred to as Defendant's Exhibit 49 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 254.

Dakota Public Service Company
General Offices
Huron, South Dakota
January 9, 1942.

Mr. S. W. White, President,
United Public Utilities Corp.,
20 No. Wacker Drive,
Chicago, Ill.

Dear Sam:

I would like to bring up again the matter of the Interchange Capacity and the Interchange Energy agreements between the Dakota Company and Northwestern.

You will remember this was held in abeyance pending such negotiations as were being carried on for the sale of Northwestern.

I understand that under conditions as they obtain now and present F. P. C. regulations any negotiations have been ended.

It seems to me that the reasons for the renegotiation of the two Interchange contracts between the Dakota Company and Northwestern are again valid and that this contract should now be completed.

We are just at the time when we are re-examining the conditions of capacity charges and failing a new agreement, I assume that these will have to be allocated under the old one.

Yours sincerely,

A. B. SANBORN.

B.
C. C. F. E. Kruesi.

Defendant's Exhibit 255, which is also referred to as Defendant's Exhibit 50 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 255.

January 13, 1942

Mr. A. B. Sanborn, President,
Dakota Public Service Company,
Huron, South Dakota.

Dear Beck:

Thanks for your letter of January 9th.

I believe your understanding is the same as mine with respect to the Power Interchange Agreement between Northwestern Public Service Company and Dakota Public Service Company.

As I think I have already told you, both verbally and in writing, I have felt all along that these two companies were committed to each other on the general basis of the revised Capacity Interchange Agreement which you drew up, and, you will recall that when you wanted to commit for the purchase of Aberdeen generating equipment, I gave you unqualified assurance that Dakota would execute that contract as soon as it could be expressed in precise wording designed to obviate future misunderstandings.

Now that negotiations with Central Electric and Telephone Company have apparently been terminated, I know of no reason for further delay in the execution of that contract, and, if my memory serves me correctly, even the details of the wording have been mutually agreed on.

I have no idea as to whether Dakota's capacity charges for 1941 or 1942 would be lower under the revised contract than under the old contract, but, regardless of any advantage or disadvantage, it would be my idea that all interchange questions should be settled or adjusted on the same basis as if the contract had been actually exe-

cuted early last summer, when we reached our mutual agreement as to what the revision was to contain.

Very truly yours,

.....

President.

Copy—Mr. F. E. Kruesi.

(Read from deposition)

Q. Mr. White, did you authorize or instruct the officers of Dakota Public Service Company to execute this 1941 contract, Exhibit F to the complaint, on behalf of Dakota Public Service Company?

A. Let me see that last exhibit. I will say that I authorized them, but I did not instruct them.

Q. You knew that the contract was executed by them?

A. Yes.

Q. Did you approve of that procedure and action?

A. Yes.

Q. Do you know whether or not the 1941 contract, Exhibit F to the complaint, was filed with the Federal Power Commission? A. Yes, it was.

Defendant's Exhibit 256, which is also referred to as Defendant's Exhibit 51 in White's deposition, was received in evidence for the purpose of showing communication to White of the matters contained therein and the correspondence between White and Sanborn. It reads as follows:

Defendant's Exhibit 256.

January 30, 1942

Via Air Mail

Mr. A. B. Sanborn, President,
Dakota Public Service Company,
Huron, South Dakota.

Dear Beck:

After you left this afternoon, George Davis called me with a constructive suggestion, i. e., that we should not

antagonize F. P. C. by filing a copy of the new Power Interchange Contract with S. E. C. before it has been filed with F. P. C. He pointed out that the companies have no right to make payments under the new contract until the new contract has been approved by F. P. C. It could also be pointed out however, that had the new contract been actually executed in 1941, the payments made prior to December 31, 1941 would have been exactly the same as the payments under the two predecessor contracts, and that if, for any reason, the new contract should not be acceptable to F. P. C., nevertheless, Exhibit B, regulating payments during 1942, would still be effective as an amendment to the old interchange contract.

I think, however, Mr. Davis' point is well taken and that Dakota and Northwestern should promptly file copies of the new contract with F. P. C. accompanied by a transmittal letter indicating that the new contract was executed on a certain day in January 1942, as of July 1, 1941; that it represents a simplified combination of the two old contracts already on file with F. P. C., without material change in the formula for determining charges, but with an added equitable provision, which might become effective in the future, if either party should desire to make a comparatively heavy addition to its generating capacity.

If on Monday, February 2nd, you should mail your revised contract to F. P. C., then the way would be clear for me to tell S. E. C. about it on February 5th (if necessary) without hedging as to whether the contract has been filed with F. P. C.

Very truly yours,

.....

President.

Copies

Messrs. C. L. Sandstedt
G. Davis

Q. I show you now, Mr. White, a document marked Defendant's Exhibit 51 for identification, purporting to be a carbon copy of a letter dated January 30, 1942, addressed

to Mr. A. B. Sanborn, President, Dakota Public Service Company, and will ask you whether or not that is a true and correct copy of a letter written by you and sent by you to Mr. Sanborn on or about that date? A. It is.

Q. You sent the original or caused the same to be mailed to Mr. Sanborn, on or about January 30, 1942? A. Yes.

Defendant's Exhibit 257, which is also referred to as Defendant's Exhibit 52 in White's deposition, was received in evidence for the purpose of showing receipt thereof by White in due course. It is a copy of the letter of February 2, 1942, to the Federal Power Commission from defendant and Dakota Public Service Company, which letter is included in Plaintiff's Exhibits 32 and 34 and is reproduced herein in plaintiff's case (R. p. 289, supra).

Q. Did you receive this document, Defendant's Exhibit 52 for identification on or about February 2, 1942?

A. Yes.

Q. From whom did you receive the same if you know?

A. From Mr. Sanborn.

(Read from deposition.)

Mr. Stafford: Let the record show I am now showing the witness a carbon copy of the 1941 agreement, dated July 1, 1941, by and between Northwestern Public Service Company and Dakota Public Service Company, being Exhibit F to the [complain.]

Q. You are familiar with this contract, Mr. White?

A. Yes.

Q. I will call your attention to Article 2 on page 3, which provides that "This agreement will become effective on July 1, 1941, and will continue thereafter for a period of ten (10) years, and thereafter unless and until specifically terminated by written notice by registered mail from either party to the other of its intention or desire to terminate this agreement and such notice of termination shall precede the intended and desired date of termination by not less than eighteen months."

At the time that this contract was executed, with your approval, which you have previously testified, were you

satisfied as president of United Public Utilities Corporation, and director thereof, which company owned all of the stock of Dakota Public Service Company, and also as a director of Dakota Public Service Company, of the fairness and justness of that term, and whether the same was proper and in the best interests of Dakota Public Service Company? A. Yes, I was.

Q. Now, is this agreement the one which was negotiated pursuant to the authorization of the U. P. U. Corporation directors at the meeting of April 30, 1941? A. Yes.

Q. Did you so negotiate the contract and put it into final execution, pursuant to that authority? A. Yes.

Q. Now, I direct your attention to page 6 of the same contract, specifically to Article V, Section 1, which provides that the company have a deficiency in required reserve capacity, as defined in the agreement, shall pay the other company having a company excess reserve capacity as defined, a charge of $13.20 per year per kilowatt of such deficiency, one-twelfth of such charge to be due and payable at the end of each calendar month during the term of the contract. At the time of the execution of this contract and the approval of such execution by you, did you, as president of the United Public Utilities Corporation, and director thereof, and also as a director of Dakota Public Service Company, consider this charge of $13.20 per year per kilowatt of deficiency fair, just, reasonable and proper insofar as the Dakota Public Service Company was concerned? A. Yes, I did.

Q. You did consider it to be fair, just, proper and reasonable? A. Yes.

Q. Insofar as Dakota Public Service Company was concerned? A. That's right.

Q. Now, referring to Section 2 of the same Article V, on the same page, where it is provided that "All energy delivered under this agreement shall be billed and paid for at the rate of five-tenths cents per kilowatt hour." Also: "In addition to the energy charge, billing for emergency power may by agreement be surcharged with the additional expense incurred by the delivering part in placing in operation and operating high cost plants for the sole purpose of supplying such emergency power."

Also in the same paragraph it is recited that it is the intent that the delivering company shall not make a profit

on any such emergency power, but will be reimbursed for its additional expense.

It is further recited that it is understood that fuel prices and generating effieiencies may change and may require an adjustment in the energy rate contained in this section.

It is further recited in the same section 2 that in January, 1942, and every year thereafter, the parties should review production costs and if necessary redetermine the energy rate to be charged. Any such revision would be effected by supplement.

Now, Mr. White, this contract was executed on behalf of Dakota Public Service Company, with your approval, and you have previously testified. Were you as president of United Public Utilities Corporation, and as director of that company, and also as a director of Dakota Public Service Company, satisfied that the energy interchange rate of .5 of a cent per kilowatt hour, and the other provisions with respect to rates and charges contained in said Section 2, which I have just recited, were you satisfied that all such rates and charges were just, reasonable, proper and fair insofar as Dakota Public Service Company was concerned? A. I was so satisfied.

Q. Now, directing your attention to Section 3 of the same Article V, again appearing on page 6 of the contract, it is provided there that as Dakota's share of the fixed charges, maintenance and operating expenses incurred by Northwestern in its ownership and operation of the interconnection facilities enumerated in a previous part of the contract, Dakota agrees to pay Northwestern $1,666.66 each month beginning January 1, 1936, and continuing through the payment due June 1, 1950, and additionally $1,348.82 on July 1, 1950, and additionally, commencing August 1, 1950, and continuing monthly thereafter $442.53, providing said transmission line charges are over and above all other charges provided in the contract.

It is also specifically provided therein that Dakota should have no obligation to pay to Northwestern any part of the construction cost of the interconnection facilities enumerated in the contract, or for the use thereof for any period prior to January 1, 1936.

At the time this contract was executed by Dakota Public Service Company, with your approval, as you have previously testified, were you, as president of United Public

Utilities Corporation and as director of that company, and as a director of Dakota Public Service Company, satisfied that the charges provided for in said Section 3 and the provisions thereof, relating to such charges, were fair, reasonable, just and proper, insofar as Dakota Public Service Company was concerned? A. I was so satisfied.

Q. You testified as to your participation rather extensively in the preparation of the various rates and charges embodied in this contract, and specifically with reference to the changes therein from the contracts theretofore in effect. You have also [testify] as to your satisfaction with the continuation of the 5 mill energy interchange rate, the new provisions with reference to transmission line charges, and the continuation of the $13.20 per kilowatt per year of intercapacity charge.

Now, I will ask you, Mr. White, whether your participation and decisions in connection with the matters and things contained in this contract, and specifically with reference to the rates and charges I have just enumerated, were arrived at as a result of your own independent judgment and thinking and free from interference or domination by Northwestern Public Service Company or persons acting for and in its behalf? A. It was.

Q. It was reached as the result of free and independent judgment on your part, and without any [comination] or control by others, specifically on the part of Northwestern or persons acting for and on its behalf? A. That's correct.

Q. Mr. White, as a part of Exhibit F to the complaint there is included another document entitled "Supplemental Agreement" and recites execution of March 13, 1943, between Northwestern Public Service Company and Dakota Public Service Company, and is a part of Exhibit F to the complaint, and comprises the last two pages of that exhibit. Are you familiar with that contract?

A. Yes.

Q. Do you recall how the question of entering into that amendment originated?

A. The question arose when Mr. Sanborn wrote me under date of November 8, 1942, suggesting that the ten year term of the July 1, 1941 contract, which had been agreed on on the basis—

Q. But it did arise through Mr. Sanborn writing you a letter? A. That's correct.

Defendant's Exhibit 258, which is also referred to as Defendant's Exhibit 53 in White's deposition, was received for the purpose of showing the communication to White of the matters contained therein and the correspondence between White and Sanborn. It reads as follows:

Defendant's Exhibit 258.

Dakota Public Service Company,
General Offices,
Huron, South Dakota.

November 18, 1942.

Mr. S. W. White, President,
United Public Utilities Corp.,
20 North Wacker Drive,
Chicago, Ill.

Subject: Interchange Energy and Capacity Contract.

Dear Sam:

In looking over the above contract, you will remember you spoke of it when I met you in Chicago, I find the following to be the case. The contract as written, page 3, article 2, section 1 is effective without recourse from July 1, 1941, for ten years and thereafter subject to eighteen months notice. The contract is a successor and assigns contract.

All of those who are familiar with the drafting of this contract and the reasons the prior contract was inadequate to meet the conditions as they existed in the summer of 1941 will remember that the prime consideration was the protection required at that time by the Northwestern Company for the large investment proposed in additional generating capacity at its Aberdeen plant for the uses of the total system.

Inasmuch as the exigencies of the present emergency have prohibited most of this investment it would seem that each company might desire to be protected against the length of term of the contract until it again becomes possible to make this investment. It is suggested that this might be done by executing a rider or an amendment to

the contract reciting the changes in conditions making this necessary. I would like to call your attention to the fact that in this rider section 3, article 5, page 6, transmission line charges would also have to be taken care of in case of short term cancellation.

If you think it desirable may I suggest that you talk this matter over with Mr. Kruesi as representing the interests of the Northwestern Company in the formulation of this contract?

Yours sincerely,

B. A. B. SANBORN.

Defendant's Exhibit 259, which is also referred to as Defendant's Exhibit 54 in White's deposition, was received in evidence for the purpose of showing the correspondence between White and Sanborn. It reads as follows:

Defendant's Exhibit 259.

December 8, 1942.

Via Air Mail.

Mr. A. B. Sanborn, President,
Dakota Public Service Co.,
Huron, South Dakota.

Dear Beck:

Mr. Peale and I had a conference this morning with Messrs. Kruesi and Purchas, and discussed the terms of the Capacity and Energy Interchange Contract between Dakota Public Service Co. and Northwestern Public Service Co.

I pointed out that the sole reason for incorporation of a 10-year term in the existing contract was to afford reasonable protection to the large additional investment which Northwestern Public Service Co. proposed to make, during 1941, for a 7500 K. W. addition to the generating capacity at Aberdeen. Messrs. Kruesi and Purchas agreed that the facts were as per my representation, and that

since Northwestern has been forced to abandon the proposed addition to Aberdeen generating capacity, it is desirable, for both Northwestern and Dakota, to amend the existing contract by making it cancellable at any time, by either party, on eighteen months written notice.

It was also agreed between us that inasmuch as the terms of the first paragraph of Section 3 of Article V of the Interchange Contract were evolved in connection with a 10-year term for this inter-company agreement, any amendment to the contract, whereunder the term might be shortened, should contain an equitable provision obligating Dakota (upon cancellation of the contract by Dakota) to pay to Northwestern any balance of one-half of Northwestern's investment in the interconnection facilities that, at such date of cancellation, may remain unamortized through payments made by Dakota under Section 3 of Article V prior to the effective date of such cancellation.

You will note that the agreement reached at our meeting here today concurs in every respect with the views expressed in your letter to me under date of November 18th.

Will you prepare a draft of a rider or amendment to the contract designed to give effect to the above.

Very truly yours,

.....

President.

Copies for:
Messrs. F. E. Kruesi,
R. W. T. Purchas.

(Read from deposition:)

Q. I note that in Defendant's Exhibit 54 for identification you requested Mr. Sanborn to prepare a draft of the rider or amendment to the 1941 contract designed to effectuate the matters and things therein set forth in your said letter. Did Mr. Sanborn prepare any such draft?

A. Yes.

Q. And did he [sent] it to you? A. Yes.

Defendant's Exhibit 260, which is also referred to as Defendant's Exhibit 55 in White's deposition, was received in evidence for the purpose of showing the communication between Sanborn and White and the information furnished to White. It reads as follows:

Defendant's Exhibit 260.

Dakota Public Service Company
General Offices
Huron, South Dakota

December 11, 1942

Mr. S. W. White, President
United Public Utilities Corporation
20 North Wacker Drive
Chicago, Ill.

Interchange Capacity and Energy Contract.

Dear Sam:

In regard to your letter of December 8, we immediately drew up roughly what we thought would take care of the situation and submitted the draft to Karl Goldsmith. This, he has returned this morning with his suggestions and we are now submitting to you herewith for your consideration, our suggested Amendment.

You will note that we have made the cancellation option an either party option. This seems to me to keep the whole agreement on a bilateral plane which is very much to be desired. You will recognize that in case of cancellation, while by all agreements the line remains the property of Northwestern, each party loses its share of useful investment in the line and Northwestern also foots the full cost of dismantling the interconnection facilities.

For your information the principal sum as set up in the contract is now reduced to approximately $93,000.00. I can't help but expressing the hope that conditions will not make necessary the use of this cancellation privilege.

If, on the other hand, either party does avail themselves of this privilege it seems to me that under the contract and this Amendment each party will be as well protected as it is possible to make them.

Yours sincerely,

A. B. SANBORN

B.
Encl.

(Read from deposition:)

Q. I will show you a document that has been previously marked for identification as Defendant's Exhibit 38 for identification, and ask you to examine the same and tell me whether or not that is the draft which you received from Mr. Sanborn with his letter of December 11, 1942?

A. It is.

Q. You recognize it to be such? A. Yes.

Q. Upon receipt of that draft from Mr. Sanborn, what did you do in regard thereto, if anything?

A. I attempted to revise it by myself.

Q. That is, you made attempts, acting personally, to make revisions of the draft which you received?

A. Yes. To put it in condition with which I would be satisfied.

Q. Were you successful in your endeavor?

A. No, I was not.

Q. And what did you do then, if anything?

A. I wrote my counsel, Mr. Scheetz, to help me out.

Q. Do you remember when?

A. Under date of December 29, 1942.

Defendant's Exhibit 261, which is also referred to as Defendant's Exhibit 37 in White's deposition, was received in evidence for the purpose of showing the communication between White and Scheetz. It reads as follows:

Defendant's Exhibit 261.

United Public Utilities Corporation
902 Market Street, Wilmington, Delaware

Chicago Office
20 North Wacker Drive.

Chicago, December 29, 1942.

Mr. Francis H. Scheetz,
Evans, Bayard & Frick,
1335 Land Title Bldg.,
Philadelphia, Pa.

Dear Francis:

In addition to the agreement for allocation of expenses of the Joint General Office at Huron, Dakota Public Service Co. and Northwestern Public Service Company operated as a single system for several years prior to July 1941 under two contracts:

1. A contract under which Dakota paid Northwestern an annual rental charge of $20,000 on the interconnection facilities built, owned and maintained by Northwestern. In the event of cancellation on one year's notice, Dakota was committed to pay one-half the cost of the inter-connection facilities, plus one-half the cost of removing and storing them.

2. A contract for interchange of generating capacity and energy under which the company having the smaller percentage of reserve capacity paid to the other company a capacity charge of $1.10 a month per kilowatt for the latter's excess reserve capacity.

When, in the Spring of 1941, it was agreed between Dakota and Northwestern that Northwestern should spend $750,000 for additional generating capacity at Aberdeen, the two above-mentioned contracts were replaced by a single new contract as of July 1, 1941, for a minimum period of ten years and thereafter cancellable on eighteen months notice. The sole reason for the ten-year term was to afford adequate protection to the large investment

which N[redacted] the benefit of

[redacted] contracts for the Aberdeen addition, [redacted] found that on account of the War situation, delivery of the equipment could not be obtained, and the planned addition has been abandoned for the time being.

It has, therefore, been mutually agreed between Northwestern, Dakota, Middle West and myself, that, in view of the underlying spirit of the agreement of 1941, the present agreement should be amended to make it cancellable, at any time, by either party on eighteen months notice.

It so happens, however, that in incorporating into the July 1941 agreement a modification of the old agreement for rental of the interconnection facilities (agreement numbered 1 above) Section 3, Article V of the New Agreement was so worded that a complete cancellation, prior to July 1950, would work unjustifiable hardship on Northwestern.

In formulating the terms of the original 1936 Agreement on interconnection facilities for which Northwestern had spent an estimated $325,000, it was agreed that on one-half that amount Dakota should pay annual rental at the rate of 12½% gross to cover operation, depreciation, maintenance, taxes, insurance and investment return. This understanding resolved itself into a flat annual rental of $20,000.

In drawing the 1941 agreement, the understanding was modified to the extent of recognizing that the $20,000 annual payments would, in due course, completely extinguish Dakota's one-half of the investment and that, thereafter, Dakota should be obligated to pay only 50% of the operating, maintenance, and taxes. An exact computation was made of Northwestern's investment in the joint interconnection facilities and it was agreed that Dakota's payments of $1,666 a month should apply, first, to ½ the cost of operation, maintenance, taxes, and insurance; and, second, to the payment of 5% interest on (the unamortized portion of) one-half of Northwestern's investment; and, third, the unused balance of such monthly payments was to be applied to the amortization of the

principal of (Dakota's one-half of) the investment. On that basis, Dakota's monthly payments, which began January 1, 1936, will have amortized one-half the entire investment by June 1, 1950 except for a small balance of nine hundred odd dollars, and, thereafter, Dakota is obligated to pay only one-half the estimated cost of operating and maintaining the facilities. Because of such complete amortization, no provision was made for sharing the expense of removing and storing the materials inasmuch as they would be Northwestern's property even though Dakota would have paid one-half the cost.

In amending the present contract to make it cancellable at any time on eighteen months notice, we would like to word the amendment so that Northwestern will be fairly treated with respect to any unamortized balance of Dakota's responsibility for one-half of Northwestern's investment in the interconnection facilities.

The enclosed draft, prepared in Huron, appears to me rather inadequate not only because of its clumsy wording but, particularly, in paragraph (2) which refers to amortization of principal since January 1, 1936. Such amortization is not mentioned in Section 3, Article V of the Contract, although it is the basis of the calculation of the terms stipulated in that section.

Would you care to draft a form of amendment of the capacity and energy interchange contract?

Very truly yours,

SAMUEL W. WHITE.
President.

Encl.

Defendant's Exhibit 262, which is also referred to as Defendant's Exhibit 38 in White's deposition, was received in evidence for the purpose of showing the information made available to White and the communication thereof by White to Scheetz. It consists of a copy of the draft of "Modification of Capacity and Energy Interchange Contract" between defendant and Dakota Public Service Company.

Q. I show you a document previously marked for identification as Defendant's Exhibit 37, and I will [as] you whether or not that is the letter to Mr. Scheetz, to which you just referred? A. Yes.

Q. That is your signature on page 3, Mr. White?

A. This is the original of that letter, bearing my signature.

Q. That is your signature? A. That is my signature.

Q. Referring once more to the document previously marked for identification as Defendant's Exhibit 38, is that the draft that you forwarded to Mr. Scheetz with your letter of December 29, 1942?

A. I sent him a copy of that draft of an agreement. I cannot say positively that that is the copy.

Q. Well, I note that in your letter to him you said, "The enclosed draft, prepared in Huron"? A. That's correct.

Q. You have testified that this is the draft which you received from Mr. Sanborn?

A. Yes, but I had more than one copy of that draft.

Q. Well, would it fair to say this is a copy of the draft that you received from Huron, from Mr. Sanborn?

A. That's correct.

Q. It might be the original, but it might be a copy?

A. That's right.

(Read from deposition)

Q. You have said you sent the contract over to Mr. Scheetz and dumped it in his lap. Did you receive any reply from him with reference to the contract? A. Yes.

Q. Do you recall the approximate date?

A. Under date of January 11, 1943.

Defendant's Exhibit 263, which is also referred to as Defendant's Exhibit 56 in White's deposition, was received in evidence to show the correspondence between Scheetz and White. It reads as follows:

Defendant's Exhibit 263.

Law Offices of
Evans, Bayard & Frick
1335-43 Land Title Building
Philadelphia

January 11, 1943.

Dakota Interchange Agreement

Dear Sam:

Enclosed is a draft of Supplemental Agreement designed to cover the point made in your letter of December 29,

1942. There are two possible approaches to the question, and the equitable answer depends on the basis for the computation of the monthly payments of $1666. provided for in Article V, Section 3.

In your letter you state that these monthly payments were designed to apply first to one-half the cost of operation, maintenance, taxes and insurance, second to the payment of 5% interest on the unamortized portion of one-half of Northwestern's investment, and third to the amortization of one-half the investment. Apparently it has been assumed that the cost of operation, maintenance, taxes and insurance will be constant throughout the period of amortization, and one could take the position that whatever the future experience may be as to these costs, at any rate the one-half of the unamortized balance of the investment will be deemed to have been amortized at the end of the period.

The draft submitted by the Company opens the door to an argument in this respect. Clause (2) states that on termination there shall become due Northwestern the sum of $151,724.63 less such payments as may have been made under the contract and prior contracts since January, 1936, on the principal cost of the inter-connection facilities. If the priorities stated in your letter are correct then an increase in cost of operation would decrease the amount paid toward amortization. If this is the intent, all well and good, but otherwise I think the formula for determining the amount paid toward amortization should be specific.

Paragraph 3 of the enclosed draft amending Article V, Section 3, follows the pattern of the Company draft, but, obviously from the foregoing discussion I do not consider it adequate. My first thought was to pro rate the amortization in the ratio of the number of months between January 1, 1936, and the date of termination to the total number of months from January 1, 1936, to July 1, 1950, plus the payment to be made on July 1, 1950, but I have not made this approach because I did not know whether it reflected the equity and because obviously there is an algebraic formula underlying the present arrangement.

In Article I, Section 14, there is a definition of the term of the agreement which is eliminated by the enclosed draft

because it is now inappropriate and also because any references to the term of the agreement are now self evident. You will note that the enclosed draft makes the agreement terminable only at the end of a calendar month. I thought this would avoid a lot of arithmetic, but I am not sure about this in the light of Article I, Section 4, which states that meter readings are to be taken as nearly as practicable on the 25th day of each month; Article I, Section 7, which provides that the maximum demand shall be determined with respect to the calendar year; Article V, Section 1, which pro rates certain payments every calendar month; and Article IX, which provides for the rendition of bills on the 5th day of the calendar month and refers to monthly bills, meaning the billings based on meter readings taken on the 25th day.

Very truly yours,

FRANCIS SCHEETZ

FHS:HM

Enclosures

Mr. S. W. White, President,
United Public Utilities Corporation,
20 North Wacker Drive,
Chicago, Illinois.

Defendant's Exhibit 264, which is also referred to as Defendant's Exhibit 57 in White's deposition, was produced and identified by White. It was received in evidence for the purpose of showing the work done by United Public Utilities Corporation officers in the preparation of the 1943 amendment to the 1941 Agreement. It reads as follows:

Draft
FEB 1/11/43

SUPPLEMENTAL AGREEMENT made January , 1943, between NORTHWESTERN PUBLIC SERVICE COMPANY (Northwestern) and DAKOTA PUBLIC SERVICE COMPANY (Dakota).

There exists between the parties an Agreement, dated July 1, 1941, (herein called Basic Agreement) relating to interchange capacity and energy, which Agreement supersedes two prior agreements known as Inter-Change Contract and Inter-Change Capacity Agreement, both dated July 1, 1939. Northwestern owns certain inter connection facilities which are described in the Basic Agreement and at January 1, 1936, ~~the unamortized balance of~~ Northwestern's investment in these inter connection facilities was $303,449.26. The Basic Agreement is for a minimum term of ten years and thereafter until terminated by either party on 18 months prior written notice and provides that Dakota shall pay Northwestern the sum of $1666.66 per month for the period January 1, 1936, to June 30, 1960, inclusive, the sum of $1,348.82 on July 1, 1950, and beginning August 1, 1950, the sum of $442.53 per month. The foregoing payments made and to be made by Dakota represent the agreed amount required fully to amortize by July 1, 1950, a one-half share or $151,724.63 of ~~the~~ aforesaid ~~unamortized balance of~~ Northwestern's investment with interest at 5% per annum on the unamortized portion of the one-half share and also the amount to be contributed by Dakota to the cost of operation, maintenance and other charges applicable to the inter connection facilities. Whereas the two prior agreements were for indefinite terms subject to termination on specified notice, the Basic Agreement provided a minimum term in order to afford Northwestern a measure of protection with respect to proposed installation of additional generating capacity at its Aberdeen Plant, a project which Northwestern has

Defendant's Exhibit 264.

been compelled to abandon because of war conditions. Inasmuch as the underlying consideration for the minimum term no longer exists, the purpose of this Supplemental Agreement is to eliminate the minimum term and otherwise protect Northwestern with respect to ~~the~~ any unamortized ~~one-half~~ one half of balance of its investment in the interconnection facilities.

Accordingly the parties mutually agree as follows:

1. Article I, Section 14, is hereby eliminated.

2. Article II, Section 1 of the Basic Agreement is hereby amended to read as follows:

"This Agreement will become effective on July 1, 1941, and shall continue thereafter unless and until terminated by written notice by registered mail from either party to the other party terminating the agreement. The Agreement may be terminated only at the end of a calendar month and the written notice shall precede the termination date by not less than 18 months".

3. Article V, Section 3, of the Basic Agreement is hereby amended by the addition of the following paragraph:

"In event of the termination of this Agreement by either party pursuant to Article II, Section 1, hereof, then the obligation of Dakota to make further monthly payments under this Section 3 shall cease, but Dakota shall pay Northwestern at the termination date the unamortized ~~one-half~~ one half balance of Northwestern's investment in the inter connection facilities, that is the sum of $151,724.63 less such payments as may have been made

on account thereof under this Section 3 and under prior agreements described in Article X below.".

4. Subject to the amendments herein prescribed the Basic Agreement shall continue in full force and effect as therein provided.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by their duly authorized officers and impressed with their respective corporate seals this day of 1943.

NORTHWESTERN PUBLIC SERVICE COMPANY

By_____
President

Attest_____
Secretary

DAKOTA PUBLIC SERVICE COMPANY

By_____
President

Attest_____
Assistant Secretary



Q. I will ask you whether or not that is the draft which you received from Mr. Scheetz with his letter of January 11, 1943? A. Yes.

Q. Will you please look at the document and tell me whether or not it is in the same condition as when you received it, excluding the reporter's symbols and the perforation holes at the top? A. No.

Q. What are the changes therein, or differences?

A. I have edited it and marked changes in pencil delineations.

Q. Are all of these pencil interlineation and delineations on the first page, and I notice some here on the second page, none on the third, are all of those in your handwriting? A. Yes.

Q. And you made them on this document? A. Yes.

Q. Personally? A. Yes.

Q. After receipt of it from Mr. Scheetz?

A. That's right.

Q. Did you make any reply to Mr. Scheetz' letter of January 11, 1943? A. I did.

Q. Do you recall the date? A. No.

Q. To refresh your recollection I will show you what defendant previously marked for identification Defendant's Exhibit 39, and ask you whether or not that refreshes your recollection? A. It does.

Q. Referring to the document, is that your signature, Mr. White? A. Yes.

Q. And you sent this to Mr. Scheetz on or about January 14, 1943, or caused the letter to be mailed to him?

A. Yes.

Defendant's Exhibit 265, which is also referred to as Defendant's Exhibit 39 in White's deposition, was received in evidence for the purpose of showing the correspondence between White and Scheetz and their work in connection with formulating the 1943 amendment. It reads as follows:

Defendant's Exhibit 265.

United Public Utilities Corporation,
902 Market Street, Wilmington, Delaware.

Chicago Office:
20 North Wacker Drive.

Chicago.
January 16, 1943.

Mr. F. H. Scheetz,
Evans, Bayard & Frick,
1335 Land Title Bldg.,
Philadelphia, Pa.

Dear Francis:

Thanks for your letter of January 11th, with draft of Amendment to the Capacity and Energy Interchange Contract between Dakota and Northwestern.

In my original letter requesting this draft, I failed to mention in that connection that the general understanding between the companies that Northwestern shall own, and pay all costs of operating, the interconnection facilities. Dakota is to pay a flat monthly charge at the rate of 3½% per annum on $151,724.63 (one-half of Northwestern's investment). This computes out at $442.53 a month.

It seems to me that your draft fills the bill admirably, so I have sent it to Mr. Sanborn for his review and suggestions. I have noted a few possible changes of which the only one worth mentioning is the re-wording of the fourth sentence on Page 1, as follows:

> The foregoing payments made and to be made by Dakota represent the agreed amount required to fully amortize by July 1, 1950, a one-half share or $151,724.63 of the aforesaid Northwestern's investment

with interest in the interim at 5% per annum on the unamortized portions of the one-half share and also the monthly amount of $442.53 to be contributed by Dakota to the cost of operation, maintenance, taxes, insurance, and all other charges applicable to the inter-connection facilities.

I will consult you on any further changes that may be suggested by Dakota.

Very truly yours,

SAMUEL W. WHITE,
President.

Q. Did you write to Mr. Sanborn? A. Yes.
Q. Did you write to Mr. Sanborn in connection with the draft which you received from Mr. Scheetz? A. Yes.

Defendant's Exhibit 266, which is also referred to as Defendant's Exhibit 58 in White's deposition, was received in evidence for the purpose of showing the correspondence between White and Sanborn in regard to the 1943 amendment. It reads as follows:

Defendant's Exhibit 266.

January 16, 1943

Mr. A. B. Sanborn, President,
Dakota Public Service Co.,
Huron, South Dakota.

Dear Beck:

In conformity with the suggestion in my letter to you under date of December 8, 1942, you sent me recently a draft of a proposed Amendment to the Capacity and Energy Interchange Contract, dated July 1, 1941, between Northwestern Public Service Company and Dakota Public Service Company. While your draft of that amendment

reflected fully the spirit of our verbal understanding in the matter, I felt that it was inadequate in its wording, particularly, because it failed to indicate a formula on which the charges mentioned in Article V, Section 3 of the July 1, 1941 Agreement had been computed. I did not have much success in my own attempts to revamp your draft of an amendment, so I asked Mr. Scheetz to tackle the job on the basis of my representation of that formula.

The result of Mr. Scheetz's first effort is hereto attached. If you find that in general this form of amendment to the agreement will serve more adequately as a clear outline of procedure in event of cancellation of the Agreement prior to July 1, 1950, then please make any and all suggestions that occur to you for the improvement of this draft and, particularly, examine the accuracy of all dollar amounts mentioned in the amendment.

When you return a revised draft including your suggestions for further changes, I will refer it to Mr. Scheetz so that he can check it over finally and to Mr. Kruesi and Mr. Ralph Stevenson, so that they can also formulate a positive opinion as to the fairness, adequacy and acceptability of the Amendment.

Very truly yours,

.....

President.

Encl.

(Read from deposition)

Q. Did you send to Mr. Sanborn a copy of Mr. Scheetz' draft with that letter? A. I sent the original.

Q. You sent the original, which had been received by you from Mr. Scheetz? A. Yes.

Q. Did you receive any reply from Mr. Sanborn to your letter of January 16? A. As I recall, I did.

Defendant's Exhibit 267, which is also referred to as Defendant's Exhibit 59 in White's deposition, was received in evidence for the purpose of showing White's participation in the formulation and development of the 1943 amendment. It reads as follows:

Defendant's Exhibit 267.

Dakota Public Service Company
General Offices
Huron, South Dakota

January 18, 1943.

Mr. S. W. White, President,
United Public Utilities Corp.,
20 North Wacker Drive,
Chicago, Ill.

Subject: Amendment—Capacity and Energy Contract.

Dear Sam:

In reply to your letter of January 16, Sandy and I have gone over Scheetz' draft of the Amendment and to the best of our knowledge it covers the situation well.

Inasmuch as this carries Mr. Scheetz' trademark which we all have confidence in, we don't see the necessity of sending it out to Karl for his O. K. There is only one thing that occurs to me in all of this, and that is, that after the passing of the present emergency Northwestern will undoubtedly proceed with its Aberdeen extension after consultation with you and will then not be protected by a reasonable term agreement. On the other hand, the necessity of the moment seems to be to meet first things first, and it is difficult to figure out how we can take care of adequately in one agreement the two contingencies we are thinking about.

I have the feeling however, that as far as possible we should get away from bombarding F. P. C. with amend-

ments to this agreement although I realize that this amendment has to be filed with them.

Yours sincerely,

A. B. SANBORN.

B.

(Read from deposition)

Q. On or about January 25, 1943, did you send a copy of the draft received by you from Mr. Scheetz to Mr. F. E. Kruesi? A. Yes.

Defendant's Exhibit 268, which is also referred to as Defendant's Exhibit 60 in White's deposition, was received in evidence for the purpose of showing the communication, knowledge and exchange of ideas between White and Kruesi in connection with the formulation of the 1943 amendment. It reads as follows:

Defendant's Exhibit 268.

January 25, 1943.

Mr. F. E. Kruesi,
Middle West Service Company,
20 N. Wacker Drive,
Chicago, Illinois.

Dear Frank:

Enclosed find draft of a proposed amendment to the Capacity and Energy Interchange Agreement, dated July 1, 1941, between Northwestern Public Service Company and Dakota Public Service Company.

I believe there is complete agreement between you and me and the operating management of these two companies, as to the fairness of an amendment to the term of that 1941 contract; and I am willing to admit, without argument, that at or before the termination of that contract, Northwestern is entitled to receive from Dakota payments sufficient to amortize one-half Northwestern's investment in

the interconnection facilities, plus interest and operating expenses from January 1, 1936 to date of termination.

The only point remaining for discussion, therefore, is as to whether the enclosed draft of an amendment is in proper form to reflect adequately the existing verbal agreement. I have submitted it to Mr. Sanborn and he considers it satisfactory, but I would like to have you look it over and have it checked by your Legal Department, with a view to incorporating any changes which you may consider necessary or desirable before the two operating companies adopt it as an Amendment.

Very truly yours,

.....

President.

Encl.

Copy to
Mr. A. B. Sanborn, Pres.,
Dakota Public Service Co.,
Huron, So. Dakota.

Q. You say, Mr. White, that you did enclose a copy of the draft received from Mr. Scheetz with your letter to Mr. Kruesi? A. Yes.

Q. Do you recall whether or not you endorsed thereon the same corrections in your handwriting as appear on the copy of the draft, the same date, which is marked Defendant's Exhibit 57 for identification? A. Yes, I did.

Q. Mr. White, you have identified a letter to you from Mr. Sanborn, dated January 18, 1943, marked Defendant's Exhibit 59 for identification. Did you make any reply to that letter? A. Yes.

Defendant's Exhibit 269, which is also referred to as Defendant's Exhibit 61 in White's deposition, was received in evidence for the purpose of showing the work done by White and Sanborn in the formulation of the 1943 amendment. It reads as follows:

Defendant's Exhibit 269.

January 25, 1943.

Mr. A. B. Sanborn, President,
Dakota Public Service Co.,
Huron, South Dakota.

Re.: Capacity & Energy Interchange Agreement.

Dear Beck:

I don't believe we ought to worry right now about possible future changes in that inter-company contract. As you say, our first job is to adjust the contract to the revised conditions arising out of Northwestern's inability to build a planned addition at Aberdeen.

Under the conditions and prospects prevailing in the Spring of 1941, the present contract was soundly and equitably conceived, and I have no reason to suppose that a future reversion to such a building program under comparable conditions and with similar outlook, would not afford the basis for restoring a definit and longer term in that July 1, 1941 contract.

It is, of course, unfortunate that we have to report these formal adjustments to F. P. C. but that is the order of the day, and in view of the fundamental soundness of the intercompany position which we are maintaining, I anticipate that the filing with F. P. C. of this Amendment, and other possible future amendments, will produce no major difficulties, but may irritate us.

Very truly yours,

.....

President.

(Read from deposition:)

Q. Did you at any time, Mr. White, take up the question of the proposed 1943 amendment to the 1941 contract, with the directors of United Public Utilities Corporation?

A. Yes.

Q. Do you recall approximately when that occurred? Was it at the meeting held,—excuse me. Go ahead.

A. Held at the meeting of February 3, 1943.

Mr. Stafford: Now, pursuant to stipulation heretofore made concerning offering into evidence portions of minutes of the United Public [Utilties] Corporation directors meetings, I am reading commencing on page 4 and going over to page 5 of the minutes of a regular meeting of that board of directors, held in Philadelphia on February 3, 1943, as follows:

> "The president read and explained to the directors a proposed supplemental agreement amending the capacity and energy interchange contract between Dakota Public Service Company and Northwestern Public Service Company, dated July 1, 1941, which had been previously approved by the Board of Directors on behalf of the corporation as the owner of all the capital stock of Dakota Public Service Company. The president explained that the present agreement was predicated on the proposed installation by Northwestern Public Service Company of additional generating capacity at its Aberdeen plant, and that it has been necessary to abandon the proposed installation because of war conditions and that, therefore, he was of the opinion that it was preferable to amend the agreement so that it could be terminated at any time on 18 months notice. He stated that both the officers of Northwestern Public Service Company and Middle West Corporation (which has a controlling interest in Northwestern Public Service Company) have indicated that they regarded this proposal as fair under the circumstances, and that he believed that such an amendment could be obtained.
>
> "After discussion, and on motion duly made and seconded, the following resolution was adopted by the

affirmative vote of Messrs. Nichols, Lakin, Zech and White, with Mr. Barroll opposed:

"Resolved, That the Board of Directors, acting on behalf of United Public Utilities Corporation as the owner of all the outstanding capital stock of Dakota Public Service Company hereby approve the proposal for the amendment of the capacity and energy interchange contract between Dakota Public Service Company and Northwestern Public Service Company, dated July 1, 1941, substantially in the form set forth in a draft of Supplemental Agreement as submitted and read to the meeting, and that the president of this corporation is authorized to recommend the consummation of the supplemental agreement to the Board of Directors of Dakota Public Service Company."

The foregoing portions of minutes were received in evidence.

Q. Mr. White, you were present at the meeting of the directors, regular meeting of the directors of United Public Utilities Corporation on February 3, 1943? A. Yes.

Q. Had you taken up the matter prior to this meeting with either Northwestern Public Service Company [of] Middle West Corporation? A. Yes.

Q. What did you tell your board?

A. I told them that the whole subject had been discussed and reviewed between me and Mr. Kruesi, and that we were agreed as to the fairness and desirability of an amendment along the lines of the form which I read to that meeting.

Q. That Mr. Kruesi said it was agreeable from the Middle West and Northwestern point of view, is that what you told your board?

A. Yes, except that when Mr. Kruesi made that statement he was making it subject to such comments as Mr. Stevenson might make upon review of the draft.

Q. Did the resolution leave the exact form of agreement open? A. Yes.

Q. That I suppose was in line with Mr. Kruesi's desire to [aubmit] it to Mr. Stevenson?

A. In line with the custom of the board in leaving leeway in its resolutions to the president and general counsel of United Public Utilities Corporation.

Q. That was the general custom of the U. P. U. Corporation board? A. Yes.

Q. Do you know whether or not the contract was submitted by Mr. Kruesi to Mr. Stevenson?

A. Yes, I know that it was.

Q. Did Mr. Stevenson suggest any amendment or did he accept the document as submitted to him, if you know?

A. He suggested an amendment.

Q. Was that amendment submitted to you? A. Yes.

Q. What did you do in regard thereto?

A. I referred it to Mr. Scheetz.

Q. Did you receive any expression of opinion from Mr. Scheetz in regard to the suggestions of Mr. Stevenson?

A. Yes.

Q. In what form did he give that expression, orally or in writing? A. In a letter.

Defendant's Exhibit 270, which is also referred to as Defendant's Exhibit 40 in White's deposition, was received in evidence for the purpose of showing the correspondence between Scheetz and White and the consideration given by them in connection with the 1943 amendment. It reads in part as follows:

Defendant's Exhibit 270.

Law Offices of
Evans, Bayard & Frick
1335-43 Land Title Building
Philadelphia

March 5, 1943.

Supplemental Agreement—Dakota Public Service Company and Northwestern Public Service

Dear Sam:

Mr. Stevenson's memorandum to Mr. Krusei, dated February 11, 1943, is certainly very apt, and I accept his amendment with thanks. While it is entirely clear from the preamble of my draft that the interest is to be covered,

my revision of Article V, Section 3, certainly would short-change Northwestern.

Enclosed are five copies of the revised agreement—two of which are counterparts for execution. After they have been executed will you please have the other three copies conformed and return one for our files.

Very truly yours,
FRANCIS SCHEETZ.

FHS:HM

Enclosures

Mr. S. W. White, President,
United Public Utilities Corporation,
20 North Wacker Drive,
Chicago, Illinois.

P. S. Your letter of January 25, 1943, to Mr. Kruesi, and Mr. Stevenson's memorandum of February 11, 1943, are returned herewith.

Defendant's Exhibit 270-A, which is also referred to as Defendant's Exhibit 40-A in White's deposition, was introduced in evidence to show the correspondence between Scheetz and White and the consideration given by them in connection with the 1943 amendment. It reads as follows:

Defendant's Exhibit 270-A

Supplemental Agreement—Dakota Public Service Company
Northwestern Public Service Company
February 11, 1943.

Mr. F. E. Kruesi
Mr. R. D. Stevenson

I return Mr. White's letter of January 25th and draft of supplemental agreement to the existing agreement dated July 1, 1941, between Northwestern Public Service Company and Dakota Public Service Company.

It seems to me that the supplemental agreement is in satisfactory form with possibly the following exceptions:

From the recitals made in the draft of supplemental agreement apparently one-half of Northwestern's investment in the interconnection facilities referred to was $151,724.63 as of January 1, 1936, and the monthly payments provided for in the agreement which is being supplemented amortized this amount *together with interest at five per centum per annum on the unamortized balances of the above amount,* provided those payments were continued to the dates mentioned in the existing agreement, and the monthly payments provided for in the existing [agrement] also covered a monthly payment of $442.53 which is Dakota's contribution to the cost of operation, maintenance, taxes, etc.

If the foregoing be correct, it seems to me that the changes indicated on page 2 of the draft of supplemental agreement should be made if the supplemental agreement is to cover fully and with exactitude the payments that should be made at the termination date of the basic agreement should it be terminated under the provisions of the proposed supplemental agreement. These proposed changes simply provide for the inclusion of interest at 5% of unpaid balances of one-half of Northwestern's investment in calculating the amount to be paid at the termination date; and provide for the payment at that time of any of the $442.53 monthly payments payable before the termination date should any of them be then in default. I assume that this was the intention of the draft as submitted.

RDS/MG RALPH D. STEVENSON.

Q. I will show you a document previously marked for identification as Defendant's Exhibit 40, and ask you whether or not that is the letter to which you have just referred? A. Yes.

Q. Did you receive that letter from Mr. Scheetz on or about the date it bears, to-wit: March 5, 1943? A. Yes.

Q. That is Mr. Scheetz' signature? A. Yes.

Q. I also show you a document previously marked Defendant's Exhibit 40-A for identification and ask you whether or not that is a copy of the memorandum submitted by Mr. Ralph D. Stevenson? A. It is.

Q. In looking at Defendant's Exhibit 40 for identification I note that it is stated that Mr. Scheetz sent to you five copies of the revised agreement, two of which were counterparts, for execution. Did you receive those copies from Mr. Scheetz? A. Yes.

Q. What did you do with them, if anything?

A. I mailed them under cover—to Mr. Sanborn, under cover of a letter dated March 8, 1943, of which I sent a copy to Mr. Kruesi.

Defendant's Exhibit 271, which is also referred to as Defendant's Exhibit 62 in White's deposition, was received in evidence for the purpose of showing the correspondence between White and Sanborn in connection with the 1943 amendment. It reads as follows:

Defendant's Exhibit 271.

March 8, 1943.

Mr. A. B. Sanborn, President,
Dakota Public Service Co.,
Huron, South Dakota.

Dear Beck:

Admittedly, I have procrastinated unduly in putting into final form the draft of the proposed Amendment to the Capacity and Energy Interchange Agreement.

Enclosed, are five copies of the latest agreement—two of which are Counterparts for execution. After these two have been executed by Northwestern Public Service Company and Dakota Public Service Company, will you please have the other three copies conformed, and return one copy to Mr. Kruesi and the other two copies to me.

This final draft of the Amendment represents an improvement over the preliminary draft which you returned to me. The effect of the Amendment has not been changed in any way but, thanks to the suggestions of Mr. Ralph

Stevenson and Mr. Frank Kruesi, the wording of one or two provisions has been slightly changed and these changes have been readily accepted by Mr. Scheetz and by me. You have full assurance, therefore, that this Amendment, in the enclosed form, has been carefully considered here and bears the stamp of approval of United Public Utilities Corporation as well as the approval of Messrs. Kruesi and Stevenson.

Very truly yours,

.....

President.

Copy to:

Mr. F. E. Kruesi, Pres.,
Middle West Service Co.,
Chicago, Illinois.

Defendant's Exhibit 272, which is also referred to as Defendant's Exhibit 63 in White's deposition, was received in evidence for the purpose of showing the activity of White and Sandstedt in connection with the development of the 1943 amendment. It reads as follows:

Defendant's Exhibit 272.

Dakota Public Service Company
General Offices
Huron, South Dakota

March 13, 1943

Mr. S. W. White, President,
United Public Utilities Corporation,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. White:

I am returning herewith two (2) executed copies of the Amendment to the Capacity and Energy Interchange Agreement.

We are furnishing Mr. Kruesi with a copy of this Amendment. It will be necessary that this agreement be

filed with the Federal Power Commission and we will also take care of this.

Yours very truly,

C. L. SANDSTEDT,

Vice President & Treasurer.

CLS/c

Encl.

cc: FE Kruesi

Defendant's Exhibit 273, which is also referred to as Defendant's Exhibit 64 in White's deposition, was received in evidence for the purpose of showing the correspondence and activity between White and Sandstedt in connection with the 1943 amendment. It reads as follows:

Defendant's Exhibit 273.

March 23, 1943

Mr. C. L. Sandstedt, Vice-President,
Dakota Public Service Company,
Huron, South Dakota.

Dear Sandy:

I am returning herewith the two originals of the Amendment to the Capacity and Interchange Agreement executed in counterparts. You will, of course, need these originals in your permanent files—1 for the files of Northwestern Public Service Company and 1 for the files of Dakota Public Service Company.

I note that these originals are not dated but, after this deficiency has been corrected, I will thank you to send me two conformed copies.

I note from your letter of March 13th that you have already sent Mr. Kruesi a conformed copy, and assume that this copy was dated.

Very truly yours,

.....

President.

Enclosures 2.

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panies, while better than in the three years past, are pointing."

. Stafford: I am now reading from the minutes of the lar meeting of the directors of United Public Utilities oration, held in Philadelphia on December 20, 1938, ing from the second page as follows:

The president made the following report of subsidiar- f the Corporation:

b) Dakota Companies. Installation of the new boilers e Bismarck plant has been completed and satisfactory have been made of their efficiency."

. Stafford: I am now reading from the minutes of the lar meeting of the directors of United Public Utili- Corporation held in Chicago, Illinois on June 28th, reading from the bottom of the second page, and con- ng on to the third page as follows:

he president made the following report on subsidiaries e Corporation:

a) Dakota Companies. The merger of Northern Power ght Company into North Dakota Power & Light Com- , as the surviving corporation, under the title of Da- Public Service Company, has been approved by the rities and Exchange Commission, and will become tive at the opening of business July 1, 1939. Studies made show the need for additional generating ca- y and indicate the probability of a recommendation stall a new 4,000 K. W. steam generating unit in the narck plant at an estimated cost, including pipe and additional cooling tower of between $288,000 and 000."

so, from the fourth page of said minutes, as follows:

At this point Messrs. C. E. Lakin, president of the Indiana subsidiaries, A. B. Sanborn, president of the ota Companies, and A. B. Harper, president of the Smith Gas Company, on invitation entered the meet- nd discussed at length the affairs of their respective panies."

(Read from deposition)

Mr. Stafford: Let the record show I am showing the witness Exhibit F to the complaint, being a photostatic copy of the agreement dated July 1, 1941, between Northwestern Public Service Company and Dakota Public Service Company, and also the supplemental agreement thereto, dated March 13, 1943, between the same parties.

Q. Directing your attention first, Mr. White, to Article V, Section 1, page 6 of the 1941 contract, which provides for a charge of $13.20 per year per kilowatt of deficiency in the required reserve capacity, one-twelfth to be paid at the end of each calendar month during the term of the contract, and I will ask you whether or not you as president, and a director, of United Public Utilities Corporation, and as a director of Dakota Public Service Company, at the time of the execution of the 1943 amendment were satisfied that the charge of $13.20 per year per kilowatt of deficiency in the required reserve capacity was fair, reasonable, proper and just insofar as Dakota Public Service Company is concerned? A. I was so satisfied.

Q. Now, I will direct your attention to section 2 of Article V on the same page, which provides for a charge of .5 of a cent per kilowatt hour for all energy delivered under the agreement.

It is further provided that in addition to such charge, billing for emergency power may by agreement be surcharged with the additional expense incurred by the delivering party in putting into operation and operating high cost plants for the sole purpose of supplying such emergency power.

It is further provided that it is the intent that the delivering company will not make a profit on such emergency power, but will be reimbursed for all added expense that it might incur during and on account of the emergency.

It is further provided that it is understood between the parties that fuel prices and generating efficiencies may change and may require an adjustment in the energy rate contained in this section.

It is further provided that in January of 1942, and in each year thereafter, the parties [ot] the contract shall review production costs and if necessary redetermine the

Mr. Stafford: I am now reading from the minutes of a regular meeting of the directors of United Public Utilities Corporation, held in Philadelphia on September 13th, 1939, commencing at the foot of the second page and continuing on the third page, as follows:

"The president reported that the following capital expenditures by subsidiaries had been planned for the near future:

"(a) Dakota Public Service Company. Between $335,000 and $350,000 for a new 4,000 K. W. turbine and 5,000 K. V. A. generator (4,000 K. W. at 80% power factor) including about $70,000 for a new switchboard and electrical work at the Bismarck plant. These installations may require a future temporary advance by the Corporation of approximately $50,000. It is estimated that they will effect a saving of approximately $32,000 per annum on the basis of the interchange of current in 1938 under the interchange agreement with Northwestern Public Service Company and also greatly increase the assurance of continuous service by Dakota Public Service Company to its most important load center."

Mr. Stafford: I will now read from the minutes of the regular meeting of the Directors of United Public Utilities Corporation, held at Philadelphia on January 30, 1940, from the second page thereof, as follows:

"The president made the following report on subsidiaries:

"Dakota Public Service Company. The franchise election whereby this subsidiary was granted a franchise to serve Mobridge, South Dakota, is being contested and a hearing will be held February 12, 1940. The capacity charge payable to Northwestern Public Service Company under the interchange capacity agreement will be at the rate of $20,433.60 until completion of the new unit at the Bismarck station."

The following portion of said minutes was received in evidence for the purpose of showing that White made the report therein contained:

energy rate to be charged. Such revision to be effected by supplement.

Now, I will ask you, Mr. White, whether, at the time the 1943 supplement to this 1941 contract was executed, whether or not you as president of United Public Utilities Corporation and a director of that company and as a director of Dakota Public Service Company, were satisfied that the .5 of a cent per kilowatt hour, and the other provisions contained in Section 2, which I have just read, were fair, reasonable, just and proper insofar as Dakota Public Service Company was concerned? A. I was so satisfied.

Q. Now, I will direct your attention to the provisions in the supplemental agreement, appearing on the second and last page of that agreement, and appearing at the top of that page, being an amendment to Article II, Section 1, of the 1941 agreement, and providing that the agreement as amended should be effective on July 1, 1941, and continue thereafter unless and until terminated by written notice by registered mail from either [part] to the other party terminating the agreement, and such termination to be only at the end of a calendar month, and a written notice of termination to precede the date of termination by not less than 18 months.

I will refer you to Section 3, of Article V appearing on page 6 of the 1941 contract, which provides that Dakota as its share of the fixed charges, maintenance and operating expenses incurred by Northwestern in its ownership and operation of the interconnection facilities enumerated in the contract, Dakota should pay to Northwestern $1,666.66 a month beginning January 1, 1936, and continuing through the payment due June 1, 1950, the further sum of $1,348.82 on July 1, 1950, and thereafter, commencing August 1, 1950, monthly $442.53 which charge is over and above all other charges provided for in the contract.

It further provides that Dakota has no obligation to pay Northwestern for any part of the construction cost of the interconnection facilities enumerated above or for the use of such facilities for any period prior to January 1, 1936.

And I will also direct your attention to the amendment to said Section 3, of Article V, which is contained on the last page of the 1943 supplemental agreement, and which provides that in the event of the termination on 18 months'

Mr. Stafford: I am now reading from the minutes of the regular meeting of the Directors of United Public Utilities Corporation held September 25, 1940, at Philadelphia, commencing with the second page and continuing onto the third page, as follows:

"The president made the following report on subsidiaries:

"Dakota Public Service Company. The 4,000 K. W. addition of the Bismarck plant has been in operation since September 1, 1940. This brings the effective capacity of the company's generating facilities to 13,955 K. W. as compared with a maximum demand of 11,451 K. W., indicating a reserve of 21.86%. Northwestern Public Service Company now has a reserve of 18.69%, and the average of the combined systems' power pool is 20.004%. Beginning September 1, 1940, this company will collect capacity charges at an annual rate of $2811.60. Between January 1 and September 1, 1940, it paid Northwestern Public Service Company capacity charges at an annual rate of $20,433.60.

"The suit involving Mobridge, South Dakota, franchise election will probably be carried to the state Supreme Court and heard this winter.

"Selby, South Dakota, where the company lost a franchise election a year ago by a vote of 96 to 93, granted a 20 year franchise to the company on August 27, 1940, by a vote of 129 to 45.

"Tolstoy, South Dakota, where the company's former franchise was due to expire in 1945, granted a new 20 year franchise on September 3, 1940, by a vote of 68 to 3."

The following portion of said minutes was received in evidence.

Mr. Stafford: I am now reading from the minutes of the regular meeting of the directors of United Public Utilities Corporation, held in Philadelphia, February 7, 1941, reading from the third page of said minutes, as follows:

"Dakota Public Service Company. The president reported that the final cost of the new 4,000 K. W. addition

notice, which was provided for in the previous amendment, the obligation of Dakota to make further monthly payments under Section 3 should cease, but Dakota should pay Northwestern on the termination date (a) the unamortized balance of one half of Northwestern's investment in the interconnection facilities, stated to be $151,724.63, with interest at the rate of 5% per annum from January 1, 1936, to the date of termination on the unamortized balances thereof less such payments as may have been made on account thereof under said Section 3 and under prior agreements described in Article X of the contract, that is, of the 1941 contract, and (b) any monthly payment or payments of $442.53 each due prior to the termination date which had not theretofore been paid.

Now, Mr. White, at the time the supplemental agreement of 1943 was executed with your approval, as you have previously testified, were you as president and a director of United Public Utilities Corporation, and as a director of Dakota Public Service Company, satisfied that the foregoing provisions which I have just referred to, including the amendment provisions and the acceleration payment in the event of termination, were you satisfied that those charges were fair, just, reasonable and proper insofar as Dakota Public Service Company was concerned.

A. I was so satisfied with respect to each—

Q. In order to avoid the objection as to the multiplicity of the question, I will ask you whether in the capacity I have previously described in each of them, you were satisfied that had there not been any termination, the charges prescribed in Article V, Section 3, which I have directed your attention to, were fair, just, reasonable and proper insofar as Dakota Public Service Company was concerned?

A. Yes.

Q. You were satisfied at that time that those charges were fair charges? A. That is correct.

Q. Insofar as Dakota Public Service Company was concerned? A. That is correct.

Q. I will ask you also: Were you satisfied, in each of the capacities I have previously described, that the provisions incorporated in the supplemental agreement, calling for accelerated payment upon termination of the unamortized balance of one half of the investment in the interconnection

to the power plant at Bismarck was $341,979, as compared with the estimated cost of $331,915, the increase having been caused by installation of additional controls which were not originally contemplated.

"Under the capacity interchange agreement with Northwestern Public Service Company, that company will be entitled to collect monthly capacity charges from Dakota Public Service Company at the annual rate of $4,276, beginning January 1, 1941. Before the addition to the Bismarck plant was completed, such charges were running at the annual rate of approximately $22,000."

(Read from deposition.)

Q. Mr. White, yesterday afternoon I read into the record and offered in evidence portions of the minutes of United Public Utilities Corporation directors' meeting at which you rendered reports and as to some of which you testified yourself. I had asked you before that whether or not you had been in the habit of rendering reports to the U. P. U. Corporation on matters other than these particular contracts involved in this lawsuit, to which you replied generally yes. Now, do those instances which I referred to by reference to the minutes yesterday afternoon pretty well cover the situation with reference to the things you reported to your board concerning your Dakota subsidiaries? A. No, by no means.

Q. You mean there were other instances? A. Many.

Q. Well, can you tell us generally what the subject matter of those reports consisted of?

A. [Wy], yes. I regularly listed on my agenda for each directors meeting subjects for discussion or for report at those meetings. I followed my agenda rather closely and I reported on many operating matters in the subsidiaries, including the Dakota subsidiaries, which reports were not actually recorded in the minutes. In addition, I took with me reports of correspondence that I had received from the operating managements of our subsidiaries, including the Dakota subsidiaries, and told the directors about everything that I had time for as to the highlights of those reports or correspondence. But there were so many detail items to be covered in a report of that sort that, as a practical matter, we could not very well include everything that was discussed in the minutes.

Q. Well, the minutes, I believe you testified the minutes were drafted by Mr. Scheetz and then were sent to you for your comments and criticisms before they were prepared in final form. Is that right?

A. Well, partially. The actual procedure in the preparation of the minutes is that at the beginning of a meeting I gave two carbon copies of my typewritten agenda, one to the secretary and one to Mr. Scheetz—

Q. That was before the meeting?

A. Before the meeting or at the beginning of the meeting. The customary procedure was for the secretary to make a rough draft of the happenings of that meeting. He sent me one copy and he sent Mr. Scheetz a copy of such draft. I made any comments that I had with respect to the secretary's draft right on the draft copy—corrections or suggestions, and in many cases deleted things that he reported on as in my opinion not important enough to clutter up the minutes. I sent that correct draft to Mr. Scheetz, who thereupon prepared a draft of the minutes in, generally, the form in which they appear in our minute books. In advance of the next meeting, however, he sent me a copy of his draft of the minutes on which I made corrections or suggestions, and sent them back to him, and where necessary those corrections were made, and it was in that form that they were submitted to the directors at the next meeting for reading and approval or disapproval.

Q. Well, you have mentioned the Dakota subsidiaries. Just so that there won't be any misunderstanding, you mean by them both North Dakota Power & Light Company and Northern Power & Light Company prior to July 1, 1939, and Dakota Public Service Company after July 1, 1939, and Knife River Coal Mining Company at all times, from 1935 to October 19, 1945? A. That is correct.

Q. Well, from your testimony, is it a fair statement then, to say that the minutes reflect the action taken by the directors, where action was taken, and also reflect some of the reports which you made to the various meetings, but that there were also many other reports which you did not—which did not find reflection upon the minutes? A. That is correct.

facilities plus any monthly payments which had not been paid prior to termination, whether or not those charges were fair, reasonable, proper and just insofar as Dakota Public Service Company was concerned?

A. I was so satisfied.

Q. And being so satisfied you did approve and direct the execution of the supplemental agreement on the part of the Dakota Public Service Company? A. That's correct.

Q. Did you approve of the supplemental agreement of 1943 and the execution thereof on the part of Dakota Public Service Company as a result of your own free and independent judgment and thinking, or was that brought about by any influence, improper or otherwise, on the part of Northwestern Public Service Company, its officers, directors, or other acting for it?

A. I did approve of the supplement as the result of my own independent thinking, and I was not subjected to pressure or attempts to influence my judgment, by any other party.

Q. In your previous testimony, Mr. White, you have referred from time to time to reports made by you to the board of directors of United Public Utilities Corporation concerning the contracts which are appended as exhibits to the complaint in this action, I think specifically the 1936 contract and 1938 contract, the contract of 1941 and the 1943 amendment to the 1941 contract. You have also testified with regard to your recollection as to discussions of those matters before the board of directors and certain action taken. Were those the only matters pertaining to the Dakota subsidiaries of United Public Utilities Corporation which you reported to your board of directors?

A. No.

Q. There were others? A. Many.

Q. The answer is many? A. Yes.

Q. Did they extend over the period of the corporate life of United Public Utilities Corporation, that is, commencing in 1935 down to and including October 19, 1945?

A. Yes.

Q. That is, the last date is the date when you transferred the securities of the Dakota subsidiaries from United Public Utilities Corporation?

A. Yes, they extended over that range of time.

Q. Now, Mr. White, you testified about the 1936 contract and that you were familiar with it,—that contract is effective January 1, 1936. Now, directing your attention to the period commencing January 1, 1936, and continuing down to October 19th, 1945, were you familiar with the operations of the Dakota subsidiaries of United Public Utilities Corporation under the various contracts in force during that period, namely, the 1936 contract, the 1938 contract, the two 1939 contracts with Dakota Public Service Company, the 1941 contract, and the amendment to that instrument by the 1943 supplement? A. Yes, I was.

Q. Were you informed as to those operations under those contracts during regular course? A. Yes.

Q. How did you keep yourself informed concerning that subject, or how were you informed as to that subject?

A. A regular system of reports from the Dakota companies to me that gave elaborate operating figures, statistics, with detailed breakdown.

Q. Now, just so that I have a proper understanding of that, were those reports rendered directly to you by operating personnel and officers of the Dakota subsidiaries?

A. The reports were on a standard printed form and came under two headings, one an operating report, another a financial report, and were submitted for each month by the [fifteen] of the calendar month and showed, normally, not only the detail and breakdown, broken down figures for the particular month, but also corresponding figures for the calendar year up to and including that month, and in most instances the comparative figures for the month, the year to date of the previous calendar year.

Q. You testified you received these form reports each month. Did you also receive the studies, correspondence and copies of [correspondent] between Dakota subsidiaries operating personnel and the personnel of Middle West Service Company, which you referred to in your previous answer? A. Yes.

Q. Were these frequent or intermittent or how was that? A. They were frequent.

Q. And you got copies of the correspondence, memoranda, rate studies and other studies which were made either by your operating personnel or by the personnel

Defendant introduced certain portions of minutes of meetings of the directors of United Public Utilities Corporation, which were received in evidence and are as follows:

Mr. Stafford: At this time, pursuant to stipulation previously made between counsel, I will read from the minutes of a special meeting of the directors of United Public Utilities Corporation held in Philadelphia on June 6th, 1935. I am reading from the sixth page of those minutes:

"President White reported at length that of necessity the rebuilding of substantial portions of the transmission system of Northern Power & Light Company had been started, to be completed in the current year at a cost to that company estimated at $149,132, with a cash requirement of about $118,000.

"After discussion of a full report of President White, upon motion duly made and seconded the following resolution was unanimously adopted:

"Resolved, that, inasmuch as the president feels that the time is appropriate for consideration of a consolidation of Northern Power & Light Company and North Dakota Power & Light Company, the president and counsel be instructed to make further study of the question and report to the Board at its next meeting."

Mr. Stafford: I am now reading from the minutes of a special meeting of the board of directors of United Public Utilities Corporation, held in Philadelphia on August 21, 1935, reading from the fourth page of those minutes as follows:

"After discussion, and on motion duly made and seconded, the following resolution was unanimously adopted:

"Resolved, That at the discretion of the president, the treasurer is authorized and directed to advance on open account, with interest at the rate of 6% per annum, as required, to Northern Power & Light Company, funds up to but not exceeding $75,000.00 for the purpose of rebuild-

of Middle West Service Company with reference to subsidiaries?

A. The established policy and standing instructions of Middle West Service Company were that copies of letters sent by Middle West Service Company to United Public Utilities Corporation subsidiaries, including our Dakota subsidiaries, were to be sent to me.

Q. Did you have an opportunity to determine whether or not those instructions were carried out?

A. It was not customary for Middle West Service Company to issue instructions to our subsidiaries. That really was not their function, not the function of Middle West Service Company.

Q. Did these reports and other document you testified as receiving in regular course include accounting data?

A. Yes.

Q. Well, was your familiarity with operations confined solely to reports, correspondence, and other documents to which you have testified, or did you have any other source?

A. I had occasion frequently to discuss operations and results with the active management of the Dakota subsidiaries, principally the executive heads. Those executive heads were frequently in Chicago and always came to see me when they were in Chicago.

Q. Now about personal observation on the premises. Did you have any occasion to make such personal observation? A. I did at infrequent intervals.

Q. In other words, out on the properties themselves?

A. Yes. I make inspection trips over the properties infrequently. Mr. Stafford, I might add that I had a great many long distance telephone conversations with the executive management.

ing the central portion of the transmission system of that subsidiary with the understanding that such open account shall be subject to funding in negotiable securities of the subsidiary at the request of this corporation."

Mr. Stafford: I am now reading from the minutes of the meeting of the directors of United Public Utilities Corporation held in Philadelphia on October 7, 1935, reading from page 3 of those minutes:

"The president reported that as of September 15, 1935, the corporation had advanced to Northern Power & Light Company for the rebuilding of the central portion of its transmission system $70,000 out of the $75,000 authorized to be advanced for that purpose at the meeting of the Board of Directors of August 21, 1935, and that an additional $10,000 actual cash would be required for completion, and accordingly requested that the previous authorization be increased to a total of $80,000. After discussion and on motion duly made and seconded the following resolution was unanimously adopted:

"Resolved, that at the discretion of the president, the treasurer is authorized and directed to advance on open account, with interest at the rate of 6% per annum, as required, to Northern Power & Light Company, funds up to but not exceeding $80,000, for the purpose of rebuilding the central portion of the transmission system of that subsidiary, with the understanding that such open account shall be subject to funding in negotiable securities of the subsidiary at the request of this Corporation, and that such negotiable securities shall be forthwith pledged under the Corporation's Trust Indenture of January 1, 1935.

"Further Resolved, that this resolution shall supersede the resolution adopted at the meeting of the Board of Directors on August 21, 1935, authorizing an advance of not exceeding $75,000.00."

Continuing and reading from the 14th page of the same minutes:

"The president reported that the Railroad Commission of North Dakota had ordered a reduction in rates of subsidiaries operating in North Dakota, representing on the

Defendant's Exhibit 274, which is also referred to as Defendant's Exhibit 65 in White's deposition, was produced and identified by White. It was received in evidence for the purpose of showing communications sent by the operating personnel to White and received by him in ordinary course. It reads as follows:

Defendant's Exhibit 274.

Interconnected System KW load January 18 9

Northwestern Public Service Co., Northern Power & Light Co., and North Dakota Power & Light Co.

W. R. Gazin:

O. C. Stokke.

Attaching copy of load diagram sheet showing peak period load conditions and station capacities for month of December, 1938.

The figures in green pencil are *coincident 15 minute demands,* taken by actual readings of indicating and integrating meters at various locations throughout the system, on date of December 20, 1938 and apply to highest 15 minute peak of that date. There were several days when similar peak conditions existed, but no readings were taken at the time. However, 15 minute readings were taken on 3 days, which were typical peak days, and the attached sheet is a compilation of the demand data, of date during maximum 15 minute demand.

Operating conditions during the past two months had been quite stable throughout the interconnected system of the three companies. Fortunately, no doubt, the weather has been favorable and no serious trouble had been experienced during the peak season, to the hilines, substations, or plant equipment. As long as the transmission lines hold together, and no trouble is experienced with switching or generating equipment at important ties and locations, we can get by safely another year even with another increase in load on the system.

Improvements made in boiler plants the past several years have made it possible to handle the station loads

basis of current consumption a reduction of $34,729 in annual gross revenue. The advisability of effecting a merger between Northern Power & Light Company and North Dakota Power & Light Company was discussed, and the proposal was referred to the president for further study in collaboration with counsel for the corporation."

Mr. Stafford: I am now reading from the minutes of a meeting of the directors of United Public Utilities Corporation held at 50 Congress Street, Boston, [Massachussets] on November 22, 1935, reading from the second page of said minutes:

"The president reported further rate reductions by the Northern Power & Light Company to large consumers in Bismarck, North Dakota, and that the reduction would probably represent a decrease of about $5,000 in the annual gross electric revenue of that subsidiary."

Mr. Stafford: I am now reading from the minutes of a regular meeting of directors of United Public Utilities Corporation held in Philadelphia on January 29, 1936, reading from the tenth page of those minutes:

"The president reported that Northern Power & Light Company is building its Venturia-Ashley line at an estimated total cost of $16,000 and an estimated saving in maintenance of $340 per annum; that Northwestern Public Service Company is asking for an annual payment to it by Northern Power & Light Company of $20,000, or $20 per annum for 1000 K. W. firm power by way of return upon its investment of $340,000 made to serve Northern Power & Light Company; that the agitation for a municipal plant in Mandan, North Dakota, has been compromised by North Dakota Power & Light Company by the assertion that a reduction from 7¢ to 6¢ per K. W. H. will be made in the top-step of the domestic rate of that company if after eighteen months conditions are no less favorable to the company [that] as of the date of compromise.

"Upon motion duly made and seconded, the following preambles and resolutions were unanimously adopted:

"Whereas, the corporation is the owner of obligations and all the outstanding capital stock of Northern Power & Light Company, all of which securities are now pledged

shown particularly at Beulah, Bismarck and Mitchell plants. In addition, we have been giving turbo-generating equipment, and diesel units, more frequent inspections, repairs and replacements of defective or failing parts in order to keep such important equipment in safe and reliable operating condition. The Moore turbine replacement to the 1250 KVA G. E. generator has bolstered up the generating capacity and reserve capacity in the Aberdeen station.

We have not contemplated any new generating equipment for the year 1939, having in mind that we could get by another year providing no serious breakdown occurs to existing line and plant equipment. However, it is my opinion that we should soon begin a study of KW loads and system capacities, and plan on a new generating unit for installation early in 1940. This is something I would like to discuss with you within the next few months.

O. C. STOKKE.

OC Stokke/t

Cc to ABS
JHB
SWW

P. S. Also enclosing copy of plant equipment information—O. C. S.

Q. Did you receive this document from Mr. Stokke on or about the date it bears? A. Yes.

Defendant's Exhibit 274-A, which is also referred to as Defendant's Exhibit 65-A in White's deposition, was produced and identified by White. It was received in evidence for the purpose of showing the communications sent by the operating personnel to White and received by him in ordinary course. It is a copy of one of the load diagrams included in Plaintiff's Exhibit 53 and is as follows:

with the Provident Trust Company of Philadelphia, Trustee under Indenture of Trust dated January 1, 1935, securing the outstanding collateral trust bonds of the corporation, and,

"Whereas, such subsidiary is the owner of an electric distribution system in Blunt, South Dakota, and now desires to sell said distribution system to Northwestern Public Service Company, the present lessee thereof, for the sum of $18,000 cash, and in the judgment of the Board of Directors of this corporation, this service in Blunt cannot be advantageously used or retained in the proper or judicious operation of the business of said subsidiary, and the sum of $18,000 is deemed to be the fair value thereof; now, therefore, be it

"Resolved, that this corporation, as the owner of the above-described securities, hereby approves and authorizes and requests Provident Trust Company of Philadelphia, Trustee, as pledgee of the above described securities, to consent to the sale of said property for $18,000 cash, and the proper officers of this corporation be and they are hereby authorized and requested to take all such proper steps, including the execution and delivery of any appropriate documents, as upon advice of counsel for this corporation are necessary or desirable to procure the consent of the Trustee to said sale, and to carry out the terms of this resolution according to the true intendment hereof."

Mr. Stafford: At this time I am reading from the minutes of the regular meeting of the directors of United Public Utilities Corporation held in Philadelphia on August 28, 1936, reading from the seventh and eighth pages of said minutes:

"Inasmuch as the sale by Northern Power & Light Company to Northwestern Public Service Company of the distribution system in Blunt, South Dakota, is being consummated at the actual book value of the property sold—$17,876.99, instead of $18,000 as approved by resolution of the Board of Directors adopted at their meeting of January 29th, 1936, on motion duly made and seconded the following resolution was unanimously adopted:

"Resolved, That the action of the officers of United Public Utilities Corporation and Provident Trust Com-

pany of Philadelphia, under the Trust Indenture of January 1, 1935, in consenting to the sale by Northern Power & Light Company of its distribution system in Bluat, South Dakota, at a price of $17,876.99 instead of $18,000 as approved by the Board of Directors at its meeting held January 29, 1936, be and it hereby is ratified and confirmed."

Mr. Fellows: I would like to read a small portion on 614 and 615.

"Mr. Scheetz reported that the Federal Power Commission was claiming jurisdiction over all operating electric utilities which own high voltage transmission lines carrying energy originating in another state, even though all that energy is consumed by the operating utility or is sold only in intrastate commerce. He stated it was not only extremely doubtful that the Commission could sustain any such claim, but that, even if the claim were sustained, it did not follow that the Commission thereby acquired jurisdiction to [determing] the qualification of directors."

Mr. Stafford: I am now reading from the minutes of a regular meeting of the directors of United Public Utilities Corporation held in Chicago, Illinois on October 2, 1937, reading from the second page of said minutes as follows:

"The president made the following report of subsidiaries of the Corporation:

"(d) Knife River Coal Mining Company, North Dakota Power & Light Company and Northern Power & Light Company. Preparatory to the trip of inspection to be made by members of the board over the properties of these subsidiaries, a general [rport] was made concerning the territory and population served, the coal supplied by Knife River Coal Mining Company and recent earnings.

"Mr. Scheetz reported that the Federal Power Commission was claiming jurisdiction over all operating electric utilities which own high voltage transmission lines carrying energy originating in another state, even though all that energy is consumed by the operating utility or is sold only in intrastate commerce. He stated it was not only extremely doubtful that the Commission could sustain any

F. W. White "A"
Chicago

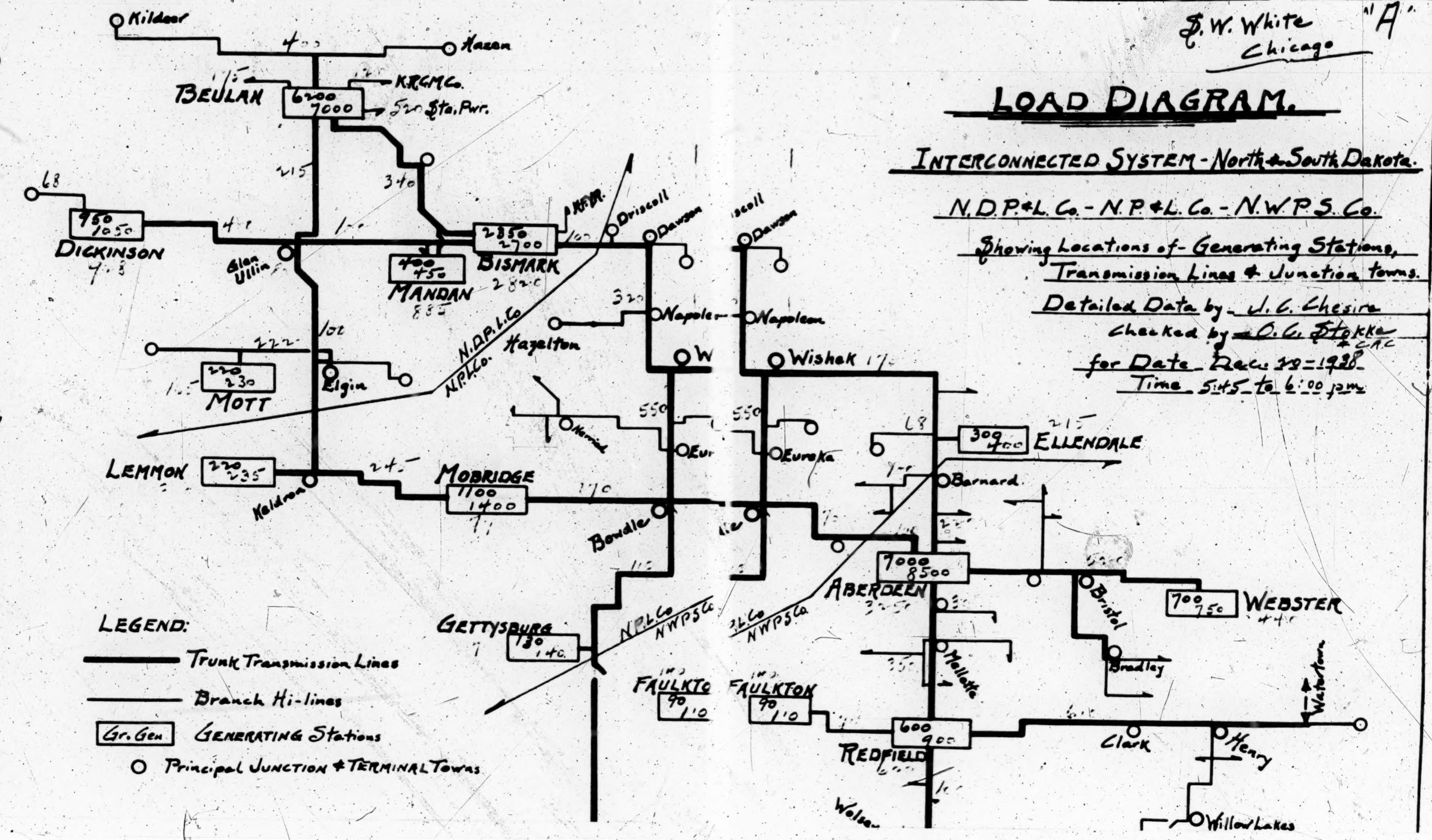
LOAD DIAGRAM.

INTERCONNECTED SYSTEM - North & South Dakota.

N.D.P.&L. Co. - N.P.&L. Co. - N.W.P.S. Co.

Showing Locations of - Generating Stations, Transmission Lines & Junction towns.

Detailed Data by - J. C. Chesire
Checked by - O. G. Stokka
for Date Dec. 29-1928
Time 5:45 to 6:00 p.m.



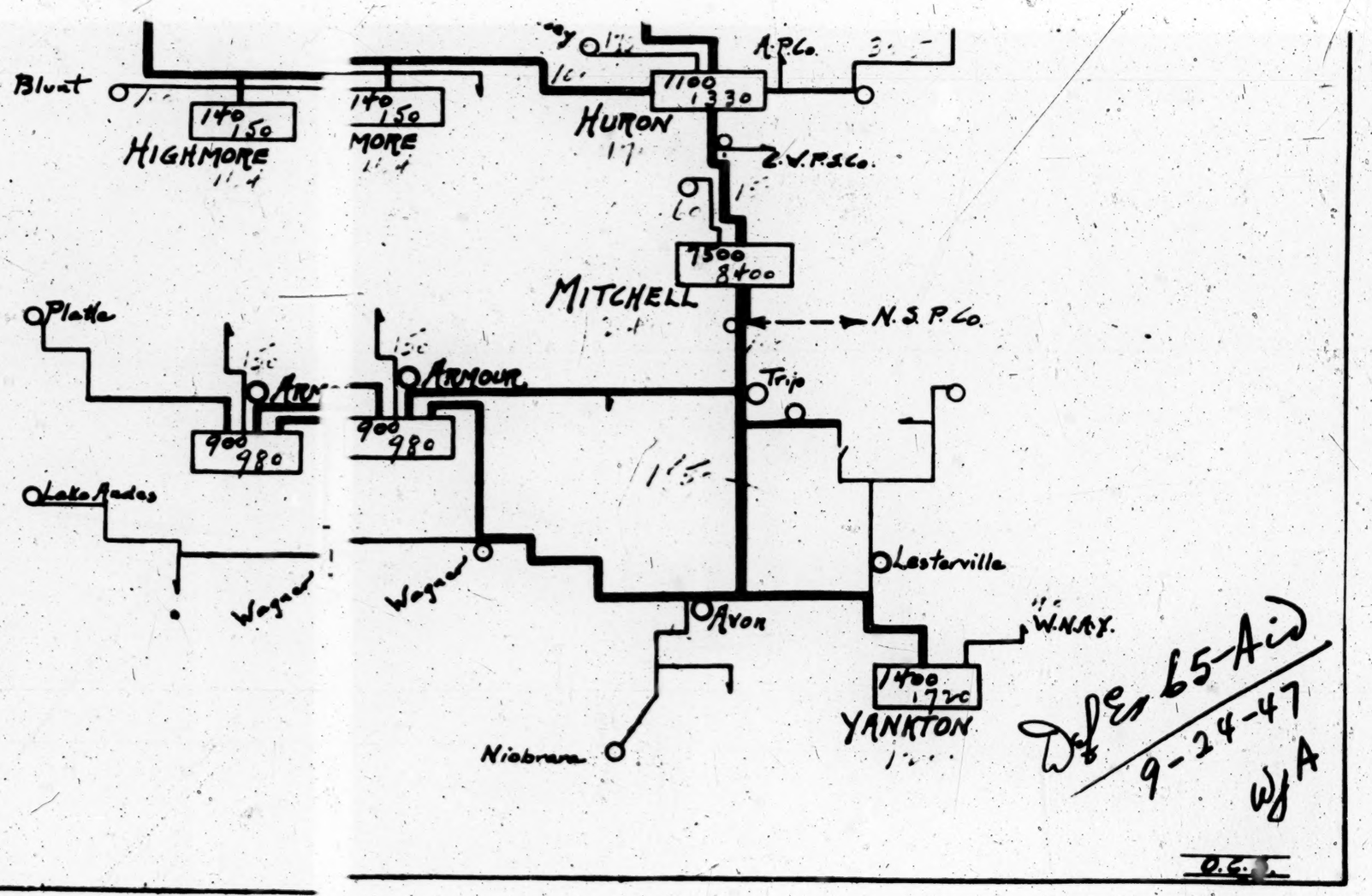
SUMMARY:-

"EFFECTIVE" K.W. Generating Capacity	1937	1938
N.D.P.&L. Co.	9120 KW	10120 KW
N.P.&L. Co.	1850 "	1750 "
N.W.P.S. Co.	19670 "	19430 "
TOTAL	30640 KW	31300 KW

"MAXIMUM" K.W. Generating Capacity	1937	1938
N.D.P.&L. Co.	10380 KW	11430 KW
N.P.&L. Co.	2175 "	2175 "
N.W.P.S. Co.	22390 "	22840 "
TOTAL	34945 KW	36445 KW

15 Min. Coincident PEAK K.W. DEMAND	1937	1938
N.D.P.&L. Co.	7115 KW	7638 KW
N.P.&L. Co.	3125	3253
N.W.P.S. Co.	14115 "	14941 "
TOTAL	24475 KW	25830 KW

Station K.W.H. LOADS during above peak demand.		
N.D.P.&L. Co.	7450 KWH	8600 KWH
N.P.&L. Co.	1000 "	500 "
N.W.P.S. Co.	14350 "	14490 "
TOTAL	22800 KWH	23590 KWH



Defs 65-Aid
9-24-47
WJA

such claim, but that, even if the claim were sustained, it did not follow that the Commission thereby acquired jurisdiction to determine the qualification of directors."

Mr. Stafford: I am now reading from the minutes of a regular meeting of the directors of the United Public Utilities Corporation, held at Philadelphia on June 15, 1938, reading from the second page of said minutes as follows:

"On motion duly made and seconded, the following resolution was unanimously adopted:

"Resolved, that Mr. James H. Buell be and he hereby is appointed, in accordance with the provisions of subdivision (6) of Section 2 of Article III of the Trust Indenture of this corporation, dated January 1, 1935, as the independent engineer, to appraise the fair value of the fundable acquisitions of Northern Power & Light Company, North Dakota Power & Light Company and Knife River Coal Mining Company, subsidiaries of this corporation, during the period from January 1, 1935 to December 31, 1937; and to [execut] and deliver to Provident Trust Company, Trustee under said Trust Indenture, a certificate setting forth his opinion of the fair value of such fundable acquisitions of said subsidiaries in [accoreance] with the provisions of the aforesaid subdivisions of said Trust Indenture."

Now, further reading from the fourth page and continuing over to the fifth page, as follows:

"The president made the following report on subsidiaries of the corporation:

"(a) North Dakota Power & Light Company, Northern Power & Light Company, and Knife River Coal Mining Company. Mr. C. J. Strike has resigned as president of all three companies, and on July 1, 1938, Mr. A. B. Sanborn, formerly general manager of East Kootenay Power Company, Fernie, British [Columbis], will become president and chief operating executive of these subsidiaries.

"Appraisal of the properties of North Dakota Power & Light Company and Northern Power & Light Company was completed by North Dakota Railroad Commission about June 1, 1938. The amounts of these appraisals, the

On the original document, of which the foregoing exhibit is a photostatic copy, the figures in the tabulations under the caption "summary" were red under the title " 'Effective' K. W. Generating Capacity"; blue under the caption " 'Maximum' K. W. Generating Capacity"; and green under the caption "15 Min. 'Coincident' Peak K. W. Demand." The figures appearing in the rectangular boxes in said exhibit were in red for the top figures, representing " 'Effective' K. W. Generating Capacity" and in blue for the bottom figures representing " 'Maximum' K. W. Generating Capacity." The figures appearing outside the rectangular boxes were in green, representing the "15 Min. 'Coincident' Peak K. W. Demand."

Q. Did you receive this load diagram, Defendant's Exhibit 65-A for identification, at the same time that you received Defendant's Exhibit 65 for identification?

A. Yes.

Q. From Mr. Stokke? A. Yes.

Directing the witness' attention to Plaintiff's Exhibit 59, which is a letter to Buell and Gazin from Stokke, copy to White, with annual graphs attached, Mr. Stafford asked:

Q. Whose signature is it, please?

A. The signature of Mr. Otto Stokke.

Q. Do you recall whether you received this document from Mr. Stokke on or about the date it bears? A. I did.

Q. Mr. White, I neglected, in asking you about Defendant's Exhibit 66-D for identification, to call your attention to the matter appearing on the reverse side, reading, "copies to Mr. S. W. White, Chicago, Ill.," in red pencil. Do you recall whether or not that handwriting was on there at the time that you received that exhibit?

A. The marking is identical with the marking and in the same handwriting as the markings on copies of correspondence and similar graphs and reports that came to me from Mr. Stokke.

Q. Is it similar to the handwriting which you previously testified as appearing on Defendant's Exhibit 65 for identification? A. Yes.

Q. I think you anticipated my next question in your

possibility of the amounts being increased on later argument, and the possible effect of the final figures upon the rate structure and earnings of the two companies were discussed. The present estimate of the cost to the two companies of the Audit and Appraisal approximates $20,000, a sum considerably larger than had been anticipated. The Railroad Commission has ordered a rate hearing for July 6th, 1938. [Length] discussion was had of the best methods of effecting a merger of the two companies should a merger be found desirable.

"Construction of the two new boilers at the Bismarck plant of North Dakota Power & Light is well advanced."

Mr. Stafford: I am now reading from the minutes of the regular meeting of the directors of United Public Utilities Corporation held in Philadephia on August 25, 1938. The accurate description is held at 1335 Land Title Building, without designation of city, reading from the third page as follows:

"The president made the following report on the subsidiaries of the corporation:

"(e) Dakota Companies. The merger of North Dakota Power & Light Company and Northern Power & Light Company has progressed as far as circumstances permit and advance preparation for its consummation can and will be carried on.

"North Dakota Railroad Commission held a hearing on July 26th, 1938, on the question of valuation and historical costs of the properties of the two companies. A decision is not expected until the late fall. The Commission desires the two companies to record on their books their historical costs as so determined.

"A new ash conveyor, costing about $12,000 was placed in operation early in August at the Bismarck plant of the North Dakota Company, with satisfactory results through an almost total elimination of flying ashes and dust. The concrete foundations and steel work for two new boilers at the Bismarck plant had been finished and the boilers themselves have recently been shipped and are expected to be in operation about October 15, 1938.

"Crop conditions in those sections served by the Dakota

answer, but I will ask it anyhow. Did you receive, from time to time, other graphs similar to Defendant's Exhibits 66-A to 66-D, inclusive? A. Yes.

Q. Was that an annual occurrence?

A. I received them at the beginning of each year, making the same showings of operating results for the preceding year.

Q. I am not going to encumber the record by asking you to produce them and offer them in [evidnce]. I do just want to know whether you did receive similar graphs in each year? A. I did.

Q. You say each year. Do you recall the period over which that extended? Defendant's Exhibit 66 for identification was February, 1939?

A. I recall that I received them each year beginning with 1938 up to and including the report received in 1945 for the year 1944.

Defendant's Exhibit 275, which is also referred to as Defendant's Exhibit 67 in White's deposition, was received in evidence for the purpose of showing the receipt of such information by White from Stokke. It reads as follows:

Defendant's Exhibit 275.

Form 203—30M—2-40

Northwestern Public Service Company.

For Company Business Only.

Date January 6, 1941.

Subject Load Diagram—1940 Peak
Dakota Public Service Co.

Location Northwestern Public Service Co.

To S. W. White

From O. C. Stokke

Attaching copy of Load Diagram sheet showing kilowatt load conditions over the interconnected systems of the two companies in North and South Dakota. Similar copies

had been send to you in previous years for your information and files.

Suggest you interview Major Buell or Bill Gazin for details and explanations of the load diagram.

O. C. STOKKE.

OCStokke/b

Defendant's Exhibit 275-A, which is also referred to as Defendant's Exhibit 67-A in White's deposition, was received in evidence for the same purpose. It is a load diagram similar to Defendant's Exhibit 274-A, setting forth the same type of information but under the date of December 18, 1940, and the colors of the figures on the original document are the same as those on Defendant's Exhibit 274-A. It is a copy of one of the load diagrams included in Plaintiff's Exhibit 53, and it bears notations thereon in pencil which were placed by White subsequent to his receipt of it.

Q. Whose signature is it, please?

A. It is the signature of Mr. O. C. Stokke.

Q. He is the same Mr. Stokke you have previously testified about this morning? A. Yes.

Q. Did you receive this memorandum, or Defendant's Exhibit 67, from Mr. Stokke on or about the date it bears, January 6, 1941? A. Yes.

Q. Mr. White, before the noon recess, when Mr. Benson interrogated you, you described the checking of the figures on the load diagram which was done by persons on the property. Do you know whether or not you had any other checking of those figures done both with respect to this particular load diagram, which is Defendant's Exhibit 67-A and other load diagrams that you received? Did you have any or not? A. Yes.

Q. Well, will you tell us generally what that checking consisted of, who did it?

A. Mr. Peale regularly checked data in those diagrams and reports against such information as might be in our

office, and on points that we could not explain to ourselves satisfactorily we went to Mr. Buell and Mr. Gazin, who had files of much more complete engineering and operating information on the properties and asked them to explain the points that we couldn't understand; and in a few instances where Mr. Buell and Mr. Gazin could not give us an [answers] that was satisfactory to us, they wrote to the operating management for detailed information to fill in the existing gap.

Q. In those instances, where they requested additional information, do you know whether or not they received the same?

A. I can recall defnitely two or three instances in which they made inquiries, and I know that they received replies and transmitted those replies to us.

Q. I think you have testified previously that you got copies of the correspondence between Buell and Gazin from Middle West Service Company to members of the operating management, or vice versa? A. That is right.

Q. And you did get copies of that correspondence?

A. Yes.

Q. Is there anybody else in your organization besides Mr. Peale who checked into these matters.

A. Mr. McClanahan checked primarily on accounting matters.

Q. Mr. Peale was treasurer of United Public Utilities Corporation and was working with you in your office at Chicago? A. Yes.

Q. Mr. McClanahan, who was he: I think you have identified him previously, but we will do it again?

A. He was in charge of the accounting of United Public Utilities Corporation, and during the last two or three years of his association with our company he was vice-president.

Q. Mr. White, you have testified concerning, and we have offered in evidence, Defendant's Exhibit 65-A and 67-A, being the two load diagrams. Did you receive other load diagrams setting forth similar information, from time to time during the period of the operations under the inter-capacity exchange contract? A. Yes.

Q. Were they in a general way similar to the ones which we have already put into evidence? A. Yes.

Q. And that extended over the entire period from 1938 to October 19, 1945? A. Yes.

Defendant's Exhibit 276, which is also referred to as Defendant's Exhibit 68 in White's deposition, was received in evidence for the purpose of showing communications sent to White in due course. It consists of a copy of memorandum dated February 15, 1939 from Gazin to Stokke, copy to White, regarding "Interconnected System Load." It reads in part as follows:

Your letter of January 18th was completely misplaced and did not come to my attention until just recently. This accounts for the delay in reply. We are very interested in knowing that there is a substantial increase in the peak load for the interconnected group but that the percent of increase for each company stays somewhere near the same relation.

For the purpose of making comparisons we have tabulated the maximum and effective capacities for 1937 and 1938, copy of which is attached. This data is taken from the load diagram for the two years and based on the readings for December 21, 1937 and December 20, 1938.

There has been certain changes in the effective capacity rating and inasmuch as these figures will, no doubt, be used in arriving at demand charges as between companies for 1939, I believe it would be well to determine the reasons for the changes noted.

Bismarck Station—Effective capacity increased 1000 kw as the result of installation of boilers during 1938.

Mobridge Station—Effective capacity shows 100 kw reduction for this station. Will you please advise the reasons for this?

Aberdeen: Effective capacity has been increased 1000 kw as the result of the installation of 1250 KVA turbine during 1938.

Redfield Station—This station shows a reduction in effective capacity of 200 kw. Please advise the reasons for this change.

Yankton Station—This station also shows a reduction of 300 kw in effective capacity. Please advise.

As pointed out in your letter it does appear that if no unusual break-downs or line failures occur during the peak load season and the luck holds out, that the system has sufficient capacity to get through 1939. I agree with you however, that a study should again be taken up with respect to increasing capacity of the system by the installation of a new generating unit next year. It is hoped that we can get together to start work on this in the very near future. Perhaps something can be worked out to get together sometime in March.

In addition, said exhibit contains a tabulation of stations for each of the three companies, North Dakota Power & Light Company, Northern Power and Light Company and defendant, showing comparative figures for 1937 and 1938 of both maximum capacity and effective capacity for each of said stations and the total for each of the said three companies. The comparison between 1937 and 1938 shows for North Dakota Power & Light Company an increase in maximum capacity from 10,330 KW to 11,430 KW and an increase in effective capacity from 9,120 to 10,120 KW; for Northern Power and Light Company an increase in maximum capacity from 2,120 KW to 2,175 KW and a decrease in effective capacity from 1,850 KW to 1,750 KW; and for defendant an increase in maximum capacity from 22,160 KW to 22,840 KW and an increase in effective capacity from 19,130 KW to 19,430 KW.

Q. From whom did you receive this document, if anyone? A. I received it from Mr. Gazin.

Q. On or about the date it bears? February 15, 1939?

A. Yes.

Defendant's Exhibit 277, which is also referred to as Defendant's Exhibit 69 in White's deposition, was received in evidence for the purpose of showing receipt of the document by White in due course. It is as follows:

Defendant's Exhibit 277.

February 20 9

Interconnected System Load.

Northwestern Public Service Co., Northern Power & Light Co., North Dakota Power & Light Co.

W. R. Gazin,
O. C. Stokke.

"Effective" KW generating capacities of the various stations is determined each month for the respective power plants, and you are familiar with the several factors which are taken into account in arriving at the "Effective" KW generating capacity of a station.

In the December peak load diagram, prepared as of December 20, 1938, we applied generating capacities to the various stations based on operating conditions and major equipment available for both effective and maximum available generating capacity of each station. The sheet sent you contains our estimate of such generating capacities. It is customary and necessary too that consideration be given to steam demands by the steam heating systems which affect the KW generating capacity of certain generating units and station totals.

Important changes in the 1938 and 1937 station generating capacities are explained as follows:

Bismarck Station. Effective capacity increased 1000 KW as a result of available ample steam generating capacity, making it readily possible and practical to operate all generating machines at their full rated or maximum capacity. Normally, both turbo-generators are available, spinning or hot, and can be considered as "effective" capacity of about 2350 KW total. This load can be readily taken by the Bismarck plant on instant notice or demand during the month of December, during peak periods.

Mobridge Station. In previous years, we fired up both boilers in the Mobridge plant, to provide additional effec-

tive KW generating capacity in that station and to the system total. For the past peak season (1938) it was decided by the management to curtail expenses in the Mobridge plant as much as possible and we concluded to operate only one boiler, without the reserve of the second boiler in banked operating condition. With only one boiler in service we were able to pull about 1100 KWH of "Effective" capacity if required of the Mobridge Station. The weather was mild during the month of December and steam heat demand light, making for greater condensing operation and load by the turbo-generator.

Aberdeen Station. Effective and Maximum KW generating capacities increased due to addition of new steam (Moore) turbine to G. E. generator unit. This turbo-unit is "hot" and ready for service in a few minutes.

Redfield Station. Effective generating capacity reduced due to operating with only one boiler in the plant during the peak season. The Connelly boiler can readily handle the 600 KW turbo-generator at full load with normal amount of bled steam to the heating system in Redfield.

Yankton Station. Effective generating capacity based on normal operating capacities of the diesel units only during the peak season. The plant boilers were not fired up nor available for immediate service in 1938 to the steam engine generating units. During the peak season of 1937, the plant boilers were carried with banked fires in readiness to serve and for operating of the steam engine-generators. We felt it desirable to cut standby expenses in the Yankton plant through fuel savings.

Each year there are changing conditions in operating requirements and weather conditions which alter our estimates of effective and maximum generating capacities of the stations. Economy and Serviceability are the two most important factors considered and we attempt to give due consideration to each. You are of course, familiar with such factors and items involved from year to year.

OCStokke/t O. C. S.

Cc to A. B. S.
J. H. B.
S. W. W.

Q. Did you receive this carbon copy from Mr. Stokke on or about February 20, 1939? A. Yes.

(Read from deposition.)

Q. If I understand your prior testimony correctly, Mr. White, you said you had received, over the period of operating under these contracts, copies of correspondence between members of the Middle West Service Company personnel and the operating personnel of the properties. Are Defendant's Exhibits 68 for identification and 69 for identification typical of that type of correspondence? A. Yes.

Q. And you did receive correspondence of that nature although pertaining to different subjects, of course, for that entire period? A. That's correct.

Q. I believe you testified previously that you are familiar with the terms and provisions of the 1938 interchange capacity agreement? A. Yes.

Q. Also with the 1939 interchange capacity agreement? A. Yes.

Q. And also with the 1941 contract? A. Yes.

Q. Those contracts, as you know, provided for the preparation by the committee on operations provided therein of certain exhibits to be used for the basis of billing during each successive term of the contract. Did you receive copies of the exhibits prepared by the committee on operations in each year? A. Yes.

Q. From whom did you receive them, if you recall?

A. From the Huron office.

Defendant's Exhibit 278, which is also referred to as Defendant's Exhibit 70, 70-A, 70-B and 70-C in White's deposition, was received in evidence for the purpose of showing the submission of copies of such correspondence and documents to White in ordinary course. It consists of 4 sheets, the first of which is as follows:

Defendant's Exhibit 278.

Interchange Capacity Agreement February 20 9

Northwestern Public Service Co., Northern Power & Light Co. and North Dakota Power & Light Co.

J. H. Buell:

O. C. Stokke.

Attaching unsigned copies of exhibits B, C and D, to apply to interchange capacity agreement to be made effective for the year 1939. The attached sheets will give you advanced information on KW capacities of the respective power plants and companies, and peak load demands of each company, during last December peak period on the combined interconnected system.

The Committee on Operations will sign the exhibit sheets tomorrow and all signed copies will be turned over to Mr. Sanborn for disposition of the contract. You will likely hear from Mr. Sanborn within a few days.

We have gone into this matter very carefully with the principal idea of being accurate in our application of the plant capacities and peak load demands by the respective companies. We endeavored to correctly follow the instructions and intent of the interchange capacity agreement, and feel sure that the figures in the attached exhibits are quite accurate in detail as applied.

Due to increase in KW generating capacities of the Bismarck and Aberdeen stations, we now find a corresponding increase in the total station ratings of the North Dakota Power & Light Co., and Northwestern Public Service Co. No increase in Northern Power & Light Co. power plant capacities during the past year (1938). The net effect of such changes in generating capacities results

in an increased capacity charge to Northern Power & Light Co. However, you will also note that both North Dakota Power & Light Co. as well as Northwestern Public Service Company are now obliged to provide firm capacity to the Northern Power & Light Co. during the current year of 1939.

Exhibit "D" gives a summary of our final figures and computations leading up to excess or deficiencies in reserve generating capacities and demand charges as apportioned to each company.

O. C. STOKKE.

OCStokke/t

Cc to A. B. S.
S. W. W.

The last 3 sheets are respectively, Exhibits "B", "C" and "D" to the Interchange Capacity Agreement for the perio[d] ginning January 1, 1939 and ending December 31, 193[9] and contain the same statements and figures as those contained in the 3 exhibits pertaining to the same period included in Plaintiff's Exhibit 31, previously described herein (R. p. 301, supra).

Q. Did you receive this document from Mr. Stokke on or about the date it bears, February 20, 1939? A. Yes.

Q. Now, directing your attention to Defendant's Exhibits 70-A, 70-B and 70-C for identification, did you receive those documents from Mr. Stokke together with Defendant's Exhibit 70 for identification, on or about February 20, 1939? A. Yes.

Defendant's Exhibit 279, which is also referred to as Defendant's Exhibit 71, 71-A and 71-B in White's deposition, was received in evidence for the purpose of showing that in ordinary course copies of such correspondence and documents reached White. It consists of 3 sheets, the first of which is as follows:

Defendant's Exhibit 279.

September 5, 1940.

Interchange Capacity Agreement

Northwestern Public Service Company

Dakota Public Service Company

James H. Buell
C. L. Sandstedt

We are enclosing herewith for your file, copy of Exhibits "B" and "D", Supplements to the Interchange Capacity Agreement between Northwestern Public Service Company and Dakota Public Service Company, covering the period September 1, 1940 to December 31, 1940. There is no change in Exhibit "C" showing the Company System Maximum Demands which apply for the contract term beginning January 1, 1940 and ending December 31, 1940.

C. L. SANDSTEDT.

f.

Encl.

CC: SWW

The second and third sheets are respectively, Exhibits "B" and "D", being the supplement to the Interchange Capacity Agreement for the period beginning September 1, 1940 and ending December 31, 1940 and containing the same statements and figures as those contained in the two exhibits pertaining to the same period included in Plaintiff's Exhibit 31, previously reproduced herein (R. p. 313, supra), and in addition containing in Exhibit "B" two columns of pencilled figures opposite each generating station, the date 12/31/39, and the word "Mandan", in White's handwriting.

(Read from deposition)

Q. Do you recall from whom you received that document? A. Yes. I received it from the Huron office.

Q. On or about September 5, 1940? A. Yes.

Q. And you received them also from the Huron office, Exhibits 71-A and 71-B? A. Yes.

(Read from deposition)

Q. Mr. White, directing your attention to Defendant's Exhibits 71-A and 71-B, both for identification, you will note that it is stated on each of said exhibits that they are signed this first day of September, 1940? A. Yes.

Q. Do you recall whether or not supplements to the interchange capacity agreement, Exhibits B and D thereto were executed by the operating committee in the early part of the year, 1940, that is, in January or February of 1940?

A. Yes, they were.

Q. Do you recall the occasion for the execution of Defendant's Exhibits 71-A and 71-B for identification?

A. Yes.

Q. Would you state what that occasion was, please?

A. The occasion was the completion of the installation of a new 4,000 k. w. unit at Bismarck, which increased the generating capacity of Dakota Public Service Company.

Q. Do you know how much it increased the effective capacity of the generating facilities of North Dakota Public Service Company?

A. The effective generating capacity of each plant in the interconnected system was a rating capacity which the contract provided should be determined by the operating committee constituted under the contract. The operating committee determined that as of September 1, 1940, the effective generating capacity of the Bismarck plant had been increased by 3 000 kilowatts over the rating of effective capacity that it had assigned to that plan on January 1, 1940. The difference of 1,000 kilowatts between the name plate rating of the new generator at Bismarck and the effective generating capacity as determined by the operating committee was, as nearly as I can recollect the facts, ascribed to a deficiency in boiler capacity in the Bismarck plant below the amount required to bring the effective capacity up to the full amount of the name plate rating.

Q. Mr. White, I believe you testified at the start of this particular inquiry about the exhibits to the interchange capacity agreements that you received those exhibits in each year during which an intercapacity exchange agreement was in force? A. Yes.

Q. To save time, would they be similar to the ones which you have just testified to and which have been offered in evidence? A. Yes.

Q. And you received them under similar circumstances? A. Yes.

Q. And you gave them similar treatment? A. Yes.

Q. When Mr. Benson was interrogating you earlier today I think you identified Mr. J. W. Chesire Did you know that Mr. Chesire was a member of the committee on operations? A. Yes.

Q. Did you approve of his appointment to that committee? A. Yes.

Q. Do you know of any particular function he was to perform on that committee? By that I mean, was he to represent any particular company?

A. He was to represent particularly Dakota Public Service Company.

Q. With your approval? A. Yes.

Q. Were you satisfied, over the period which Mr. Chesire did represent Dakota Public Service Company on that committee with his work in that connection? A. Yes.

Q. You were satisfied he gave proper representation on the committee for Dakota Public Service Company?

A. Yes.

Q. You were satisfied at the time, that is, during each year during the period in which he so acted? A. Yes.

Q. And you are so satisfied now? A. Yes.

Q. Were you so satisfied during those periods and at the time you testified to in your capacity as president and director of the United Public Utilities Corporation, and also as a director of Dakota Public Service Company?

A. Yes.

Q. You also mentioned various times in your testimony putting on additional capacity at Bismarck. Referring to the Sargent & Lundy report back in 1936, did they make any recommendation as to the installation of additional capacity at that point, that you recall?

A. Yes, they did make such recommendation.

Q. Do you recall how much capacity they recommended?

A. Yes.

Q. You do recall that that Sargent & Lundy report was discussed at the directors meeting of the United Public Utilities Corporation during the summer of 1936, do you not? A. Yes.

Q. Well, what was the recommendation they made as to the installation of additional capacity at Bismarck?

A. They recommended the installation of an additional 3,000 kilowatts.

Q. Do you recall that, Mr. White, of your own recollection? A. Yes.

Q. Was that recommendation followed? A. No.

Q. Do you recall why it was not?

A. Yes, because the load conditions had changed between 1936, when the Sargent & Lundy report was made, and 1939, when it was decided to install additional capacity at Bismarck.

Q. I asked you if you recalled why the Sargent & Lundy recommendation was not followed?

A. Because it was determined in 1936, by the management of North Dakota Power & Light Company, after conferences with me and after my discussion of the subject with my board, that it was not practicable to finance the recommended 3000 k. w. addition at Bismarck.

Q. When you say "my board" to whom do you refer?

A. To the board of directors of United Public Utilities Corporation.

Q. Well, you have testified previously that an addition was made at Bismarck. Do you recall anything about how the matter was revived? A. Yes.

Q. All right. Can you state it from your recollection?

A. The management of Dakota Public Service Company determined that the demands on its generating facilities had grown to a point where the service to the public was endangered by the shortage in generating capacity, and that additional capacity was absolutely necessary.

Defendant's Exhibit 280, which is also referred to as Defendant's Exhibit 73 and 73-A in White's deposition, was received in evidence for the purpose of showing receipt by White from Sandstedt of those documents. It consists of 3 pages, the first of which is as follows:

Defendant's Exhibit 280.

Dakota Public Service Company
General Offices
Huron, South Dakota
November 4, 1939

Mr. Samuel W. White, President
United Public Utilities Corporation
20 North Wacker Drive
Chicago, Illinois

Dear Mr. White:

The Interchange Capacity Agreement between Northwestern Public Service Company and Dakota Public Service Company provides that when additional capacity is needed the parties will agree as to the location of the additional capacity.

I a. enclosing herewith a copy of the recommendation of the Committee on Operations which has been approved by the management of each company. If you have any suggestions or questions in regard to this matter we should appreciate hearing from you.

Yours very truly,
C. L. SANDSTEDT,
Vice President.

CLS/f

CC: J. H. Buell

Encl.

The second and third sheets are in part as follows:

Northwestern Public Service Company

Dakota Public Service Company

Section 7 of Article III of the Interchange Capacity Agreement between Northwestern Public Service Company and Dakota Public Service Company, dated January 1, 1938, provides that when, in the opinion of the parties thereto, the interconnected system's coincident demand increases to a point that the system does not have adequate reserve facilities to insure reliable service, the parties thereto will agree to the installation of additional capacity.

In accordance with this section it is agreed by the Committee on Operations that additional capacity is required and it is recommended that a 4000 KW turbine be installed at the Bismarck Station of Dakota Public Service Company. This installation will bring the installed generating capacity of the respective parties within closer balance and will also protect service to the important load centers of Bismarck and Mandan.

The following tabulation shows the effect of this installation:

The tabulation sets forth the figures resulting in the excess or deficiency in reserve capacity of defendant and Dakota Public Service Company under the billing under the 1938 and 1939 interchange capacity agreements for the year 1939 and the billing under said contracts for 1940, both prior to and after the installation of the new turbine at Bismarck; and shows an excess for defendant and a deficiency for Dakota Public Service Company of 1,374 KW under the 1939 billing and of 1,361 KW under the 1940 billing prior to installation and a deficiency for defendant and an excess for Dakota Public Service Company of 425 KW after the turbine installation.

It is estimated that the installation of the turbine will be completed about July 1, 1940 and upon completion of the installation it is recommended that the rated capacity of Dakota Public Service Company for the purpose of this Agreement be increased from 10,955 KW to 13,955 KW.

The Committee on Operations certify that this rating is fair and equitable and that the same basis of rating the respective generating stations has been used for both companies.

Signed October 10, 1939.

COMMITTEE ON OPERATIONS,

NORTHWESTERN PUBLIC SERVICE COMPANY,

By O. C. STOKKE,

DAKOTA PUBLIC SERVICE COMPANY,

By J. W. CHESIRE.

The undersigned mutually agree to the installation of a turbo-generator by Dakota Public Service Company at Bismarck, North Dakota, and approve the rated capacities as herein recommended by the Committee on Operations.

NORTHWESTERN PUBLIC SERVICE COMPANY,

By A. B. SANBORN,

President.

DAKOTA PUBLIC SERVICE COMPANY,

By C. L. SANDSTEDT,

Vice-President.

(Read from deposition.)

Q. Mr. White, do you recall whether or not the committee on operations did recommend the installation of the additional capacity at Bismarck? A. They did.

Q. On or about November 4, 1939? A. Yes.

Q. Were those recommendations carried out? A. Yes.

Q. And the additional capacity was installed? A. Yes.

Q. I believe you have previously testified it went on the line and in operation about September, 1940?

A. That's correct.

Q. As president of United Public Utilities Corporation from January 1, 1935 down to October 19, 1945, did you have any policy or practice in connection with the work orders for the expenditure of funds on behalf of the Dakota

subsidiaries of United Public Utilities Corporation? I just ask whether you did? A. Yes.

Q. Will you describe as briefly as possible for us what that policy was?

A. Before proceeding to make additions to the physical properties or replacements, it was customary for the operating companies to submit work orders covering such proposed additions and the expenditures involved, and those work orders were sent in the first instance to Middle West Service Company after they had been approved and signed by the proper operating officers of the subsidiary company. When Middle West Service Company received them, the work orders were passed in turn to department heads of Middle West Service Company who were competent to form an opinion on the desirability of the improvement and the justification for the proposed expenditure. After the work orders had been approved by the appropriate department heads of Middle West Service Company they were sent to me for my approval or disapproval. If and when I approved them in writing they were returned by me to Middle West Service Company. In each case I indicated my approval on two copies of the work order, one copy of which was retained in the files of Middle West Service Company and the other was sent to the operating subsidiary as their authority for proceeding with the work.

Q. I was out at the time, and I don't know whether you went into the question of the amounts of those work orders. Did that practice you have just described apply to all work orders, or were there any particular amounts as to which some required your approval and other might not require your approval?

A. The procedure which I have just described applied to all work orders required to be submitted for the approval of Middle West Service Company and of myself before beginning the work. The managements of the operating subsidiaries were under instructions that they need not receive advance approval on expenditures below certain limits in the cost thereof.

Q. Did those limits vary from time to time during the period you are referring to?

A. Those limits—the maximum limit on the cost of work which could be done without advance approval was at one

time as low as $100 or $200. Later that limit was moved up until in the latter part of the period under discussion it was, I believe, a limit of $500 on expenditures that had not been included in the annual budget for the year and $1,000 on items that had been included in the budget submitted at the beginning of the year.

Q. Who fixed those minimum amounts, if you know?

A. Those were fixed by agreement between me and Middle West Service Company and instructions were sent to the operating managements.

Q. Did you send the instructions?

A. The instructions were sent by Middle West Service Company with advice that I had concurred.

Q. In other words, the instructions and the limits were fixed by agreement between you and Middle West, and the instructions to the operating personnel were given by Middle West, but with your approval? A. That's correct.

Q. Was that practice which you have described with reference to work orders over the minimum amounts adhered to over the period in which you were president of United Public Utilities Corporation to and including October 19, 1945? A. Yes, strictly.

Q. Did you have that same practice in connection with other subsidiaries of United Public Utilities Corporation which was serviced by Middle West?

A. Yes, invariably, as to the practice, but the amounts, maximum amounts of expenditures without prior authorization varied with respect to each of the groups of subsidiaries.

Q. Now, Mr. White, over this period when these contracts were in force, namely, from January 1, 1936, down to and including October 19, 1945 will you state whether or not as president of United Public Utilities Corporation, and as a director of that company, and also as a director of North Dakota Power & Light Company, Northern Power & Light Company, and Dakota Public Service Company, you were satisfied as to the operations on the part of those subsidiaries which I have just named, under those contracts? A. I was so satisfied.

Q. During the testimony, Mr. White, there has been references to certain service arrangements with Middle West Service and others. I would like to go into that mat-

ter just a little bit more in detail at this point. Can you tell us who furnished those services, who made the arrangement for them, whether they were under oral or written contracts, starting back at the beginning, when you first went on the properties on April 15, 1932, as receiver and continuing on down to October 19, 1945? Let us start back in 1932, and tell us what the situation was at that time?

A. As I recollect the facts, they were that at the date of receivership on April 15, 1932, there existed between United Public Service Company and Middle West Utilities Company an arrangement which had been reduced to writing, in which it was agreed that for a consideration of $25,000 a year Middle West Utilities Company would provide all officers and directors of United Public Service Company and its subsidiaries, one of which was United Public Utilities Company, the predecessor of United Public Utilities Corporation, and another of which was Southern United Gas Company.

A. (Continuing) Under that agreement and as a consideration for the $25,000 payment, Middle West Utilities Company also undertook to do all of the accounting and treasury work of those companies and to provide management supervision over their operation subsidiaries.

Q. Was there any arrangement as to engineering services?

A. That management supervision included in it engineering services to the subsidiaries, accounting, treasury, financing, advice and assistance, the preparation of their annual reports and in general all the services that those corporations would have required for the conduct, for the independent conduct of their own business, as well as the supervision and assistance that they would have found necessary to furnish to operating subsidiaries.

Q. The contract you just described was between United Public Service Company and Middle West Utilities Company. Is that right? A. Yes.

Q. At that time Middle West Utilities Company owned all of United Public Service Company, didn't it? A. Yes.

Q. Which in turn owned all of the stock of the United Public Utilities Company and Southern United Gas Company? A. That's correct.

Q. You were receiver of United Public Service Company,

United Public Utilities Company and Southern United Gas Company. Is that correct? A. Beginning April 15, 1932.

Q. Now, after you became receiver what, if anything, did you do in connection with continuing, changing or abrogating that arrangement which you found existing between U. P. S. and Middle West Utilities Company, which you just previously described for us?

A. I reported to the Court the existence of that arrangement, and recommended that I be permitted to operate under such an arrangement with the receivers of Middle West Utilities Company, or rather, I reported that I had entered into a temporary agreement with the receivers of Middle West Utilities Company by which that contract was to be continued in force until June 30, 1932, at which time the matter of an arrangement between me as receiver and the receivers of Middle West Utilities Company would be further discussed.

Q. Well, did you do anything after your first report?

A. Yes.

Q. With regard to the same matter?

A. Yes. I made another report to the Court of my action with respect to that contract, to that arrangement.

Q. Is that the second report you are talking about, that has been identified? Do you want to look at it? (Handing document to the witness.)

Mr. Stafford: For the record that is identified as Defendant's Exhibit 6 for identification, part of which is Defendant's Exhibit 230 (R. p. 1082 supra). Let the record show that I showed him that exhibit.

A. (Continuing) —and the details of the revision of the arrangement were outlined in a subsequent report to the Court. As receiver of those three companies I had, with the Court's consent, allocated the $25,000 cost of the arrangement, 50 per cent to United Public Service Company, 40 per cent to United Public Utilities Company and 10 per cent to Southern United Gas Company.

Q. That is still the $25,000 per annum charge that you found existing when you became receiver?

A. Yes. I operated under that arrangement until September 1, 1933, when I entered into an arrangement with the receivers of Middle West Utilities Company whereby

for a fee of $6,000 a year in the [aggregte], the accounting and statistical work of the three holding companies of which I was receiver was to be done by the staff of the receivers of Middle West Utilities Company, and the general supervisory and advisory services which were being received by the operating subsidiaries of the holding companies of which I was receiver were to be paid for by the respective operating subsidiaries to the receivers of Middle West Utilities Company at one per cent of their annual operating revenues, determined after deduction of their merchandise sales and inter-company sales.

Q. You say you made that arrangement with the receivers of Middle West Utilities Company? A. Yes.

Q. In other words, if I understand you correctly, the arrangement directly between the operating subsidiaries and Middle West Utilities Company receivers was initiated during the period of your [receiverhsip], I think you said September 1, 1933?

A. The arrangement for the payment of $6,000 a year by the holding companies was initiated as of September 1, 1933, and the fee paid by the subsidiaries for the advisory and supervisory services were initiated at the same time, or approximately the same time.

Q. Now, did you report that action to the Court? A. Yes.

Q. To the United States District Court, for the Northern District of Illinois, Eastern Division, here in Chicago?

A. That is correct.

Q. Did you report that in your third report filed as receiver in that action? A. The report was so designated.

That report is Plaintiff's Exhibit 60 (R. p. 458a, supra). A portion of White's deposition is omitted for the reason that it appears in plaintiff's case, beginning at line 17, page 459 through line 11th from the bottom of page 461.

Q. Were the contracts made by North Dakota Power & Light Company and Northern Power & Light Company with Middle West Service Company submitted to the board of directors of United Public Utilities Corporation. A. Yes.

Q. Were they approved by that board of directors?

A. Yes.

Q. Do you recall at what meeting that action was taken?

A. No.

Q. Was it at the meeting of March 1, 1937?

A. I can tell by looking at the minutes.

Q. All right, sir. I show you the minutes of that meeting. Now, I show you, Mr. White, the original minutes of United Public Utilities Corporation, referring specifically to minutes of the organization meeting of the board of directors of that company, held in [Philadelphis] on March 17, 1937. Were you present at that meeting? A. Yes.

Q. Now, directing your attention to the 13th page of those minutes, you will read the same, beginning with the second paragraph? Just read it to yourself. Now, Mr. White, having read that portion of the minutes, does that refresh your recollection as to whether or not at that meeting the contracts between North Dakota Power & Light Company and Northern Power & Light Company and Middle West Service Company were submitted to the board and included within the resolution as stated in the minutes? A. It does.

Q. Were they so included? A. Yes.

Q. Was that resolution adopted, do you recall?

A. Yes, it was.

Q. Do you recall whether or not there was any report by you at that meeting as to the estimated aggregate cost to the subsidiaries under those contracts with Middle West Service Company?

A. Yes. The estimated aggregate cost for all of the electric, gas, ice, cold storage and water companies was $30,000 per annum.

Q. In other words, that was for all subsidiaries of United Public Utilities Corporation which had executed similar contracts with Middle West Service Company and not restricted just to North Dakota Power & Light Company and Northern Power & Light Company?

A. That's correct.

A portion of White's deposition is omitted for the reason that it appears in plaintiff's case, beginning at line 8, page 462, through line 15, page 463.

Q. And did you have any reasons of your own for continuing these service arrangements with Middle West Service Company, that you recall? A. Yes.

Q. Would you mind stating what they were?

A. I recognized the need for the judgment of experienced utility men in arriving at administrative decisions, and I welcomed the opportunity to arrange for the services of the Middle West Service Company organization at a cost that was substantially less than I would have incurred had I attempted to set up a supervisory organization of my own to help me in the administration of these businesses and to assist the operating managements of these [subisidiary] companies.

Q. Now, when you made your last answer, was that with relation to the time when you were receiver or with reference to the time after United Public Utilities Corporation commenced business? A. Both.

Q. Both your thoughts were the same? A. Yes.

Q. In other words, as I get your reasons, you wanted experienced knowledge and advice at a minimum of cost?

A. In the light of my direct experience with the men who comprised the staff of Middle West Service Company, I had formed a definite opinion that they could furnish to me the administrative assistance, of which I felt a need, and that they could furnish to the operating subsidiaries the advisory assistance which was desirable for the success of both operating subsidiaries, according to the opinion of both myself and the operating heads of those subsidiaries.

Q. Can you tell us something about the personnel of the Middle West Service Company and its predecessors, receivers of Middle West Utilities Company, with whom you dealt over the years, and under these contracts and arrangements you have been describing? I mean who were some of these gentlemen?

A. In the days of the receivership and trusteeship of Middle West Utilities Company I dealt, among [other], with Mr. Daniel C. Green, who was president of Middle West Utilities Company under the receivership, and later became trustee of that company. I dealt with engineers, such as Edward A. Olsen and George Mills.

Mr. Benson: George A. Mills?

A. George A. Mills; yes; with Frank E. Kruesi, up to the time he left Middle West Utilities Company organization to become president of the Dakota Companies; with J. B. Wilson who, as a sponsor of—as engineer sponsor of a group of properties, occupied a position comparable with that of Mr. Olsen and Mr. Mills; Mr. James H. Buell, with Mr. Grover C. Neff; who was president of Middle West Utilities Company under the receivership prior to the advent of Mr. Daniel C. Green, and both before and after holding that presidency was president of the Wisconsin Power & Light Company at Madison, Wisconsin.

Q. Well, now, these gentlemen that you have been telling us about, do I understand you were describing men whom you dealt with in the early days? A. Yes.

Q. By that you mean when you were receiver and trustee?

A. Well, say up to the formation of Middle West Service Company.

Q. Well, that would be up until about January, 1936?

A. That's right.

Q. Well, were there any others that you recall?

A. Yes, if I can recall them. I dealt with the heads of the accounting department, notably Mr. C. E. Packman, who was in charge of that department.

Q. Packman?

A. Yes. I dealt with statisticians and bookkeepers.

Q. We are getting pretty low down on the list now?

A. Yes.

Q. And how about after the inception of Middle West Service Company, specifically, do you have anyone in mind?

A. My dealings were with the same men or successors who occupied comparable positions.

Q. Well, Mr. Green was not there, was he?

A. Mr. Green was not there.

Q. Mr. Neff was not there? A. No.

Q. Or Mr. Olsen? Did he continue?

A. He continued about until 1937.

Q. How about Mr. Kruesi?

A. Mr. Kruesi returned to Chicago and became vice-president, and very shortly after, president of Middle West Service Company, about July, 1937, having previ-

ously been president of our Dakota subsidiaries for four years.

Q. How long did you have dealings, then, with Mr. Kruesi, after 1937, approximately?

A. Continuously up until and after October.

Q. 19th? A. 1945.

Q. How about Mr. Buell?

A. I had dealings with Mr. Buell from the beginning of the receivership up until at least October 19, 1945.

Q. Was there a Mr. Purchas among that personnel?

A. Mr. Purchas became associated with Middle West Utilities Company shortly after the beginning of the receivership, and upon the formation of the Middle West Service Company transferred his association to that company, and he is still there.

Q. Is there a Mr. Vennard among that personnel, that you dealt with? A. Yes.

Q. From when to when?

A. Mr. Edwin Vennard was with Middle West Utilities Company prior to its reorganization, according to the best of my recollection, and has been a vice-president of Middle West Service Company from its inception to the present time.

Q. Anybody else that you recall?

A. I have dealt with Mr. Gazin frequently, who is the same Mr. Gazin about whom I have previously testified.

Q. Is that with both the receivers of Middle West Utilities Company and the Middle West Service Company, or just with the latter?

A. As I recall, Mr. Gazin came to work for the receivers or trustee of Middle West Utilities Company about the beginning of 1935, and since the organization of Middle West Service Company has been associated with that company.

Q. Now, Mr. White, over this period of time you have been describing, namely, when you were receiver and trustee and subsequently as president of United Public Utilities Corporation, down to October 19, 1945, I understand from your testimony that you have had dealings and relationships with some or all of these men whom you have described to us during that period. Not all of them at the

same time, but some of them over different periods. Is that right?

A. Yes, and with all of them at some time.

Q. With all of them at some time? A. Yes.

Q. Well, can you tell us in a general way about the nature of the services which they rendered to you and to your subsidiaries, the Dakota subsidiaries, and any other subsidiaries of the U. P. U. Corporation?

A. Those services rendered to the subsidiaries are outlined in rather complete detail in the agreements between the operating subsidiaries and Middle West Service Company.

Q. Do you know whether or not the services, as outlined in those agreements, were in fact performed and rendered by these various personnel of Middle West Service Company and of the receivers prior thereto?

A. Not in every instance, because the operating subsidiaries of United Public Utilities Corporation had not called upon Middle West Service Company to furnish all of the services which the service company has had available for them. I refer particularly to advice and assistance on treasury matters.

Q. Are these matters which they do not avail themselves of?

A. Yes. Also I have in mind such services as assistance in the preparation of annual reports, and there are probably some other minor services.

Q. How about supervisory services, did they render any supervisory services to those operating subsidiaries, to your knowledge?

A. In general, except upon request from me, it has been understood between Middle West Service Company and myself that their services to our subsidiaries are advisory and not supervisory.

Q. When you say "our" subsidiaries, you mean all of the subsidiaries of United Public Utilities Corporation which had similar contracts with Middle West Service Company? A. Yes.

Q. All right, sir. I didn't mean to interrupt you. Will you proceed?

A. (Continuing) —and except by arrangement with me they have not undertaken to supervise. In certain mat-

ters, notably construction of property additions, such as power plant or transmission lines, I have asked the engineering department of Middle West Service Company to supervise the technical details of construction projects.

Q. Did they do so? A. Yes.

Q. Only on your request? A. Yes.

Q. Have you completed your statement regarding this matter? A. I guess so.

Q. All right. I believe you previously testified some time today that you received copies of memoranda, reports, correspondence, and so forth, which passed between members of Middle West Service Company and the operating personnel of the Dakota subsidiaries. Is that correct? A. Yes.

Q. Did you also receive copies of such memoranda, reports, correspondence and similar papers that passed between the personnel of Middle West Service Company and the operating heads of the other subsidiaries of United Public Utilities Corporation? A. Yes.

Q. Did you deal with the gentlemen whom you enumerated a little while back as being among the personnel of the Middle West Service Company and the predecessor, receivers of Middle West Utilities Company, on these matters of service arrangement and services rendered to your operating subsidiaries? A. Yes.

Q. You knew these men personally? A. Yes.

Q. Over the period of time you have testified? A. Yes.

Q. Mr. White, during the period of time you dealt with the Middle West Service Company, and the receivers of Middle West Utilities Company, and the various members of the personnel described, were you satisfied, as receiver, and later as trustee, of United Public Utilities Company, and later as president and director of United Public Utilities Corporation, and as a director of the Dakota subsidiaries of that last named company, with the services rendered by that personnel and by those organizations to your operating companies? A. I was satisfied.

Q. Now, also, Mr. White, were you satisfied as receiver, as trustee, president and director, as described in the preceding question, with the services rendered by Middle West Service Company and the preceding receivers of Middle West Utilities Company, and the various personnel thereof, which you have described before, rendered by

them to the Dakota subsidiaries of your receivership and then later of United Public Utilities Corporation? A. Yes.

Q. Yesterday afternoon you described for me the members of the personnel of Middle West Service Company and of the receivers of the prior Middle West Utilities Company with whom you had had dealings from the time of your appointment as receiver on April 15, 1932, and continuing on down to October 19, 1945. Did you, in your description, include all of the personnel, or are there other that you would care to add?

A. Well, I didn't intend that list as a complete list of all the people in Middle West Service Company with whom I discussed the affairs of our company. I do recall, however, that there were a few important omissions because there were a few members that I did not name with whom I had had many discussions, and I have in mind particularly Mr. R. M. Winnsborough, who was the head of the department of public relations, including advertising and including counsel on such matters as dealing with agitations for public ownership, the securing of franchises or franchise renewals. Another department head with whom I consulted a number of times, and who made one or more trips over the property with me—

Q. By "property" you mean Dakota?

A. Over the Dakota property with me, was Mr. M. R. Rodger, who was a counsellor on merchandising problems, merchandising being used in the public utility business to build load. I believe your original question was framed to include members of the Middle West Service Company whom I consulted with respect to the problems of any of the U. P. U. subsidiaries, and therefore I should include Mr. Fred Armbruster, a gas engineer.

Q. All right.

A. Very frequently on matters affecting my gas subsidiaries, and with Mr. E. G. Waters, who was a specialist in hydraulic and refrigeration engineering, with whom I have consulted on problems affecting U. P. U. subsidiaries engaged in the water business, the ice business and the cold storage business. I have made inspection trips over the properties of U. P. U. subsidiaries, accompanied by each of those men. I believe those are the most important omissions.

Q. Now, I neglected to ask you yesterday, and I will ask

you now, and in order to shorten it I will not ask you when you met each one of these individuals you have named, but rather I will ask you how many of them you knew prior to your appointment as receiver of United Public Utilities Company, on April 15, 1932, if any of them?

A. To the best of my recollection I had never met, prior to my appointment as receiver on April 15, 1932, any of the gentlemen whose names I have mentioned, or any other members of the service organization, with the exception of Daniel C. Green, whom I had met about 1913, when he was general manager of a utility company in Arkansas, whose securities, whose bonds were being handled at that time by the investment banking house with which I was then associated. Between that period, from say 1913 to not later than 1915 or '16, and my appointment as receiver, I had not seen Mr. Green.

Q. You mean during the period from approximately 1915 to 1916 to and including April 15, 1932, you had not seen Mr. Green? A. That is correct.

Q. Are there any other exceptions besides Mr. Green, that you recall?

A. Mr. Frank Kruesi lived two blocks from my home in Evanston, and I knew that he lived there, but to the best of my recollection I had not met him until I was appointed receiver on April 15, 1932.

Q. And each of the other members of the personnel of the service organization, which you have described, you did not meet until after April 15, 1932? A. That is correct.

Q. There has been mentioned in the testimony, particularly in your testimony, from time to time, the question of joint management of the Dakota subsidiary properties and Northwestern Public Service Company; also references to a general office or central office. I would like to go into that a little bit more at this time. Suppose we go back to April 15, 1932, when you were appointed receiver. Can you describe for us the situation with reference to joint management or central or general offices which existed at that time, if any?

A. In the United Public Utilities Company system?

Q. With reference to the Dakota subsidiaries.

A. When I was appointed receiver of the U. P. U. company on April 15, 1932, I found that there was a joint

management set up on the Dakota properties, including both the subsidiaries of U. P. U. and Northwestern Public Service Company, under which the operating affairs of those companies were being directed by a president who kept—Mr. T. T. Parker, who made his headquarters in Omaha, and a general office at Huron, under the immediate charge of Mr. C. J. Strike, vice president.

Q. You said Dakota subsidiaries. Is that North Dakota Power & Light Company and Northern Power & Light Company, and Knife River Coal Mining Company? A. Yes.

Q. Those three, together with Northwestern Public Service Company, is that right? A. Yes.

Q. Now, at that time, I think you have previously testified, you had 21 properties in the U. P. U. Company system. Were there any joint management arrangements existing at that time with reference to any of the other operating subsidiaries of the U. P. U. Company?

A. Yes, there was a joint management—there were one or more joint management arrangements, under which the operations of all of the 21 U. P. U. subsidiaries were affected. I reported each of those operating, joint operating arrangements to the court in detail, both in my first receiver's report and my second receiver's report.

Q. Will you describe them briefly for us, Mr. White?

A. Yes. There were seven separate operating arrangements. From Marion, Ohio, the Ohio Electric Power Company, which I believe was a subsidiary of Middle West Utilities Company, or one of its affiliated holding companies.

Mr. Benson: What did you call that, Ohio Electric Power Company?

A. Yes. Directed the operations of the seven subsidiaries of U. P. U. operating in Ohio. From Indianapolis, Indiana, Public Service Company of Indiana, a subsidiary of Midland United Company, which in turn was an affiliate of Middle West Utilities Company, operated the properties of the four Indiana subsidiaries of the U. P. U. Company. From Louisville, Kentucky, Kentucky Utilities Company, a subsidiary of Middle West Utilities Company, operated the two Kentucky subsidiaries, which were subsidiaries of United Public Service Company but not of United Public Utilities Company.

Q. You were also receiver of United Public Service Company at the same time?

A. Yes. From Jackson, Mississippi, Southern United Ice Company, a wholly owned subsidiary of United Public Service Company, operated four ice companies, which were subsidiaries of United Public Utilities Company. From Dallas, Texas, Central and Southwest Utilities Company operated two Arkansas gas subsidiaries of United Public Utilities Company. From Dallas also was operated all six subsidiaries of Southern United Gas, of which I was also receiver. I have described the sixth arrangement under which Dakota subsidiaries of United Public Utilities Company and Northwestern Public Service Company were jointly operated. The seventh joint management arrangement was one under which the City Ice Company of Kansas City, a subsidiary of Middle West Utilities Company, operated two ice subsidiaries of United Public Utilities Company, one being an ice and cold storage plant in [Forth] Worth, Texas, and the other an ice manufacturing company in [Forth] Smith, Arkansas.

Q. Do you recall the date when you filed this report with the Court? A. June 14, 1932.

Q. At that time, Mr. White, had you made any change in the joint management situations which you just described to us, and which you had reported to the Court?

A. No.

Q. Thereafter did you make any changes in any of those situations? A. Yes.

Q. Well, will you please recount for us what changes you made?

A. The first part of such a recital could be more accurately and more concisely if I referred to my second receiver's report.

Q. That is the report that is marked Defendant's Exhibit 6 for identification, part of which is Defendant's Exhibit 230 (R. p. 1082, supra). A. Yes.

Q. All right. Please do so. I just want the history.

A. Within the following eleven months after filing that first receiver's report I had caused a divisional operating office to be established at Greenville, Ohio, by Mr. C. E. Lakin, to take over from Ohio Electric Power Company and from Public Service Company of Indiana the opera-

tions of the seven Ohio subsidiaries and the four Indiana subsidiaries.

Q. Mr. C. E. Lakin is the same Mr. Lakin whom you have testified about previously in these proceedings?

A. Yes, and who still is in charge of the operations of those eleven subsidiaries in Ohio and Indiana.

Q. For United Public Utilities Corporation? A. Correct.

Q. All right.

A. I transferred to Southwestern Gas & Electric Company, Shreveport, Louisiana, the supervision of the operations of the two Arkansas gas subsidiaries of United Public Utilities Company and all of the six gas subsidiaries of Southern United Gas Company, and one ice manufacturing subsidiary of Public Utilities Company. I personally took over from City Ice Company of Kansas City the supervision of the ice manufacturing and cold storage subsidiary in [Forth] Worth, Texas, which was a subsidiary of United Public Utilities Company. Subsequently I transferred from Southwestern Gas & Electric Company the operating supervision of all the subsidiaries of United Public Utilities Company, or United Public Utilities Corporation.

Q. Do I understand your testimony correctly, from the detail you have just given us, that you terminated the arrangements which you found existing on the operating subsidiaries of U. P. U. Company, and made arrangement for other supervision or by direct supervision from your office, on all of such subsidiaries except three, namely, the Dakota subsidiaries? A. That's correct.

Q. Did you make any inquiry at any time into, or give any consideration at any time to terminating the joint management which you found in 1932 existing with reference to the three Dakota subsidiaries? A. Yes.

Q. What consideration did you give to that problem?

A. I gave general consideration to it in the days of the receivership, along with consideration of the same problem on all of our subsidiaries. It was my objective to make any management changes where I felt that such changes would result in better direction of the subsidiary business at comparable cost or equal direction at lower cost. In the case of some of the subsidiaries of United Public Utilities Corporation I was dissatisfied, I became dissatisfied with the quality of the direction and the cost

of that supervision. I considered the matter of a change in the joint management of the Dakota companies early in the receivership. I was the first one, as far as I know, to express dissatisfaction with the competency of Mr. T. T. Parker, as president of those companies, and in about a year after my appointment as receiver he had been relieved of his position.

Q. Who succeeded Mr. Parker, if you know?

A. Mr. Kruesi.

Q. What, if anything, did you have to do with Mr. Kruesi's election?

A. I was called on to tell the receivers of Middle West Utilities Company whether it would be acceptable to me from the standpoint of the subsidiaries of United Public Utilities Corporation—

Q. Company?

A. (Continuing) Company, to have Mr. Kruesi head up that joint management.

Q. Did they ask for your approval?

A. Yes, and asked for my approval of the salary that he was to be paid.

Q. Did you approve his selection and the salary paid to him? A. Yes.

Q. Was he also at that time put on the board of directors of the Dakota subsidiary companies? A. He was.

Q. Were you asked to approve his selection as a director of those companies? A. I do not recall that I was.

Q. Now, have you finished explaining to us the consideration that you gave with reference to the possible change in that situation, that you found at the Dakota companies?

A. I think my statement is complete. I am confident, however, that your summary question completes the picture, because the fact is that in due course all joint management arrangements that existed at the time of the receivership in 1932 were eliminated, with the exception of the joint management, which operated the Dakota subsidiaries of U. P. U. and Northwestern Public Service Company.

Q. You continued that arrangement. Is that it? A. Yes.

Q. Down to October 19, 1945? A. Yes.

Q. I don't mean by that not to except from that the

changes of personnel as to which there has been previous testimony, but the arrangement was continued?

A. There were some changes in the arrangement, but they were relatively unimportant.

Q. Now, what reasons did you have, Mr. White, if any, for continuing the Dakota subsidiary joint management arrangements?

A. I could never convince myself that from the standpoint of myself as an administrator of the ownership of those companies, or from the standpoint of the companies themselves, or from the standpoint of the stockholders of United Public Utilities Corporation, that I could change the arrangement to advantage. I felt that no arrangement could be made in which operating direction of the business of equal merit could be provided for equal cost, or even that an organization, an independent organization of less but acceptable merit could be provided at or less than the cost of the existing arrangement.

Q. Did you ever at any time make any exploration of the possibility of setting up a separate office for the Dakota subsidiaries? A. Yes.

Q. Do you recall when that was, Mr. White?

A. I don't believe I can fix the date.

Q. Was it during the receivership or after U. P. U. Corporation took over?

A. I had discussions on the subject both during and after the receivership, and I also recall that after one of those discussions I asked that the estimated cost of an independent set-up be prepared for me, in comparison with the cost under the joint management arrangement. That study was made, and Mr. Sandstedt came into Chicago and sat down with Mr. Peale and me, and we went over it in considerable detail, but I cannot recall the date.

Q. Was Mr. Peale with you during the receivership?

A. Yes.

Q. Well, there was such a discussion in Chicago, between you, Mr. Peale and Mr. Sandstedt? A. Yes.

Q. Was anyone else present, if you recall?

A. Not that I can recall.

Q. And you fix the time somewhere between April 15, 1932, and October, 1945?

A. Oh, yes. It was early, in the first half of that period.

Q. I see.

A. I think it was in the first half of that period, I should say.

Q. Some time between April 15, 1932, and let us say, 1938, 1939? A. Yes.

Q. Now, you say that report was made and it was discussed. Do you recall what the results of that report were? Just what did that show? Would it be desirable or undesirable?

A. Well, that was not the purpose of the report. The purpose of the report was to show the cost.

Q. Well, what did it show with reference to the cost?

A. The desirability was something on which I was reserving judgment.

Q. You tell it in your own way?

A. The analysis as submitted showed that for that type of organization—

Defendant's Exhibit 281, which is also referred to as Defendant's Exhibit 75 in White's deposition, was received for the purpose of showing a report which was prepared in the Huron office and submitted to White and discussed in accordance with his testimony. The first page of Exhibit 281 reads as follows:

Defendant's Exhibit 281.

Comparative Present and Proposed Costs by Companies
(Northwestern–U. P. U.)

The following analysis shows the actual General Office salaries and expenses for the year 1937 in comparison with a suggested General Office in Bismarck for handling the U. P. U. Companies.

Exhibit "A" shows actual salaries and expenses for the Year 1937 with the allocation to the companies, while Exhibit "B" shows the estimated salaries and expenses with a separate office in Bismarck for the U. P. U. Companies. These exhibits are summarized as follows:

Salaries	Northwestern Public Service Exhibit "A" Actual G. O. Expense 1937	Exhibit "B" Estimated With Separate Office	U. P. U. Companies "Exhibit "A" Actual G. O. Expense 1937	Exhibit "B" Est. With Bismarck Office
Executive	12,080	9,660	6,580	9,320
Treasury & Accounting	23,992	20,240	13,068	13,380
Engineering	9,840	13,100	5,360	6,600
Sales Promotion	5,904	6,120	3,216	3,600
Miscellaneous	4,778	6,600	2,602	....
Billing	3,949	4,260	2,151	3,200
Load Dispatching	2,719	2,720	1,481	1,480
Total Payroll	63,262	61,920	34,458	37,580
Other Expenses	32,262	28,100	17,313	14,800
Total G. O. Expense	95,524	90,020	51,771	52,380

Under the proposed plan there is a savings of approximately $5,500 per year for Northwestern Public Service Company, while U. P. U. expense will be approximately the same as under the present arrangement.

Insofar as possible it is desirable to take care of present employees from a company as well as the employee's standpoint in setting up a separate organization for the U. P. U. Companies, and in Exhibit "B" we have given careful consideration to this phase of the problem.

There would be some transfer of equipment such as automobiles, office equipment, etc., all of which at present is owned by Northwestern. There would also be the purchase of one billing machine, unless it was deemed more advisable to contract this work to Northwestern on a unit basis.

The Exhibit also contains two detailed sheets as to the 1937 general office payroll and expense and the allocation thereof between defendant and the U. P. U. Companies, and also two detailed sheets showing similar information as to defendant and the U. P. U. Companies with a proposed separate general office for the U. P. U. Companies at Bismarck.

Q. Who did you say prepared the report?

A. It was prepared in the Huron office, and was submitted to me by Mr. Sandstedt, and I think that Mr. Sandstedt himself prepared the report.

Q. Now, Mr. White, if you will please refer to Defendant's Exhibit 75 for identification and tell me whether or not that refreshes your recollection as to the date or approximate date of that conversation with Mr. Sandstedt and Mr. Peale?

A. Well, it does to the extent that the analysis used in the projection is based on actual figures for 1937, indicating that the time was some time in 1938.

Q. Well now, Mr. White, do you recall, independently of this Exhibit 75 for identification, what the results were which Mr. Sandstedt's report showed regarding a comparison of the projected costs with separate offices as against the actual costs for 1937?

A. As I recall the report, it had been prepared on the basis of my request, that it projects for the Dakota subsidiaries of United Public Utilities Corporation a central office at Bismarck, North Dakota, with a minimum staff, and that it need not propose for that staff as many specialists as department heads as there were in the joint management at Huron, but that where possible departmental responsibilities should be combined in one man at Bismarck, even though those responsibilities might actually have been assigned to two or more department heads in the Huron office. The overall effect of the report which Mr. Sandstedt presented showed—

Q. Hold up a minute. I am asking you what result costwise the report shows. Specifically, did it show that the arrangement for a separate office at Bismarck would be advantageous costwise to the Dakota subsidiaries, or disadvantageous?

A. Costwise the report as submitted showed that the cost to Dakota Public Service Company of maintaining such a proposed central office at Bismarck would be approximately the same as the cost that it was incurring under the joint management arrangement at Huron.

Q. Well, what is your recollection as to what the report showed costwise with reference to Northwestern Public Service Company under such a separate office arrangement for the Dakota subsidiaries?

A. The report showed a saving of approximately $5,000 to Northwestern if that company should be operated from a general office in Huron without relation to any operations of Dakota Public Service Company.

Q. All right. Now, Mr. White, did you discuss this report at the meeting you have told us about with Mr. Sandstedt and Mr. Peale? A. Yes.

Q. Did you agree with the findings as set forth in this report, which is Defendant's Exhibit 75 for identification, which you have just testified to, separately?

A. No, not altogether.

Q. Would you tell us what happened?

A. We had no occasion to object to the figures as presented in that report but as I recall we felt that for an adequate, independent management staff at Bismarck it would require either additional personnel not contemplated in the report, or executives of a caliber greater than was indicated in the report by the salaries that had been projected, and to the best of my recollection we felt that the cost of such Bismarck office would be about $15,000 a year greater than was presented in that report.

Q. You say "we felt". To whom do you refer?

A. Mr. Peale and I.

Q. The $15,000 estimated additional expense of the Dakota subsidiaries was as a result of the consideration and thinking on the part of yourself and Mr. Peale. Is that right? A. Yes.

Q. You have already testified that you made no change in the joint management arrangement, so I assume from that that you abandoned the idea of establishing any separate office? A. Yes.

Q. Now, Mr. White, you have mentioned from time to time various parties who participated in that joint management. I think it would be helpful if you could review for us at this time some of the more prominent ones with whom you had dealings from 1932 on down to 1945. You have mentioned Mr. Parker. You have mentioned Mr. Kruesi. Who else was there? I think you mentioned Mr. Strike. Can you tell us who they were and what their capacities were? A. Mr. Buckmeier.

Q. These are in addition to Mr. Parker, Mr. Kruesi and Mr. Strike? A. Yes.

Q. Who was Mr. Buckmeier?

A. Mr. Buckmeier was in charge of the accounting of all companies in the joint—general office at Huron.

Q. During the entire period?

A. He was connected with the accounting during the entire period, but Mr. Sandstedt was really in charge of the accounting department, at least during the early years of the period.

Q. I see. Well, who was Mr.— All right, go ahead.

A. I presume I have indicated sufficiently that I had many dealings with Mr. Sandstedt?

Q. Yes. I was going to ask you, who was Mr. Sandstedt during that period?

A. I believe his title—I believe there were changes in his title, but during a great portion of the time he was the vice president.

Q. Down to when? A. His death.

Q. In 1944? A. In 1944.

Q. All right. A. I had dealings with Mr. Bayles.

Q. Who was Mr. Bayles?

A. Mr. Bayles was an engineer in charge of transmission lines, substations, distribution problems—

Q. Anybody else?

A. (Continuing) —and with his assistant, who succeeded to Mr. Bayles' position when Mr. Bayles went to war Mr. Stanley Sickel.

Q. And he took over Mr. Bayles' duties when Mr. Bayles left for the service?

A. Yes, having previously been Mr. Bayles' assistant.

Q. I see.

A. Mr. Stokke, who had charge of power plants.

Q. Did that include mechanical engineering?

A. That would be designated—his work would be designated, I believe, as mechanical engineering, and Mr. Bayles' work as electrical engineering. Mr. E. M. Nottestad and I had numerous conversations about the merchandising activities of the U. P. U. subsidiaries. Mr. Nottestad had supervised those activities, and directed them.

Q. Anybody else you recall? How about Mr. Gazin. Do you know Mr. Gazin?

A. Mr. Gazin was the predecessor of Mr. Stokke.

Q. He did the same work as Mr. Stokke that you have described? A. Yes.

Q. That is, power plants, mechanical, inside? A. Yes.

Q. He preceded Mr. Stokke?

A. Yes. I had correspondence with Mr. Gazin. I talked with him in the Huron offices, but unlike Mr. Stokke and the other engineers, I did not take a trip over the properties with him. I did on a number of occasions with several others, with all of the other engineers.

Q. How about Mr. Albert? Was Mr. Albert there?

A. Yes, for a time Mr. Albert was the predecessor of Mr. Bayles.

Q. I see. Doing the same job as you have described with reference to Mr. Bayles?

A. Yes, and I went over the properties more than once with Mr. Albert.

Q. How about Mr. Sanborn? I think you have testified previously about Mr. Sanborn?

A. He was president of the company, and I have testified as to correspondence, matters, in which he was receiving copies of the same correspondence that I either received or sent.

Q. Well was the correspondence that you testified to specifically in this deposition hearing the only correspondence which you had with Mr. Sanborn?

A. Oh, no. I corresponded continuously with Mr. Sanborn, as I did with Mr. Strike and Mr. Sandstedt and Mr. Kruesi. During Mr. Sanborn's tenure as president, he had accompanied me on all trips that I took over the properties. I had talked to him on numerous occasions in my office, he and Mr. Sandstedt having been in Chicago more frequently than any of the members of the central office staff. I have talked with him numerous times on the long distance telephone.

Q. I don't think we have asked you specifically with reference to Mr. Kruesi. You have mentioned him. Now, did you go over the properties with Mr. Kruesi at any time?

A. I think Mr. Kruesi accompanied me on my trips over that property at least 80 per cent of the time. He went with me before he became president of the Dakota companies. He went with me on every trip that I took while he was president, and after he resigned as president of those operating companies, and became president of Middle West

Service Company, he accompanied me on most of my trips over those properties.

Q. Was there a Mr. McArthur in that general management?

A. Yes. Mr. McArthur is vice president of those companies, in charge of public relations and franchises; and I have had many meetings with him.

Q. You say you had many meetings with him? A. Yes.

Q. Was there a Mr. Dunn?

A. Yes. Mr. William M. Dunn.

Q. Who was he?

A. He is now the treasurer of Northwestern Public Service Company, and immediately following Mr. Sandstedt's death in 1944, he was elected, with my prior approval, as treasurer and director of Dakota Public Service Company, and continued in that office until October 19, 1945.

Q. Well, Mr. White, you have testified, during the description of these various people that you had correspondence with certain of them and personal interviews with certain of them. Would your testimony as to the ones you have mentioned prevail or obtain with reference to the others? That is, did you have correspondence with all of these people who you talked about, or personal interviews, from time to time?

A. The list that I have named would be people that I had either correspondence or personal [inteviews] with.

Q. The list you have named is not exclusive, is it? You didn't name all of them?

A. Probably not, but I did not want to give the impression that I was in active correspondence with some of those department heads.

Q. I see. Well, did you meet all of those people personally at one time or another? A. Yes.

Q. The testimony has shown reports and memorandum and recommendations submitted to you by various of these people you have mentioned. Did they from time to time submit to you memoranda, studies, and their recommendations as to various matters beyond those which we have already discussed in these depositions? A. Yes.

Q. Well, now, Mr. White, I take it that during 1932 to October 19, 1945, you had dealings with the various per-

sons whom you have just previously testified about, either some of them all at one time or all of them on some one or more occasions. I will ask you now whether or not you were satisfied with that personnel, as to their ability in the various positions which they held? A. I was.

Q. Were you satisfied as to the results which were being accomplished? A. Yes.

Q. Were you satisfied, Mr. White, over that period, with respect to those persons as to their personal integrity and loyalty to the interests of the Dakota subsidiaries?

A. Yes, I was so satisfied.

Q. Entirely so? A. Yes.

Q. And were you satisfied as to the ability and integrity and loyalty of that personnel, in your capacity as president and a director of the United Public Utilities Corporation, and as a director of Dakota Public Utilities Corporation, and as a director of Dakota Public Service Company, and its two predecessor companies, namely, North Dakota Power & Light Company and Northern Power & Light Company? A. In those capacities I was also satisfied.

Q. To the extent that that personnel performed services for the Knife River Coal Mining Company, were you also satisfied as to the same matters in [you] capacity as a director of Knife River Coal Mining Company?

A. I was not a director of Knife River Coal Mining Company.

Q. You were not a director of Knife River Coal Mining Company? A. No sir.

Q. As president and a director of United Public Utilities Corporation, and as a director of the Dakota subsidiaries thereof, excluding Knife River Coal Mining Company, were you satisfied with the monetary or financial results produced by those subsidiaries under the direction and management of the personnel you have just testified about?

A. I was so satisfied.

Q. Mr. White, you have testified previously as to your satisfaction, in the capacities as president and director of United Public Utilities Corporation, and as a director of the particular Dakota subsidiaries which were in existence at the time of my inquiries, with the five mill energy interchange rate, the [intercpacity] exchange rate of $13.20 per kilowatt firm demand, and the transmission line charges of

$20,000, with respect to the dates when the various contracts pertaining to those rates were executed by and between the Dakota subsidiaries and Northwestern Public Service Company. Now, I will just ask you over the entire period, commencing with the receivership and continuing to October 19, 1945, whether or not as president and director of United Public Utilities Corporation, and as a director of the particular Dakota subsidiaries of that company involved, and as receiver and trustee where applicable, you were satisfied with the five mill energy interchange rate, and that the same was fair, just, reasonable and proper insofar as the Dakota subsidiaries of United Public Utilities Corporation or United Public [Utilties] Company, as the case may be, were concerned?

A. I was so satisfied.

Q. I will ask you also, Mr. White, whether or not as president and director of United Public Utilities Corporation and as a director of the particular Dakota companies of that company involved, you were satisfied that the $20,000 annual charge paid by Northern Power & Light Company and subsequently by the Dakota Public Service [Compnay], under the applicable contracts, on account of the interconnection facilities, was fair, just, reasonable and proper charge insofar as those Dakota subsidiaries of the United Public Utilities Corporation were concerned?

A. I was so satisfied.

Q. Were you satisfied as to that $20,000 per annum charge during the entire period that the contracts providing for such charge were in force and effect? A. Yes, I was.

Q. Now, I will ask you further, Mr. White, whether or not, in your capacity as president and director of United Public Utilities Corporation, and as a director of the Dakota subsidiaries of that company which were involved in the particular contracts, you were satisfied that the charge of $13.20 per kilowatt of firm demand per year provided for in the 1938 interchange capacity agreement and the respective subsequent contracts providing for that same charge, I will ask you whether or not you were satisfied that that charge was fair, just, reasonable and proper insofar as the Dakota subsidiaries of United Public Utilities Corporation were concerned?

Q. Were you so satisfied, over the entire period that the

contracts providing for that interchange capacity charge were in operation and in effect? A. Yes.

Q. And I further ask you, Mr. White, whether or not since the execution of the supplemental agreement amending the 1941 contract, commonly known as the 1943 supplement, you have been satisfied from the date of that agreement to October 19, 1945, in your capacity as president and director of United Public Utilities Corporation, and as director of Dakota Public Service Company, that the acceleration provisions provided therein upon termination of the 1941 contract were fair, reasonable, just and proper insofar as the same affected Dakota Public Service Company?

Q. Mr. White, do you know whether or not Northern Power & Light Company made any payments to Northwestern Public Service Company under the 1936 contract?

A. Yes.

Q. Were those payments made with your approval?

A. Yes.

Q. And do you know whether that company, Northern Power & Light Company, made any payments to Northwestern Public Service Company under the 1938 contract?

A. Yes, they did.

Q. Were those payments made with your approval?

A. Yes, they were made with my approval.

Q. Do you know whether or not Northern Power & Light Company received payments from Northwestern Public Service Company under the 1936 contract?

A. The settlements under that contract were made on the basis of net balances of energy purchased and sold, and I don't recall whether or not Northern Power & Light Company in any one month purchased more energy under that contract than it sold during that month, but in general Northern Power & Light Company was selling more energy under the contract than it was buying, and therefore was usually required to make payment.

Q. It would be the other way around, wouldn't it, Mr. White?

A. Was required to receive payment for a net balance of energy sold.

Q. Do you know whether they did receive the payments for those net balances? A. Yes, they did.

Q. Did you approve the amounts of payments which were received by Northern Power & Light Company?

A. Yes, I did.

Q. Do you know whether or not, Mr. White, Dakota Public Service Company, subsequent to July 1, 1939, paid any moneys to Northwestern Public Service Company under the 1939 and 1941 contracts? A. Yes, it did.

Q. Did you approve those payments?

Mr. Benson: How do you know?

A. I had each month a record of the financial statements of Dakota Public Service Company, including balance sheets, which listed the accounts payable, and if and to the extent that payments of those charges were not made, such charges would have been listed as an accrual in those monthly balance sheets. Furthermore, those monthly statements included an income statement for the month in which payment under those contracts were included as operating charges for the month. Still further, I had monthly operating reports, showing the amounts of the cost to Dakota Public Service Company under those contracts, which could be used as a basis to check against the financial statements that I [preveriously] referred to.

Mr. Stafford: Will you read my last question? "Q. Did you approve those payments?" A. Yes.

Mr. Robinson: Mr. White, you have just stated that you received monthly certain financial reports and operating reports. Did you examine these reports when they were received? A. Yes.

Q. Was that a regular practice, to examine these reports? A. Yes.

Q. Did you make comparisons from time to time with monthly reports made from month to month?

A. Not as a regular practice did I have occasion to make comparisons of one month's report with another month's report, except as comparisons were made in each of those monthly reports for the comparative periods of the preceding year.

Mr. Stafford: Q. Mr. White, those reports which you have been describing, did they show the amounts of money paid from one company to the other, whichever way it

went, on the five mill interchange of energy? Did they show that information?

A. To the best of my knowledge they did.

Q. Did they show the amounts paid on the $20,000 per annum charge, which I believe was payable $1,666.66 a month? A. Yes.

Q. Did they show the amounts paid under the inter-capacity exchange agreement?

A. According to my recollection they showed them under the cost of purchased power, with an exhibit to break down the details and show that item.

Q. You did have knowledge of those payments as they were made, and your knowledge was current?

A. As I recall, yes.

Q. Were the payments made by the Dakota Public Service Company to Northwestern Public Service Company under these contracts and the amounts received by Dakota Public Service Company from Northwestern Public Service Company under these contracts, paid and received with your approval? A. Yes.

Q. Mr. White, during the course of your familiarity with these properties, either as receiver, trustee, or in your capacity as a director of the Dakota subsidiaries, and president and director of United Public Utilities Corporation, do you know whether or not there was any particular method of operating the properties followed by the operating personnel? A. Read that, will you?

Q. I specifically refer to the operation of the plants, which plants were on the line and which plants were off the line, and so forth. Do you know whether or not there was any such policy or plan of procedure followed?

A. (Read) I knew that the company had a policy—

Mr. Stafford: Q. You say you know that was the policy and the instructions given to the load dispatchers. Did you approve of that policy? A. Yes.

Q. Did you have occasion to observe at any time, Mr. White, whether that policy was followed?

A. Yes, I did have occasion to observe.

Q. When was that?

A. I have talked with the load dispatcher at Aberdeen and discussed his board on the wall, which showed what

plants were on the line at the moment of my visit in that room; asked him as to the amount of the system load, and the plants that were furnishing that load, and how much.

Mr. Benson: When was that conversation?

A. I have had at least half a dozen conversations of that sort with the load dispatcher on the occasion of visits at the Aberdeen plant during this period.

Q. Mr. White, you have testified throughout that United Public Utilities Corporation owned the securities and common stocks of Dakota Public Service Company and Knife River Coal Mining Company down to October 19, 1945?

A. Yes.

Q. Did they at that time sell those securities and stock to anyone else?

A. On October 19, 1945, United Public Utilities Corporation delivered to Montana-Dakota Utilities Co. all of the outstanding bonds, stock and notes of Dakota Public Service Company, the entire amount of which had theretofore been owned by United Public Utilities Corporation, and received payment in full on that date of the amount due under a contract or agreement of sale that had previously been entered into with Montana-Dakota Utilities Company.

Q. Do you recall when the price was agreed upon between United Public Utilities Corporation and Montana-Dakota Utilities Co.?

A. Yes. It was agreed on about April 24, 1945, and I might add that the price agreed on also included United Public Utilities Corporation's holding of Knife River Coal Mining Company.

Defendant's Exhibit 282, which is also referred to as Defendant's Exhibit 76 in White's deposition, was received in evidence. It is a conformed copy of a contract consisting of 12 pages and one cover page and 6 additional pages covering Exhibits "A" and "B", respectively. The contract was executed between United Public Utilities Corporation and plaintiff, dated July 2, 1945, relating to the sale by United Public Utilities Corporation to plaintiff of all of the outstanding securities, including the capital stock, of Dakota Public Service Company and of Knife River Coal Mining Company. The total price for the se-

curities of Dakota Public Service Company was $6,521,060.74 plus an amount equal to the net income of Dakota Public Service Company from April 30, 1945 to the closing date and the total price for the securities of Knife River Coal Mining Company was $547,461.57 plus a similar amount equal to the net income of that company for the said period. The contract provided as a condition precedent to the seller's obligation to sell the securities of Dakota Public Service Company and of Knife River Coal Mining Company that the Securities and Exchange Commission should have approved the sale of securities of Dakota Public Service Company and that all proceedings before that Commission be carried out in a manner satisfactory to or approved by Messrs. Evans, Bayard & Frick, counsel for the seller. It further provided that the obligations of the buyer to purchase should be subject, among other things, to prior approval (1) by the Securities and Exchange Commission, among other things, of the sale and purchase of the securities and of the liquidation of Dakota Public Service Company by plaintiff; (2) by the Federal Power Commission to the extent of its jurisdiction, among other things, of the purchase of the securities and the liquidation of Dakota Public Service Company by plaintiff; and (3) by the Public Service Commission of North Dakota under the statutes of that State of, among other things, said purchase and liquidation; and that neither Dakota Public Service Company nor Knife River Coal Mining Company should enter into any material contracts other than the contracts listed in Exhibits "A" and "B" to the Agreement, unless approved by plaintiff. The contract further provided that neither the seller nor plaintiff should be obligated to sell or buy the securities of either Dakota Public Service Company or Knife River Coal Mining Company separately, and that it was understood that the sale of the securities of both companies was by way of compliance by the seller with the requirements of Section 11 (b) of the Public Utility Holding Company Act of 1935.

Exhibit "A" attached to and made a part of the Agreement is a list of material contracts of Dakota Public Service Company, which list included as items 22 to 27, the following:

22. Agreement

dated March 31, 1945 between Dakota Public Service Company and Knife River Coal Mining Company. Dakota agrees to purchase annually approximately 35,000 tons of 1¼" Lignite screenings and 95,000 tons of 2" Crushed Lignite. Agreement will be in full force and effect for one year and thereafter unless cancelled by either party by at least thirty days' written notice prior to its anniversary date. This agreement amended May 29, 1945.

23. Contract for Delivery of Coal

dated April 1, 1945 between Dakota Public Service Company and Knife River Coal Mining Company. Covers investment charge and for operation and maintenance of bunker and conveying equipment at Beulah, North Dakota.

24. Agreement

dated July 1, 1941, between Northwestern Public Service Company and Dakota Public Service Company, relating to interchange capacity and energy. Term—10 years.

25. Supplemental Agreement

dated March 13, 1943, between Northwestern Public Service Company and Dakota Public Service Company, supplementing above agreement, eliminates minimum term and provides for termination of contract upon 18 months' prior written notice.

26. Agreement for Allocation of Joint Management Expenses

dated July 1, 1939, between Northwestern Public Service Company, Dakota Public Service Company, Knife River Coal Mining Company. May be cancelled on ninety days' notice.

27. Supervision Agreement

between Dakota Public Service Company and Middle West Service Company, dated July 1, 1939. May be cancelled on ninety days' notice.

Exhibit "B" attached to and made a part of the Agreement is a list of material contracts of Knife River Coal Mining Company, which list included as items 5, 7 and 8 the contracts described under items 22, 23 and 26, respectively, of Exhibit A, and item 6, being the contract between defendant and Knife River Coal Mining Company as to delivery of coal at Aberdeen.

Q. rior to the execution of this contract, of which Defendant's Exhibit 76 purports to be a true copy, did you have any conversations with any representatives of Montana-Dakota Utilities Co. with regard to the contractual arrangements between Dakota Public Service Company and Knife River Coal Mining Company on the one hand and Northwestern Public Service Company on the other?

Mr. Benson: Answer that yes or no. A. Yes.

Mr. Stafford: Q. Do you recall the approximate dates of such conversations? A. During the first six months of 1945.

Q. Well, the contract bears date July 2, 1945. Was it 30 days prior? Let me ask you another question first: Do you recall who you had the conversation with? Maybe that will refresh it better.

A. I can recall of a conversation in the month of April with Mr. Heskett.

Q. April of 1945? A. Yes.

Q. Where, Mr. White? A. In my office.

Q. In your office in Chicago? A. Yes.

Q. Was anyone else present other than you and Mr. Heskett? A. No.

Q. All right, sir. Will you please tell me the substance of that conversation the best you can recall? What did you say to Mr. Heskett and what did he say to you, regarding these contractual arrangements between Dakota Public Service Company and Knife River Coal Min-

ing Company on the one hand and Northwestern Public Service Company on the other?

A. I told him that these arrangements were in effect; told him the principal features of the arrangements, and our reasons for making them.

Q. By "arrangement," do you mean the arrangement as embodied in the 1941 contract as amended by the 1943 amendment? A. Yes, that's what I mean.

Q. Did you tell him anything about the history which antedated the 1941 contract? A. Yes.

Q. Can you tell us in substance what you told him?

A. I told him how the interconnection facilities were originally built, and how the interconnection agreement came into being.

Q. By the interconnection agreement, you mean the 1936 contract? A. Yes.

Q. Exhibit B to the complaint in this suit? A. Yes.

Q. Did you tell him anything with reference to the original of the 1938 contract, Exhibit C to the complaint, if you recall?

A. I don't recall that I told him details of the origin of the agreement. I merely told him that the arrangements included in the 1941 agreement and the 1943 supplement were in effect.

Q. Do you recall whether he made any inquiry of you as to those prior matters, on that occasion?

A. I do not recall specifically that he did.

Q. Did you tell him anything with reference to the common directors and officers who were serving both Dakota Public Service Company and Northwestern Public Service Company? A. I don't recall that I did.

Q. Well, do you recall anything else that you told him on that occasion.

A. Yes. I would like to amend that last answer.

Q. All right, sir.

A. To the extent of saying that I told him in detail as to our joint management setup in Huron, and in the course of that discussion I told him that we did have joint officers, but I do not recall any discussion of directors because the discussion was with respect to the operating features of the business.

Q. Well, do you recall anything further that you said

or that Mr. Heskett said with reference to that subject matter at that time and place?

A. I recall that I gave him as complete a word picture of our business and the operating conditions within the business of Dakota Public Service Company and Knife River Coal Mining Company, as I could, in a period of which I believe was about two hours.

Q. Well, after that conversation with Mr. Heskett, did you have any further talks with him about that same subject matter? A. Not that I recall.

Q. Well, after that conversation with Mr. Heskett, did you have any conversations with any other representative of Montana-Dakota Utilities Co? A. Yes.

Q. Well, who, for instance?

A. Well, Mr. Cecil S. Smith.

Q. Who is Mr. Smith? A. Vice president.

Q. All right.

A. Mr. Gamble, who is vice president. With Mr. Elvig.

Q. Mr. Elvig, the same gentleman who is here?

A. That's right. Who is general auditor of Montana-Dakota Utilities Company.

Mr. Benson: Q. You just asked Mr. Elvig his title, didn't you?

A. Yes, and with Mr. Paul Christopherson, who was of counsel for the company.

Q. Well, do you recall any particular pairing of these people when you had your conversations?

A. To the best of my recollection I told Mr. Cecil Smith about these arrangements at a time when he was in my office in company with Mr. Elvig.

Q. With he and Mr. Elvig in your office?

A. And that I told Mr. Christopherson about them when he was in my office, accompanied by Mr. Gamble.

Q. All right. You have told the approximate date of those conversations. That is, more definite than they occurred between the time you talked to Mr. Heskett and the time the contract was signed. Would that be in that period?

A. I think that would be in the period intervening between my conversation with Mr. Heskett and the signing of the contract.

Q. All right. Now, you can relate as nearly as you rec-

ollect, the substance of the conversation between you three gentlemen concerning the question of these inter-company contracts and arrangments, specifically as to inquiries made by them and the information given to them by you?

A. There are no outstanding features, conversations, that I can possibly recall, except that they represented an effort on my part to explain to them that the arrangements existed, and what the nature of the arrangement was, and if they asked any questions, such questions would have been no more than an ordinary attempt to understand what I was trying to tell them.

Q. Do you have any present recollection as to what explanation you made to them?

A. No more than I attempted to make a full disclosure.

Q. What do you mean by "full disclosure," of the existing arrangements or the then arrangements together with the history, or what?

A. Principally of the arrangements as they existed.

Q. Do you recall now anything more about the existing arrangements? You testified that you gave a general description. Do you recall anything beyond that?

A. Well, I think I am safe in saying that I knew the arrangements fairly well, and it was certainly my disposition to tell them everything I knew.

Q. Well, did you attempt to tell them everything you knew?

A. I did attempt to tell them everything I knew. I cannot make a representation as to the degree with which I succeeded in that attempt.

Q. During the course of those conversations with Mr. Gamble and Christopherson, did you tell them anything about the joint management and the common officers and directors of the companies? Do you recall that, whether you did or not? A. Not specifically.

Q. You do not recall. You could have, but you do not know at the present time? A. No, I do not.

Q. Now, referring to your conversation with Messrs. Elvig and Smith, I believe you said they were together—do you recall about the time that conversation occurred, other than it was during this same general period?

A. On reflection I think that my talk with Mr. Smith

and Mr. Elvig was prior to my conversation with Mr. Heskett.

Q. Where? A. In my office in Chicago.

Q. Was anyone else present besides you three gentlemen?

A. In some phases of those discussions with those two gentlemen, Mr. McClanahan, vice president of my company, was present, as was Mr. Peale, our treasurer.

Q. Mr. McClanahan and Mr. Peale were present part of the time but not all the time?

A. That is correct, to the best of my recollection.

Q. Do you recall whether or not you stated anything to either Mr. Elvig or Mr. Smith regarding the intercompany relations and the contracts and the history thereof, the joint management arrangements and the common officers and directors of those companies, which you had not stated to Mr. Christopherson, Mr. Gamble and Mr. Heskett?

A. I had one or more talks with Mr. Smith, during at least one of which Mr. Elvig was present. Mr. Elvig stayed over in Chicago to acquire some information that he wanted from our records, and he was working in another room in our office during the most of that time. As I recall, he had enough work to do to keep him busy, without participating in the general discussion of our affairs which I had with Mr. Cecil Smith.

(Question read.)

A. In answer to Mr. Stafford's question, the purpose of my conversations with Mr. Smith was to acquaint him as fully as possible with the actual state of affairs in our Dakota subsidiaries, in the course of which I discussed operating personnel, operating relationships with Northwestern Public Service Company, and the principal terms, and the effect of the contracts between Dakota Public Service Company and Knife River Coal Mining Company.

Q. How about the contract between Knife River Coal Mining Company and Northwestern Public Service Company?

A. I told him of those, and also of the contracts between Knife River Coal Mining Company and Dakota Public Service Company and the Knife River Coal Mining

Company contracts with Northwestern Public Service Company.

Q. You mentioned you told him about the operating personnel. Did you include therein the joint management arrangements and the fact that there were common officers and directors of the Dakota Company and Northwestern Public Service Company?

A. I cannot recall specifically that there was discussion.

Q. Do you know whether or not any investigation was made by Montana-Dakota Utilities Co. or representatives on their behalf, of the records, books and other papers of Dakota Public Service Company and Knife River Coal Mining Company?

A. Yes, I recall that investigations were made.

Q. Were the investigations made prior to the execution of the contract, that is, the contract of July 2, 1945?

A. Some of them were.

Q. Some of them were. Were there some investigations made after the contract, too? A. There may have been.

Q. In a prior session I referred to Exhibit D to the complaint in this action, being the contract made and entered into July 1, 1939, between Northwestern Public Service Company and Dakota Public Service Company, and I directed your attention to Article XII, which provides that 1939 contract cancels and supersedes the interconnection contract dated October 7, 1936, Exhibit B of the complaint. I ask you with reference to same contract and the same period, whether you were satisfied that the rates and charges therein provided for to be received by Northern Power & Light Company were fair, reasonable and proper from the standpoint of that company? A. I was satisfied.

Q. Were you so satisfied in your capacity as president and a director of United Public Utilities Corporation, and as a director of Northern Power & Light Company during that period? A. Yes.

Q. Mr. White, I will show you once more Defendant's Exhibit 22 for identification, which is Defendant's Exhibit 242 (R. p. 1140, supra). I ask you to read the same, and then refresh your recollection. (Handing document to witness.) A. Yes.

Q. Now, I will ask you whether or not at the meeting of the directors of United Public Utilities Corporation

on June 24, 1937, there was discussed by that board of directors the fact that a recent survey of available generating capacity on Dakota properties showed a serious shortage, that the full peak load in 1936 was 9715 K. W. and effective capacity only of 9990 k: w.; also that the maximum rate capacity of all plants, including small high-cost standbys was at that time 11,460 k. w., so that even if it were practicable to use all the plants on the peak load, the reserve would only be 1745 k. w., or about 18 per cent. Do you recall whether there was any discussion of those matters before the board?

A. The generating capacities were discussed.

Q. I will now also ask you whether there was discussed by the directors at that meeting the question of the effect upon the effective capacity if the 3500 k. w. unit at [Buelah] should go out on the peak, and that it would thereby be reduced to 6490 k. w., leaving a shortage of 3275 k. w. of effective capacity and reducing the minimum available rated capacity to 7960 k. w. or 1756 k. w. under the peak load. Were those matters discussed before the board by you? A. Yes.

Q. Were they discussed by the directors?

A. I do not recall that they were.

Q. Now, was there any other discussion at that board meeting of the fact that under normal operations Northwestern Public Service Company was sending 2200 k. w. north on the winter peak loads for about four hours and was sending 500 k. w. north on the spring peak loads?

A. That report was made by me.

Q. To your board of directors at that time?

A. That is correct.

Q. I have one more question, Mr. White. I have asked you and Mr. Robinson has asked you over the past few days whether you have produced those various documents from your files, to which you have answered I believe without exception "yes". May I ask you just what you mean by your files? Are those your personal files or your corporation files, or what?

A. I mean the general files of United Public Utilities Corporation, as maintained in their offices at 20 North Wacker Drive, Chicago, including certain amounts of material that had been transferred from those files to a storage vault.

Mr. Stafford: That brings us to the cross examination by Mr. Benson.

Mr. Fellows: The plaintiff will offer in evidence in toto, subject to the objections which appear therein, the cross examination of the witness, White, Volume 9 of the same deposition, which is on file herein, taken at Chicago on September 26th and succeeding dates consisting of page 903 to 1006, inclusive; Volume 10 of the same deposition consisting of page 1007 to 1119, inclusive; Volume 11 of the same deposition consisting of page 1120 to 1132, inclusive; Volume 12 of the same deposition consisting of page 1183 to 1280, inclusive.

Mr. Woods: If Your Honor please, we object to that method of offering this portion for the reason it does not make it possible for the defendant to know what the rulings of the Court are upon the testimony that is offered.

Mr. Robinson: For the further reason that in view of the fact all of direct testimony of White was not read in this record, there may be certain portions of the cross examination offered by the plaintiff which is improper and going outside of the scope of the direct examination. It is impossible for the Court to pass upon that feature in the absence of hearing what those questions are.

Mr. Fellows: Let me suggest if we would read every word in these depositions and the Court, upon objection received it subject to objection, it would be a proper ruling of the Court.

The Court: I don't have to receive everything. I haven't received everything. Where you have a case like this, dependent upon an enormous volume of record, if an appellate court should rule any evidence out, even though it might appear on first glance to be reversible error, for that reason the Court prefers to admit evidence rather than take the time to go into the question whether or not it is competent to the issues before the Court. I am not going to say to counsel how they shall present their evidence, but as to what the Court is apt to do, counsel has stated the attitude of the Court on that proposition. I am not going to, in the midst of this trial go into the question of the technical competency or relevancy of testimony

offered here by either side. If I did, we would be here until next summer. I am going to admit evidence over which I have no judgment at all subject to objection. I am not undertaking to dictate to counsel how they shall present their case. You are trying the case. It is up to you to present the evidence in the manner in which you think it ought to be presented.

Mr. Fellows: That is the way we want to do it, Your Honor. If the Court will receive it, I would like to read a few extracts from it.

The Court: Very well.

Mr. Stafford: We would like the same privilege. We have gone over this very carefully in an effort to shorten up this proceedings. We have boiled it down I think, not to exceed fifteen or twenty pages. We would like the same privilege of reading excerpts which we think are pertinent.

The Court: Very well.

(Read from deposition by Mr. Fellows)

Mr. Benson: I don't want to encumber the record with the entire minutes of the annual meeting of stockholders. I would like to ask counsel whether it may be stipulated that at the annual meeting held on April 25, 1946, of the stockholders of United Public Utilities Corporation, being designated in the minutes as annual meeting of stockholders, there was no resolution adopted [approved] all or any of the acts of the officers or board of directors for the preceding year.

Mr. Stafford: Well, subject to the objections previously stated, we will so stipulate, and we want the record also to show that the minutes indicate that meeting was adjourned and reconvened subsequently on Friday, June 8th, 1945, in Flemington, New Jersey.

Mr. Benson: Now, I refer to the original minutes of United Public Utilities Corporation, and specifically to the minutes entitled The Adjourned Annual Meeting of Stockholders, or rather, entitled United Public Utilities Corporation, minutes of Adjourned Annual Meeting of Stockholders, and reading from said minutes, the first paragraph thereof, I read:

"The adjourned annual meeting of stockholders was called to order at the office of the Corporation, 117 Main Street, Flemington, New Jersey, on Friday, June 8th, 1945, at 11:00 O'clock A. M., Eastern War Time."

And I ask counsel whether he is willing to stipulate that there is recorded, in the minutes of that meeting, no resolution of the stockholders approving any action of the officers and directors in the preceding year or at any other time.

Mr. Stafford: Now, what is he asking us to stipulate?

(Record read by the reporter)

Mr. Stafford: You just want it as the fact?

Mr. Benson: Yes.

Mr. Stafford: We will so stipulate, subject to the preservation of our objections as to the materiality and also such objections as we may wish to interpose to any inferences sought to be drawn from such omission.

Mr. Royhl: And the further objection that it is not proper cross examination.

Mr. Stafford: And it is not proper method of proving corporate facts.

The Court: As part of the cross examination in this deposition it may stand.

(Read from deposition)

Mr. Benson: I ask counsel for the defendant whether he will stipulate that, in the minutes of the annual meetings of the stockholders of United Public Utilities Corporation for the years 1937 to 1944, both inclusive, and all intervening years, there is no record of any resolution by the stockholders approving any action of the officers or directors in the preceding year.

Mr. Stafford: We will stipulate to that fact, subject to the same reservations as stated in the stipulation with reference to the 1945 minutes of the annual meeting of stockholders.

Q. I show you booklet marked Plaintiff's Exhibit 3 for identification, which is Plaintiff's Exhibit 98, infra. That

is an exact duplicate of the report which you filed, with the court indicated thereon, and which you filed as receiver in the proceedings indicated in the document?

A. Yes, except in the report as filed, as I recall, there were a few errors in the location of items in Exhibit 1 at the end of the report, and in this particular copy—

Q. Is it an exact duplicate except for the folded page marked Exhibit 1, which is pasted onto the inside of the back cover page? A. Yes.

Mr. Benson: The plaintiff offers Plaintiff's Exhibit 3 for identification, and particularly paragraph 8 on page 29 of said exhibit.

Plaintiff's Exhibit 98, which is also referred to as Plaintiff's Exhibit 3 in White's deposition, was marked for identification and is in part as follows:

8. In view of the substantial investment of Middle West Utilities Co. in the common stock of United Public Service Company, the substantial Middle West Utilities Company holdings of United Public Utilities Company First Lien Bonds, and also of secured notes payable by United Public Service Company and/or subsidiaries to Middle West Utilities Company and/or subsidiaries, which appear on the records to be outstanding in the amount of $5,918,000 it has appeared to me that the work of the Receiver, so far as possible and proper, should be conducted in close cooperation with the Receivers of the Middle West Utilities Company in order that they might have at all times the most complete knowledge of what is going on and in order that they may be able to contribute suggestions based on their own experience with these properties, and, also, in order that the receivership operation may have the benefit of the many possible economies available as result of such cooperation between your Receiver and the Receivers of the Middle West Utilities Company.

Mr. Fellows: We offer in evidence Plaintiff's Exhibit 98.

Mr. Stafford: Objected to as incompetent, irrelevant and immaterial; not proper cross examination; self serving; no sufficient foundation.

The Court: Objection overruled.

(Read from deposition)

Q. Mr. White, prior to your appointment as receiver of United Public Service Company and the others who were, in those days, defendants in proceedings of this type, in the District Court of the United States, for the Northern District of Illinois, Eastern Division, in the case in Equity 11652, entitled Howard J. Umland, Complainant, versus United Public Service Company, a corporation of New Jersey, et al., Defendants, will you state what businesses you had been in?

A. I had been in only one business, the investment banking business, dealing primarily in the purchase and sale of bonds, and I was in that business continuously from December, 1907, until about April 15, 1932.

Q. Were the joint management expense agreements between the Dakota subsidiaries of U. P. U. Corporation and Northwestern Public Service Company submitted to the board of directors of U. P. U. for consideration or approval or action of any kind?

A. I don't recall. I know that the directors knew of the arrangement, and that such an arrangement existed, and the general basis.

Q. I was trying to recall. I had not seen anything, or any formal action or formal report about it. You do not recall that there was any formal report about it?

A. Not that I recall, no.

Q. Has all of that material been introduced in evidence, or do you have some that has not been introduced?

Mr. Royhl: We object, unless he knows what has been introduced in evidence. We object as calling for the opinion and conclusion of the witness.

Mr. Fellows: He is asking him if he produced all reports and engineering studies found concerning the contract dated July 1, 1941.

A I find, in the additional material that I have brought over this afternoon, no further engineering reports that were made in connection with the 1941 agreement, and I had previously brought all the material that I could find in that connection. I think all of it was introduced into the record.

Q. After the July 1, 1941, contract was made, prior to

the execution to the supplement there, which is a part of Exhibit F to the complaint, was there any engineering or cost studies made for the purpose of determining the advisability of executing the supplement?

A. To the best of my knowledge, no.

Q. In considering the sale of energy from the North Dakota Company to the Northern Company at 3½ mills and the sale of energy from Northern to Northwestern Public Service Company at 5 mills, and later that rate being 5 mills as between Dakota Public Service Company and Northwestern, did you investigate the reasonableness of that rate and charge? A. Yes.

Q. You understood that the rate for energy at 5 mills was reciprocal, that is, the Northwestern Public Service Company would be 5 mills, or to the extent that they delivered under that agreement they would receive 5 mills. You understood that?

A. Yes. That was an interchange rate.

Q. Now, in considering the reasonableness of that charge and rate, did you consider it on the basis of the incremental fuel cost of generation?

A. I considered it on a basis of incremental cost insofar as the sale of energy to Northwestern was concerned.

(Read from deposition by Mr. Fellows)

Mr. Stafford: Q. Mr. White, back at the beginning of your testimony you described for us the method by which proxies were given to vote the shares of stock of the Dakota subsidiaries of United Public Utilities Corporation. I asked you at that time whether you remember or recalled the method under which that stock was voted at the annual meeting of those companies, for the election of directors during the time of your receivership and subsequent trusteeship, and you replied I believe that you did not recall the mechanics of it. I will now ask you specifically whether during the period prior to January 1, 1935, that is, when you were receiver and trustee, did you as such receiver and trustee direct the method in which those shares should be voted in the election of directors?

A. Having refreshed my memory from some additional correspondence that I was able to produce yesterday noon, I can state that I did.

Q. And did you do that in each case that there was an election prior to January 1, 1935? A. Yes.

Q. If I understand you clearly, you have as receiver directed or designated which persons those shares should be voted for in electing directors of those Dakota subsidiaries of United Public Utilities Company?

A. I designated them to the extent that I accepted recommendations, or that the final slates of directors were the recommendations with or without changes that I may have considered necessary. I haven't worded that quite correctly.

Mr. Benson: Q. Recommendations of whom?

A. The joint management.

Mr. Stafford: Q. Well, you approved the slates that they recommended?

A. I approved the slates in advance, before they were submitted to the annual meetings of stockholders.

Q. The shares of stock were voted by the proxies for those people, with your approval and consent? A. Yes.

Plaintiff's Exhibit 99, which is also referred to as Plaintiff's Exhibit 1 in White's deposition, and which is the Certificate of Incorporation of United Public Utilities Corporation under the laws of New Jersey, was received in evidence.

Plaintiff's Exhibit 100, which is also referred to as Plaintiff's Exhibit 2 in White's deposition, is a certified copy of a document entitled "Certificate of Information Recording the Elimination on July 1, 1945 of All Distinction between The Class A Common Stock and The Class B Common Stock" of United Public Utilities Corporation, executed by Samuel W. White, as President, and Lee Barroll, as Secretary of said Company, and is in part as follows:

* * * * * * *

2. Article Fourth, Sub-Division (6) of the Certificate of Incorporation further provides as follows:

> "Class A Common Stock and Class B Common Stock shall, share and share alike, be in all respects on a parity as to payment of dividends and distribution of asests and in all other respects, except that Class B Common Stock shall have no voting rights except as

(a) from time to time provided by statute, and (b) hereinafter provided in this subdivision (6) and (c) provided in subdivision numbered (7) hereof. Until the occurrence of the event mentioned in the next following sentence the holders of the Class B Common Stock shall be entitled exclusively to elect one director of the Corporation and the holders of the Class A Common Stock shall be entitled exclusively to elect the remaining directors of the Corporation. Whenever the Corporation shall have retired (by purchase, payment, conversion, redemption or otherwise), in the aggregate, an amount of its Series A bonds and/or Series B bonds and/or $3 Dividend Series Preferred Stock and/or $2.75 Dividend Series Preferred Stock (reckoning in computing such amount any such stock at $50 per share and any such bonds at the principal amount thereof) equal to one-half of the amount, in the aggregate, of all such bonds and/or Preferred Stock which shall be issued by the Corporation as a part of the reorganization of United Public Utilities Company, a corporation of the State of New Jersey, all distinction between Class A Common Stock and Class B Common Stock shall cease and the two classes of such stock shall thenceforth constitute a single class of common stock."

The reorganization of United Public Utilities Company referred to in the above quoted Sub-Division (6) is the Plan of Reorganization referred to in Paragraph 1 above.

* * * * * * *

5. Having completed on July 1, 1945 the retirement, in the aggregate, of an amount equal to one-half of the amount of the Collateral Trust Bonds and Preferred Stock (reckoning in computing such amount the Preferred Stock at $50 per share and the Collateral Trust Bonds at the principal amount thereof) issued by the Corporation under and as a part of the aforesaid Plan of Reorganization, all distinction between the Class A Common Stock and Class B Common Stock ceased on that date, and thenceforth the shares of common stock previously designated as Class A Common Stock and Class B Common Stock constituted a single class of common stock with equal voting rights

share for share, in accordance with the provisions of Article Fourth, Sub-Division (6). Accordingly, and by reason of the happening of the aforesaid contingency, the authorized common stock of the Corporation is now 1,121,758 shares, and the outstanding common stock is 370,300 shares.

* * * * * * * * *

Mr. Fellows: That completes our cross examination.

Mr. Stafford: I would like to avail ourselves of the privilege of reading portions also.

The Court: Very well.

(Read from deposition by Mr. Stafford.)

Mr. Stafford: Now, we will ask counsel for plaintiff to stipulate that the minutes of the annual meeting of stockholders of United Public Utilities Corporation, held March 9th, 1937, recite that "The Chairman stated that the accountants for the corporation had been unable to complete the preparation of the Financial Statement for the calendar year 1936, but produced for inspection a Tentative and Preliminary Report, and advised that a copy of the final report would be mailed to each stockholder."

Mr. Benson: We so stipulate.

Mr. Stafford: I will ask counsel also to stipulate that the minutes for the annual meeting of stockholders of the same corporation, held March 8th, 1938, recite that the Chairman stated that a copy of the printed annual report of the directors would be mailed to each stockholder within the current month, and that he thereupon discussed at length and in detail the year's operations of the corporation and of the subsidiaries, and that questions from stockholders were invited and answered.

Mr. Benson: We stipulate that appears in the record.

Mr. Stafford: In these minutes?

Mr. Benson: Of the minutes.

Mr. Stafford: We will further ask counsel for plaintiff to stipulate that in the minutes of each of the annual

[meeting] of the stockholders of United Public Utilities Corporation for the calendar year 1939 to and including 1945, there appears in the minutes of each such annual meeting a statement that the chairman ordered the minutes of the preceding annual meeting of the stockholders of said corporation, and also the minutes of all meetings of the board of directors of said corporation held since the preceding annual meeting of stockholders to be presented to and made available throughout the meeting for the examinations of any stockholders desiring to examine them, and that the Secretary thereupon produced said minutes, which remained open for inspection.

Mr. Benson: We so stipulate.

(Read from deposition by Mr. Stafford.)

Q. Now, Mr. White, I call your attention to Exhibit C to the plaintiff's complaint. That is a contract dated the 1st day of January, 1938, entitled Interchange Capacity Agreement. You are familiar with that agreement?

A. Yes, sir.

Q. Have you any information as to how the rate of $13.20 referred to in Article VIII was arrived [——] and which information has not been introduced in evidence here in your testimony?

A. I have a recollection on that point, and I don't recall whether or not it has been introduced in my testimony.

Mr. Benson: All right.

Q. Was this thing that you recall a written document?

The Witness: I [recal] it very clearly, and I think that —strike that—and I think now that it does appear in some of the documents that were introduced, although I don't believe the specific answer to your question was—

Mr. Benson: Elicited by counsel?

The Witness: —elicited by counsel from me.

Mr. Benson: That is the [responsiblity] of counsel, isn't it?

A. It certainly is, as far as I am concerned.

Mr. Benson: Now I show you all of the exhibits that have been offered to date in this hearing—now let's keep

them separate from your papers there—and will you run through them and indicate the document which you had in mind when you answered my last question?

The Witness: Defendant's Exhibit 24 id, which is Defendant's Exhibit 244 (R. p. 1144, supra).

Mr. Benson: Q. "Id" means for identification, doesn't it? A. I would judge so.

Q. Read the title at the top of Exhibit 24, on the first page.

A. Survey of Power Requirements, Northwestern Public Service Company, Northern Power & Light Company, North Dakota Power & Light Company.

Q. Now, in what portion of Exhibit 24 do you find what you had in mind as a statement or any representation having anything to do in any way with the rate of ~~$13.20~~?

A. I find on page 11, in the fourth full paragraph at the top of the page, being the third paragraph from the bottom of the pages, the [state] that,—shall I read it?

Mr. Benson: Yes.

The Witness: (Reading) We believe a fair basis would be to assume an investment of $110 per kilowatt and to charge 12% on this investment.

Mr. Benson: Q. Now, Mr. White, do you have any information that is not in the exhibits and that you have not heretofore testified to, which information has to do with how the rate of $13.20 per kilowatt of firm demand per year was arrived at, for use in Article VIII of Exhibit C to the plaintiff's complaint?

The Witness: I think the same basis for the $13.20 figure may be mentioned in other places in the material I have produced, and I have an independent recollection of conversations in which the fairness of that method of calculation was discussed.

Q. Now, with whom did you have such conversations?

A. With Mr. Strike and I think with Mr. Buell.

Q. Did you have more than one conversation with Mr. Strike concerning this charge? A. That I can't recollect.

Q. Can you recall the time of the conversation? A. No.

Q. Nor the place? A. No.

Q. Do you recall the conversation in detail or just the substance of it? A. Just the substance.

Q. What did Mr. Strike say, according to your best recollection?

A. That he had suggested a figure that was so low that I couldn't possibly disagree with it.

Q. Where was your experience in the investment banking business secured?

A. In Chicago between December, 1907 and July, 1922 I was connected with the Chicago office of Lee Higginson & Company, whose headquarters were in Boston. In July, 1922, I was elected vice president of the National Bank of the Republic of Chicago, and had charge of their investment securities department. I became a director in that bank about a year later, and about January 1, 1924, I formed and became the first president of the National Republic Company, an investment affiliate of the National Bank of the Republic, all of the $500,000 capital stock of which was owned in trust by the stockholders of the bank. I continued as president of that investment affiliate and as director in the bank, and I don't recall now whether I continued as a vice president of the bank, but my status in those first two capacities at least remained unchanged until about 1931, when National Bank of the Republic and the Central Trust Company of Chicago were merged into Central Republic Bank & Trust Company. At the same time, the National Republic Company and the Central Illinois Company, investment affiliates of the Central Trust Company were merged into a corporation called the Central Republic Company.

Q. You were president of that company?

A. I became vice-chairman of the board of that company.

Q. And then what?

A. And continued in that capacity, until I resigned to become receiver of United Public Service Company, et al.

Mr. Benson: Q. When you were answering Mr. Stafford's question and gave the answer to which your attention was directed by me a few moments ago in cross examination, did you mean to omit or did you just overlook defendant's Exhibit 3, and the statement made in the third paragraph, after the quotation of prices at the top of the page?

Mr. Royhl: Which page, Mr. Benson?

Mr. Benson: Page 2 of the exhibit.

The Witness: A. My statement as made in response to Mr. Stafford's question was a generalization which I expected at some time to have to amplify.

Q. Well, do you want to amplify it now?

A. The basis upon which the $1.40 price was figured was the highest price that we felt could be justified before the North Dakota Utilities Commission as a purchase price on coal purchased by North Dakota Power & Light Company at Beulah. Our reason for determining the price on that basis was to keep the profits on the sale of coal by our wholly owned coal mining subsidiary to our wholly owned electric utility subsidiary in the profit account of the coal mining company, because the earnings of that coal mining company were not subject to regulation by the State Commission. If the price on that coal had been lower, the profits of North Dakota Power & Light Company would thereby have been increased and those profits, in the aggregate, were limited, or subject to limitation by the State Railroad Commission.

Q. The explanation that you have just made was made after you had read the portion of the second paragraph of Defendant's Exhibit 3 for identification to which I directed your attention before you made the explanation?

A. Yes, but my recollection on the point needed no refreshing.

Q. Now, you made a contract on behalf of yourself as receiver of United Public Utilities Company with the receiver of Middle West Utilities Company?

A. As receiver of United Public Service Company I continued an arrangement with the receivers of Middle West Utilities Company which, at the beginning of my receivership, I found had been in effect between United Public Service Company and Middle West Utilities Company.

Mr. Benson: Q. Did you make any other agreement with the receivers of Middle West Utilities Company concerning services during your administration as receiver of United Public Service Company or United Public Utilities Company?

A. None that I can recall, except a verbal understanding that the services for which I had contracted on behalf of the operating subsidiaries in the United Public Service system were to be advisory rather than supervisory.

Q. Now, when you became president of United Public Utilities Corporation, did you make a service agreement between United Public Utilities Corporation and any service company to service United Public Utilities Corporation?

A. I made an agreement with Daniel C. Green, president and trustee of Middle West Utilities Company, under which—

Q. Well let us straighten out first what the form of that agreement was. Was it oral or written?

A. I believe it was confirmed by letter.

Q. Have you looked for that letter?

A. Yes, and that is also one which I haven't found.

Q. Will you ask your counsel to make a memorandum of that?

A. Yes. I recall it was a short, one page letter, because it provided solely that his accounting and statistical departments were to do the accounting work and furnish statistical information. By accounting work I mean accounting work, keep the books and prepare the monthly income accounts, the balance sheets of United Public Utilities Corporation, and to furnish to the holding company consolidated balance sheets and income statement of United Public Utilities Corporation and subsidiaries.

The Witness: Mr. Benson, I have, through oversight, made an incorrect or at least an incomplete answer to the question which you asked me as to whether or not I, as receiver of United Public Service Company, made any other arrangements with receivers of Middle West Utilities Company, the deficiency in my reply being a matter of record.

Mr. Benson: All right. Will you refer to the record?

The Witness: I refer to Defendant's Exhibit 74 which is Plaintiff's Exhibit 60 (R. p. 458, supra), page 4, starting at the middle of the page and continuing through the first paragraph on page 5. That is another arrangement which I made as receiver of United Public Service Company with

the receivers of Middle West Utilities Company, and which I unintentionally omitted from my answer to your question.

Q. Prior to your appointment as receiver of United Public Utilities Co., had the investment banking firms that you say you were connected with sold to the public securities of United Public Utilities Co.?

A. To the best of my recollection they had not. I would like to say that in the course of the utilities business, an investment banking house will occasionally acquire an odd lot of companies, but I used to do all of the buyings for the National Republic Company and I recall that, when I was first approached with respect to becoming receiver of United Public Service Company and United Public Utilities Company, that I had no conception whatever of what they were or where they were.

Q. Who first approached you?

A. I was in New York when I received a long distance telephone call from Mr. Philip Clarke, who was president of Central Republic Bank & Trust Company, with which the Central Republic Company was affiliated. Mr. Clarke told me that within a few days receivers were going to be appointed for a number of companies in the Middle West System, and for Middle West Utilities Company itself, and that the bankers in Chicago, or any group in Chicago, the personnel probably was not told and in no event do I recall it, wanted to be able to recommend to the court men for appointment as receivers, and he asked me whether I would consent to the use of my name for a recommendation for receiver of United Public Service Company. I had to defer my answer until I could scurry around and get some information about the United Public Service Company, which I acquired with great difficulty, because it was at that time eight o'clock at night. And after consulting with several of my friends in the east, by telephone, I called him back at midnight that night and told him that I was willing to have my name used.

Q. Do you know who first suggested Mr. Briggs as a member of the board? A. Yes.

Q. Who? A. Mr. Herbert L. Nichols.

Q. Is my recollection correct that Mr. Gail Belden was nominated by The Middle West Corporation, to be a

director of United Public Utilities Corporation, after the deal with reference to the sale to somebody of Middle West holdings in United Public Service Corporation had fallen through?

A. In effect that is correct, although formally he was nominated by United Public Service Corporation of which Mr. Belden was president.

Q. Mr. Gail Belden was president of United Public Service Company at the time he was elected to the board of United Public Utilities Corporation. Correct?

A. That is correct.

Q. (By Mr. Benson) In your examination you mentioned Ralph Stevenson and Ralph D. Stevenson. You were referring to the same man? A. Yes.

Q. Was Ralph D. Stevenson attorney for The Middle West Corporation? A. Yes.

Q. He has been, to your knowledge, ever since Middle West Corporation was organized?

A. I believe he has been since Middle West Utilities Company was organized.

Q. I see. Was he attorney for United Public Utilities Corporation in 1939? A. No.

Q. Was he ever attorney for United Public Utilities Corporation? A. No.

Q. Did he do any work for United Public Utilities Corporation? A. No.

Q. What is the full name of the gentleman, Peale, to whom you have made reference in your examination in chief? A. Clifford McChesney Peale.

Q. Is he a graduate of any technical school?

A. He holds an A.B and a B.S. from Washington and Lee University, and a M.B.S. from Harvard Business School. I don't know the exact significance of his B.S. degree. My judgment would be that it was not in engineering.

Q. How long has he worked for you?

A. To the best of my recollection he started to work for me in the National Republic Company about 1928, and continued to work for me in the Central Republic Company until about 1931. Then there was an interval of perhaps a year in which he was associated with some other undertaking, and in a matter of weeks or the most, say

three months, after I was appointed receiver of United Public Service Company I invited him to come over and help me, and he remained with me until about a year ago.

Q. He worked for you during the receivership, as you have described? A. Yes.

Q. And then he went to work for United Public Utilities Corporation when you became president of United Public Utilities Corporation? A. That's right.

Q. And he worked for you until about a year ago, you say? A. Yes.

Q. Where did he go then?

A. He left to take charge of the Chicago office of an industrial company, with headquarters over in Ohio.

Q. During your examination in chief Mr. Stafford read from the minutes of a regular meeting of the board of directors of United Public Utilities Corporation, held in Philadelphia on June 15, 1938, and in the portion of the minutes read by Mr. Stafford there appears the statement:

> "The president furnished to members of the board copies of a memorandum dated May 2, 1938, of the interchange capacity agreement by the three participating companies, Northwestern Public Service Company, North Dakota Power & Light Company, and Northern Power & Light Company, with the statement that the provisions of this agreement are substantially in accord with the 'survey of power requirements,' copies of which were submitted to the board in January, 1938."

Can you identify, among the exhibits that have been marked by the defendant for identification, any document which is the document called "Survey of Power Requirements" in the portion of the minutes read by Mr. Stafford?

A. I can. It is Defendant's Exhibit 24 for identification, which is Defendant's Exhibit 244 (R. p. 1144, supra).

Q. Mr. White, in Defendant's Exhibit 26-A, which is defendant's Exhibit 247-A (R. p. 1174, supra), for identification, appears the following statement: "The contract as prepared follows the arrangement which obtains for the companies in the power pool of the Chicago area." Do you know anything about the power pool of the Chicago area? You can answer that yes or no. A. Yes.

Q. Do you know what generating stations are included

in the power pool of the Chicago area? A. I don't know now. I did know at that time.

Q. On [may] 3, 1938, you knew?

A. I knew because I had a copy of the particular contract referred to in that memorandum.

Q. Referred to in Defendant's Exhibit 26-A for identification? A. Yes.

Q. You compared the contract referred to in the third paragraph of Exhibit 26-A with the Chicago power pool contract, did you? A. Yes.

Q. What was the purpose of your comparison?

A. To form an opinion as to the desirability of the form of a first draft of contract that had been prepared by Mr. Buell, and to determine whether I could suggest any other features in the Chicago Pool contract that might be incorporated into Mr. Buell's draft.

Q. Do you recall what amount Mr. Sandstedt had, if any, in that formula for the total amount to be retired?

A. Yes.

Q. You can refresh your recollection from anything you have here.

A. Yes. Well, I haven't got anything here. Yes, I do. He had $162,500, or well, being half of $325,000.

Q. Now, did you mean that he had a figure which was $325,000 in round figures in the formula that you were discussing? A. In his first suggestion, yes.

Q. And when was that first suggestion made? I don't mean the hour it was made.

A. In the early stages, in connection with the first one or two drafts of the 1941 contract.

Q. Now, you have referred to arriving at a lower figure.

A. Yes.

Q. Did you arrive at a lower figure at this meeting at Detroit Lakes?

A. That is what I was hesitating about making a definite statement on, as to just when we arrived at the lower figure. It could have been that that lower figure was arrived at after the draft of the contract was revised at Detroit Lakes, and then having subsequently agreed on a lower figure, that that lower figure was incorporated into a later draft.

Q. Do you remember who was present at the meeting when Mr. Sandstedt suggested $325,000, was it 325? A. Yes.

Q. (Continuing) The $325,000 figure?

A. The $325,000 figure—

Q. I asked you to tell me who was present, if you remember, when he suggested that figure?

A. The figure itself was not initially suggested at that meeting.

Q. Where was that figure initially suggested?

A. At the time the 1936 agreement was under discussion.

Q. That is your best recollection now, is it? A. Yes.

Q. I see. Now, who suggested that figure to you at the time the 1936 agreement was under discussion? Was that Mr. Sandstedt? A. I think it was Mr. Strike.

Q. Mr. Strike?

A. It may have been Mr. Sandstedt, or both. That was the figure that was commonly used for a number of years by them.

Q. The 325. By whom? A. By them.

Q. Who do you mean by them?

A. By Mr. Strike and Mr. Sandstedt, as their idea of the cost to Northwestern Public Service Company of those facilities.

Q. Can you take 3½ per cent for taxes, maintenance and renewals on an investment of $325,000, figure interest on the investment at 5 per cent per annum, and tell us what formula to use to determine when the $325,000 will be retired?

A. I don't know of any formula. Such a computation was made.

Q. Did you make it? A. No, but—

Q. Can you make such a computation? A. Yes.

Q. By going through it year by year?

A. Month by month.

Q. Month by month? A. Yes.

Q. Do you know a formula for doing it quicker than that? A. No.

Q. You do not? A. No.

Q. Did Sandstedt do that month by month when you were working on this problem?

A. Either he did it or his office did.

Q. Did you arrive at an agreement at the Detroit Lakes meeting cutting down the amount to be amortized according to the formula that included the 3½ per cent charge and the 5 per cent interest?

A. We had previously had nothing to cut down.

The Witness: When I said that we had previously had no figure to cut down I had in mind that a figure in any amount had not been a part of an agreement, of an effective agreement. In other words, the 1936 and 1939 interconnection agreements had not recognized any specific cost figure to Northwestern Public Service Company for the construction of those interconnection facilities.

Q. Do you recall who was responsible for the delay in the execution of the agreements between Dakota Public Service Company and Northwestern Public Service Company, embodied in the 1941 contract, while the negotiations were pending for the sale of Northwestern Public Service Company, who held up the agreement during that time?

A. To the best of my recollection the existence of those negotiations contributed directly to that delay, and I think that—I felt that the delay was desirable from the standpoint of Dakota Public Service Company, particularly as to what the general character of the contract would be, subject only to mutually satisfactory wording, and I can recall a hesitation on my part of making any commitments to Central Electric & Telephone Company as to what we would or would not do with Dakota Public Service Company in the event they bought Northwestern Public Service Company.

Q. You mean what you would do in the way of selling Dakota Public Service Company?

A. No. Operating arrangements, and joint management in particular, is what I recall, because I recall a visit from two or three, I think it was three, of the Central Electric & Telephone people in which they said in effect, If we buy Northwestern Public Service Company will you continue a joint management arrangement with us? That is as I recall it; and also, to the best of my recollection I told them that I would make no commitment and that they would have to make their decision on the purchase of Northwestern, irrespective of any, or without any indication from me as to what [out] attitude would be.

Q. Was B. P. Stevenson ever an [officers] of your United Public Utilities Corporation?

A. Yes, he has been assistant secretary and assistant

treasurer, I believe, every year since we opened an office in Wilmington, Delaware, and handled our bookkeeping.

Q. And during those years he also has been an officer of Middle West Corporation?

A. I think probably he was.

Q. And of North West Utilities Company?

A. I don't know as to that. That office in Wilmington, Delaware, is a joint office maintained by a number of holding companies, in order to locate their business situs outside of the state of Illinois.

Q. Is Gail Belden an officer of United Public Utilities Corporation?

A. Yes, he is vice president and lives in Wilmington, Delaware, and is in charge of that joint office maintained in Wilmington by several holding companies.

Q. Do you know when he became an officer of United Public Utilities Corporation.

A. I can identify that date as being between March, 1939 and March, 1940.

Q. Now, I take it from what you say, that Gail Belden is also an officer of The Middle West Corporation?

A. According to the information which Mr. Belden has furnished to us for our proxy statements in connection with the annual meetings, he is an officer and director in several holding companies whose offices are domiciled at Wilmington, and I am quite sure that he is an officer of The Middle West Corporation, and I have the impression that he is not a director.

Q. Can you tell us whether he has been such an officer since the year 1939 or the year 1940?

A. I am reasonably confident that he has been.

Q. During that same period, from 1939 to 1940 to date, has he been an officer of North West Utilities Company?

A. I have not got real information on that point, but I do recall that North West Utilities Company is domiciled at Wilmington, and I assume that he is an officer of that company.

Q. When you say "domiciled at Wilmington," you mean in the same offices with United Public Utilities Corporation and several other holding companies?

A. Yes, sir.

Q. Mr. N. P. Zech was a director of your corporation from the time of its organization, if I understand correctly, for a period of several years? A. Yes, sir.

Q. Up until the incident you mentioned, where he was succeeded by Mr. Briggs? A. Yes.

Q. You cannot state whether he was comptroller of Middle West Corporation? A. I cannot verify that, no.

Q. Can you state whether or not he was at any time a director of North West Utilities Company?

A. No, I do not know.

Q. Can you state whether or not N. P. Zech was at any time president of North West Utilities Company?

A. If he ever was, I was not aware of it.

Q. Mr. White, did you have any conversations with anybody in the joint management staff at Huron concerning the installation of transformers at Bowdle, South Dakota?

A. Well, I can recall discussions regarding the cost of a new substation at Bowdle, and while I don't recall the conversation with respect to the transformers themselves, I do recall that the conversation had to do with the installation of some expensive oil switches.

Q. Do you recall whether you got any written communications from the joint management concerning the Bowdle installation?

A. I looked for material that was mentioned in the subpoena and I brought all of the information that I could find in my files that seemed to relate to that subject. Among the communications that I found was with respect to the Venturia Ashley line, which I was also asked to produce. With respect to the Bowdle substation, the only thing that I found was a letter with respect to the transmission line between Ipswich and that substation at Bowdle. This is a copy of a letter from Mr. E. L. Bayles to Mr. Sanborn. I might add that improvements to the substation at Bowdle were listed in the budgets submitted at the beginning of the year, and as I recall appeared in more than one annual budget before the work was actually done.

Q. You said your wife had some securities in United Public Utilities Corporation. Do you know whether any of those securities which your wife held at the time came from Middle West Utilities Company or any of its affiliates?

A. Yes, there was one transaction in which she made the highest bid that could be [ovtained] for some preferred

and common stock which was owned by Middle West Corporation.

Q. How many shares of preferred were involved?

A. There was approximately eleven hundred and some odd shares of $3 [dividence] preferred stock in United Public Utilities Corporation, and about 6,000 [share] of Class A common, which represented, as I understood it, all of the stockholdings of United Public Utilities Corporation which the Middle West Corporation held. They wanted to sell it in order to be free and clear of all holding in U. P. U. My wife made a bid for 1,000 shares and Middle West shopped in the market for a better bid, weren't able to get it, and confirmed the sale of the 1,000 shares to her, and I believe that it was at exactly the same time that she bought their entire holdings of Class A common stock, because she made, also, a better bid than they were able to get anywhere else, even though she gave them three or four days or a week to try and improve on it.

Q. I thought when you told about a bid, that you might be talking about a sale that was supervised by the Securities and Exchange Commission. Is that the fact?

A. No, that was—

Q. Just an over-the-counter transaction?

A. Just an over-the-counter transaction, but it was a matter of record in writing at the time, both the bid and the acceptance of the bid.

Q. Can you give us the approximate date of the transaction in the preferred and the approximate date of the transaction in the common?

A. As nearly as I can tell from my memorandum which I prepared some time ago of her transactions in stock—and I prepared it in connection with an entirely different matter from this hearing—I note that in the first six months of 1939 she bought 1000 shares of $3 [dividence] series preferred stock and 6,918 shares of common stock. During all of 1938 she had bought only five shares of preferred stock and 395 shares of common stock, and, from that memorandum, I am deducing, without remembering, that this particular transaction took place in the first half of 1939.

Q. Now, when you say "this particular transaction" you mean the transactions involving the preferred and the common stock?

A. Yes. Although, as I recall, they took place simultaneously.

Mr. Stafford: That concludes the portion we wish to read from the cross examination.

Passing to further examination of the same witness—

(Read from deposition by Mr. Stafford.)

Q. You testified in response to an inquiry by Mr. Benson, with reference to the $20,000 per annum charge provided in the 1936 interconnection contract, Exhibit B to the complaint, and also in Exhibits D and F and the supplement thereto of the complaint, being one of the 1939 contracts, the 1941 contract, and the 1943 supplement, that you have produced here or testified concerning all facts or opinions furnished by others to you concerning that charge; with the exception of a book of memoranda made by Mr. Lakin on his inspection trips in 1936 and 1941. I show you this book and ask you whether or not that is the book of memoranda to which you referred?

A. Yes, it is.

Defendant's Exhibit 283, which is also referred to as Defendant's Exhibit 79 in White's deposition, was received for the purpose of showing information communicated by Lakin to White prior to July 7, 1936. It is as follows:

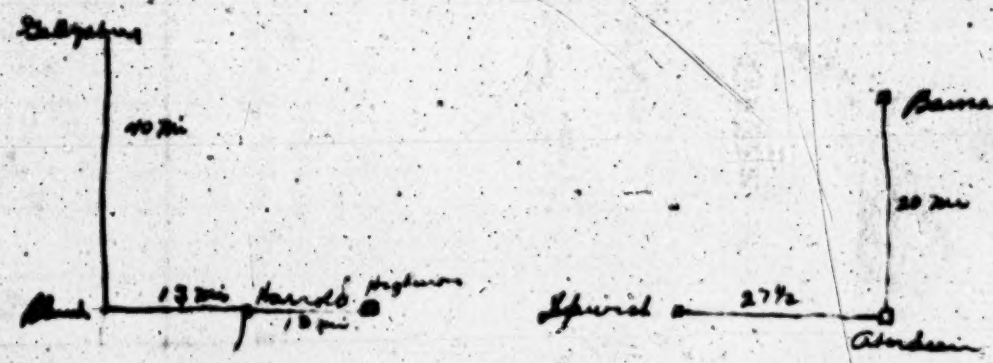
1936

Aberdeen - Barnard Line WO 49 Rev 118
WO 271 Rev 1937
WO 404 Oct 1930 49,573.99.

Less original cost of Barnard line 16,773.65
$32,800.34

There is now a 2.3 KV line on poles originally on Barnard line

Aberdeen Jct. - Ilwaco Sub. 27½ Miles.		404	64,370.97	Oct 1930
Aberdeen Substation Auto Transformers	Allocated as follows: WO 404. WO 1081		~~49,801.52~~ $52,547	Oct. 1930 July 1932.
Gettysburg Line	WO 420. Line		92,025.16	Oct 1930
Harold Substation	WO 397.		17,755.90	" "
	WO 420 Sub		24,220.26	Oct. 1930
	Total Gettysburg Line.		134,001.82	
			631.60	
			$134,631.42	
Total all expenditures			~~$240,179.15~~ 284,351.72	
Annual Charges.		13%	~~$31,222.63.~~ 36,965.76	
Per Basis of 50%			~~$15611.32~~ 18,482.88	



40
23
27½
20
110½

40
27½
67½
22
110½

Transmission Operation 11.40 / mile / yr
Maintenance

Def Ex 79

Defendant's Exhibit 283.

Defendant's Exhibit 284, which is also referred to as Defendant's Exhibit 80 in White's deposition, was received in evidence for the same purpose. It is as follows:

Interconnection Investment	$240,174.75
Annual Charges on 13% basis	31,222.63
Transmission Operation 90½ mi @ $11.40	1030.70
Maintenance 17%	2401.74
	34654.37
On basis of 50%	17,327.19

Final Corrected Investment	$284,351.72
Annual Charges on 13% basis	36,965.76
Transmission Operation 90½ miles @ $11.40	1,030.00
Transmission - Sub. Maint 1%	2843.51
	40,809.27
On basis of 50%	20,405.

Final Investment Figures as Submitted Contract.

Aberdeen Substation	54,521.32
Gillespie Sub.	24,220.26
Gillespie - Rockhaven	141,001.20
Aberdeen - Bancroft	105,247.00
	$324,989.78

OK

1369

Defendant's Exhibit 284.

Q. Do you recall any particular parts that you received prior to 1941?

A. I received, on or about July 7, 1936, this particular letter from Mr. Lakin, with its attachment of curves, and prior to that date I had received that portion of his notes which referred to his inspection trip made a few weeks previously.

Q. That portion where there are included the documents now marked as Defendant's Exhibit 79 for identification and Exhibit 80 for identification? A. Yes.

Q. So that you had received that portion including these two exhibits, Defendant's Exhibits 79 and 80, prior to July 7, 1936? A. Yes.

(Read from deposition.)

Q. Now, Mr. White, you have testified previously that, I believe on my examination, you had a conversation with Mr. Lakin in Chicago, in your office, I believe on June 19, 1936, at which only you and Mr. Lakin were present, at which time he made a report to you concerning his inspection trip of the properties of your Dakota subsidiaries, prior to that date. Now, directing your attention to the time and place and that conversation, do you recall whether or not you and Mr. Lakin had any discussion concerning the figures which appear on Defendant's Exhibit 79 for identification and Defendant's Exhibit 80 for identification?

A. I recall such a discussion, but I had to refer to these exhibits to refresh my recollection on the amounts of the figures discussed.

Q. Having referred to these exhibits and refreshed your recollection, do you now recall whether you had any discussion concerning the [abount] of $284,351.72, being the total of expenditures on interconnection facilities?

A. Yes.

Q. [Will], do you recall whether that discussion included anything with reference to how Mr. Lakin arrived at that figure? A. Yes.

Q. Will you tell us what you recall about it?

A. My recollection of the discussion was that Mr. Lakin had examined the original work orders on the construction of the interconnection facilities, and that he has

been unable to prove out a cost of $325,000, which was the amount at which that cost had been stated to me by Mr. Strike. He went on to say that he had proved up the work orders on a portion of the facilities, which were exclusively interconnection facilities, and that portion proved out at an amount which, when I refer to these exhibits, I recognize as $284,351.

Q. In other words, you now have a recollection that this figure of $284,351.72 is the amount which Mr. Lakin stated to you he had proved to his satisfaction from work orders which he examined? Is that a fair statement?

A. As part of the cost of the interconnection facilities.

Q. He had proved the work orders to his satisfaction up to that figure? A. That is correct.

Q. Now, do you recall anything further that was discussed?

A. Yes. He said that in addition to that there were some portions of the facilities that were jointly used both for the interconnection and also for the separate use of Northwestern Public Service Company, and that he had not had time to check the allocation of the cost of those joint facilities as between Northwestern Public Service Company and the interconnection facilities.

Q. Now, Mr. White, looking specifically at Defendant's Exhibit 80 for identification, do you recall whether or not at that discussion with Mr. Laken there was included any discussion concerning the calculations thereon, and referring specifically to this calculation labeled: As corrected. Investment $284,351.72—and which, when carried down, results, on the [bais] of 50 per cent, $20,405. Do you recall whether you had any discussion of those figures or that calculation with Mr. Lakin? A. I do.

Q. Do you recall whether you had any discussion of those figures or that calculation with Mr. Lakin?

A. I do, to the extent of Mr. Lakin's summary statement to me that the payment of $20,000 a year would be justified on the basis of 13 per cent on that amount of the cost which he had proved up.

Q. Of the 284,000 figure? A. Yes.

Q. Do you have any further recollection specifically with reference to any discussion concerning transmission operating charges or transmission sub-maintenance, substation maintenance charges?

A. I do not. I know we went over these notes, together, and I was primarily interested in the overall figure rather than those details upon which he had based his own conclusion.

Q. Do you recall whether or not, in going over those notes, Mr. Lakin explained his calculation, or how he arrived at 20,000?

A. I recall his computation of 13 per cent.

Q. Well, as a result of that conversation with Mr. Lakin, and going over the notes, and your discussion which you just testified about, were you or were you not satisfied that the payment to Northwestern would be justified on the basis of the then value to Northern of interchange facilities?

A. I was so satisfied, in the light of the generating position of Northern Power & Light Company and my own business judgment of Mr. Lakin's report and my [believe] in his ability to appraise the situation soundly from an operating point of view.

Q. Now, Mr. White, Mr. Benson also asked you with regard to investigations if any made by you concerning certain of the personnel; that is, the operating personnel on your subsidiaries and on Northwestern Public Service Company. Among others I believe you testified you had made no investigation of William M. Dunn. Did you have any prior acquaintance with Mr. Dunn before he went on the board of the Dakota subsidiaries, and became an [officers] of those companies?

A. Yes. I had known him for several years.

Q. For several years? A. Yes.

Q. During the course of that period had you formed any opinion as to his ability? A. Yes.

Q. What was that?

A. He had been a division manager of Northwestern Public Service Company. I had met him at the annual meetings of division managers. He regularly gave talks to those meetings. I had previously inquired as to his business history, and I had a good idea of his capabilities at the time his name was proposed to me.

Q. All matters you have just testified to occurred prior to the time that his name was proposed for the position he ultimately held in your Dakota subsidiaries? A. Yes.

Q. Also, Mr. White, you were describing in some detail

during Mr. Benson's interrogation, your early history prior to the receivership and the formation of certain companies with which you were connected. Among those was Central Republic Company, which I believe you testified was formed in 1931, when the Central Illinois Company merged with the National Republic Company?

A. That is right.

Q. Is that correct? A. Yes.

Q. Do you know whether or not Central Republic Company has continued in business since that date down to the present time? A. Yes, it has.

Q. Also on your examination by Mr. Benson, when you were describing the coal rates in force at the time you were receiver, between Knife River Coal Mining Company and the Dakota utility subsidiaries of U. P. U. and Northwestern Public Service Company, I believe you stated that at that time there was an 85 cent rate on coal delivered to North Dakota Power & Light Company at Bismarck. I show you Defendant's Exhibit 3 for identification and ask you to look at the same, then state whether or not you care to make any further or other statements in regard to that instrument?

A. At the time we were talking about this exhibit, if I referred to the 85 cent price as the rate to North Dakota Power & Light Company at Bismarck, I was wrong, because obviously it states in this exhibit that the discussion was about an 85 cent rate to Northern Power & Light Company, and I believe that price refers exclusively to the Mobridge plant of Northern Power & Light Company.

Q. Well, you have referred to this 75 cent rate to Northwestern Public Service Company obtaining in 1933. Do you know whether or not that rate continued from 1933 down to 1945? A. It did not.

Q. It changed? A. Yes.

Q. Did you have anything to do with the changes in the coal rates or the lignite rates from Knife River to Northwestern Public Service Company?

A. Well, I had very much to do with one change.

Q. Which one was that, sir?

A. That was the change that, as I recall it, became effective as of January 1, 1945.

Q. What rate was put in effect on January 1, 1945, if you recall?

A. As I recall, the rate was $1.25 a ton f. o. b. mine.

Q. You would say you had considerable to do with that. Will you please tell us what you had to do with it?

A. In 1944 we were experiencing at the mine a sharp increase in mining costs, and it looked as though those costs were going to continue to [increas] in 1945. In talking with Mr. Sanborn we agreed that the price of boiler fuel to Dakota Public Service Company and Northwestern Public Service Company would have to be revised upward for 1945.

Mr. Sanborn suggested that a discussion of that revision of the price be deferred until the operating budget of the mine for 1945 had been completed, and I concurred in that suggestion, with the verbal understanding that any price change that might later be agreed on would be effective from and after January 1, 1945. After those budgets were completed, Mr. Sanborn told me that he did not care to be in the position of determining or arguing as to what a proper revised price should be, and that he was going to ask Mr. Kruesi of Middle West Service Company to represent Northwestern Public Service Company in such a discussion, and that he hoped I would represent the Knife River Coal Mining Company in that discussion. I agreed to that suggestion. Mr. Sanborn asked Mr. Kruesi to represent Northwestern Public Service Company, and Mr. Kruesi was unable to find the time to do it, but suggested that Mr. Robert Purchas act in his place, Mr. Purchas having had considerable experience in buying or contracting for the purchase of all kinds of materials and supplies for public utility companies, including fuel. By arrangement with Mr. Purchas it was agreed that he and I should go to Bismarck, where I could have the benefit of consultation with Mr. Mounts, the mine manager from [Buelah], and Mr. Solberg, who was sales manager for the Knife River Coal Mining Company. That was particularly necessary from my standpoint, because Mr. Sanborn had told me previously that in preparing the budget of Knife River Coal Mining Company for 1945, he had used some figures that were lower in some respects than the operating estimates that had been prepared by Mr. Mounts and Mr. Solberg as a basis for the budget, and I wanted to know just what those differences in opinion consisted of before I agreed to any selling price of coal. When we got to Bismarck

Mr. Purchas was very persistent in using factors for the determination of a fair selling price, and I was unwilling to admit, and when, after a discussion lasting until after midnight, we had been unable to reach an agreement, I stated to the meeting that the price on coal to Northwestern was going to be $1.25 a ton or they would have to make other arrangements for their coal supply, that I would offer them the services of Mr. Solberg, who knew every lignite mine within shipping distance, and who would go with some Northwestern Public Service representative to make every effort to buy coal for Northwestern at less than the equivalent of $1.25 a [tone] f. o. b. [Buelah], and that if they were able to contract for their required supply of coal at a price less than $1.25 a ton, f. o. b. [Buelah], I would accept that price equivalent as the fair price from January 1st to the date deliveries began, and under such new contracts as they might make; but that after a period of I think it was for six weeks the mine would not ship coal to Northwestern except under a contract at $1.25 a ton.

Q. Did Northwestern Public Service Company avail themselves of your offer to make Mr. Solberg available to them? A. They did.

Q. I think you have testified already, but was a contract entered into between Northwestern and Knife River at $1.25 a ton? A. Yes.

Q. Did Purchas or Solberg find he could buy lignite cheaper anywhere?

A. No. They could not buy it at all. The requirements of Northwestern were heavier than any other mine was willing to sell to a new customer.

Q. Was Mr. Purchas with Middle West Service Company? A. Yes.

Q. What was the coal rate to Northwestern out of the Beulah mine in 1944, if you know?

A. I think it was 95 cents a ton.

Q. It was not 75 cents a ton? A. No.

Q. In other words, there had been an intervening change since 1933? A. Oh, yes.

Q. Now, during the time when U. P. U. Corporation owned the Dakota subsidiaries, did you have any desire that the Beulah plant of North Dakota Power & Light Company, and subsequently of Dakota Public Service Company, be run at capacity or near capacity?

A. Yes. It was our desire and intention that the plant should run at as nearly full capacity as was physically possible.

Q. That was your desire, Mr. White? A. Yes.

Q. Did you ever have occasion to criticize any of the operating personnel in regard to the running of that plant at capacity or the failure to do so? Do you recall any such occasion?

A. Well, I certainly delivered very few, if any, criticisms of operating personnel to operating personnel because if I had criticisms of operating personnel I always mentioned them to the head office executives.

Q. Well, did you ever have any occasion to make any criticisms to the head office executives about the question of how the Beulah plant was being run, that you recall?

A. Well, I can recall one instance where I made an inquiry which was in the form of a criticism.

Q. May I ask when was that?

A. I directed my inquiry to Mr. Sandstedt.

Q. When, approximately?

A. On an occasion when a group of us were making an inspection trip over the properties.

Mr. Benson: When was that?

A. I would estimate that it was about somewhere from 1940 to 1942.

Mr. Stafford: Q. It was on an inspection trip? The occasion to which you refer did occur some time between 1940 to 1942, on an inspection trip by you and others over the property. Is that correct?

A. That is correct. The date is my best recollection.

Q. That is as close as you can figure at the present time?

A. Yes.

Q. Now, can you tell us where this instance occurred?

A. It occurred in the dispatcher's room at the power plant at Aberdeen, South Dakota,

Q. Do you recall who, if anybody, was present on that occasion besides you and Mr. Sandstedt?

A. There were others in the party. Some of them were in the station, and I think that there were others than Mr. Sandstedt and the dispatchers in the dispatcher's room at the time I have in mind. I don't recall just who they were.

Q. Were your remarks directed to Mr. Sandstedt privately or were they voiced so that those standing about could hear them? That's what I am trying to get at.

A. Oh, no. They were directed to Mr. Sandstedt after we got in the car to leave the station.

Q. In other words, at the time you made these remarks both you and Mr. Sandstedt were in the car. Was anybody else with you in the car that you recall?

A. Well, the particular incident was that after we had gone through the power plant, boiler room, we went into the dispatcher's room, and someone asked the dispatcher as to the amount of the load at that particular time. He stated a figure that represented a light load, and I asked how Beulah was operating. He told me, as I recall it, that Beulah was pulling about 3,000 kilowatts. Well, I had just come through the Aberdeen station and noted that one of their generators was spinning very vigorously, so I asked the dispatcher if any of the generators were down at Beulah and he said no. So after we left the station I asked Mr. Sandstedt how it could be that with Beulah having no generator down, was carrying such a small load when Aberdeen was running. He saw the point and said that he would make it his business to find out. He later told me that he had checked up on it and he found that the dispatcher had been requested by the chief engineer of the Aberdeen station to put Aberdeen on the line, even though Beulah's full capacity wasn't being taken, because the chief engineer at Aberdeen was distressed by his station's high unit cost of generation; that is, the Aberdeen station had all of its fixed expense; it had its boilers well fired, so that it was incurring practically all of the cost of generating energy, but it was not actually generating; so that when that chief engineer made his report for the month, the cost of generation, he was showing up with a very high cost figure per kilowatt hour generated, and he apparently thought that such a high cost figure would reflect on his own efficiency; therefore he wanted to average that cost figure down for purposes of his report by getting his station on the line as much as he could, and that the particular time that we were at that station the dispatcher was acceding to his request. Mr. Sandstedt told me that he

did not think that that had been the operating policy, but was a rare occurrence and that it would not happen again.

Q. You mean by "operating policy" putting Aberdeen on the line?

A. Putting any station on the line except in the order of their operating efficiency, as was agreed to be the basis of operating the generating stations for the interconnected system.

Q. Now, Mr. White, you were asked by Mr. Benson concerning the so-called amortization table which has been identified as Plaintiff's Exhibit 6 for identification, and you were asked about the origin of the 3½ per cent maintenance figures therein and the interest figures at 5 per cent. Do you recall that? A. Yes.

Q. Now, I ask you whether or not you were satisfied that the 3½ per cent charge in that schedule for maintenance and 5 per cent charge for the interest were fair, insofar as the Dakota Public Service Company was concerned? A. I was.

Q. Before I left I was just about to inquire of you, Mr. White, regarding your testimony given on Mr. Benson's examination regarding Mr. Gail Belden, being a vice president of United Public Utilities Corporation. The memorandum which I have read covering the session at which I was not present indicates that you stated that he became vice president of U. P. U. Corporation between March, 1939 and March, 1940. Do I have a correct understanding of those dates? A. That is my recollection.

Q. Can you tell us—I don't know whether you went into this at that time or not, but if you did will you tell me again why, if there was any particular reason, Mr. Belden became an officer of United Public Utilities Corporation?

A. Well, it was during that period that United Public Utilities Corporation opened an office in Wilmington, Delaware, to keep the accounts, to receive all payments of money and to make all payments of money.

Q. Was that that joint office that you testified about when Mr. Benson was examining you?

A. Yes, the arrangement whereby we arranged to participate in the operation of a joint office, to perform similar functions for several holding companies.

Q. Did you feel that the service performed at that joint

office on behalf of United Public Utilities Corporation required a vice president of that company to be at that office?

A. Yes. We required signing officers in that office to administer that part of our business.

Q. Was there any other reason why you elected Mr. Belden to the office of vice president of your corporation at that time? A. No.

Q. Now, yesterday afternoon toward the close of your testimony, Mr. Benson was inquiring with reference to the number of shares of United Public Utilities Corporation owned by your wife?

A. The facts are that in the first six months of 1939 she did buy from The Middle West Corporation 1,000 shares of $3.00 dividend series preferred of U. P. U. Corporation; and during the entire year of 1939 she bought an aggregate of 6,918 shares of Class A common stock [or] which a substantial part were acquired from The Middle West Corporation. I don't recall the amount acquired during that year in the open market, but I am under the impression that some part of that 6,918 share total was acquired in the open market.

Q. But most of it from Middle West Corporation?

A. Most of it, if not all. I merely mention incidentally that during 1938 she had acquired five shares of $3.00 preferred stock and 395 of Class A common, but no part of that stock had been bought from The Middle West Corporation. It was all bought in the open market.

Q. Well, now did [Mr.] White purchase any other shares of United Public Utilities Corporation prior to the transactions you have just testified about? A. Yes.

Q. Do you know what shares she purchased? A. Yes.

Q. Tell us the date, the approximate date, and the amounts purchased?

A. During 1935 she acquired a total of 2,028 shares of $4.00 preferred, of which she sold two shares, and she also acquired 818 shares of common.

Q. Is that A common or B common? A. A common.

Q. Thank you.

A. Also during 1935 she acquired 305 shares of $2.75 preferred, which she sold in the same year. During 1936 she acquired 215 shares of $3.00 preferred and five shares of

$2.75 preferred, and one share of Class A common stock. In 1937 she acquired 257 shares of $3.00 preferred. In 1938 she acquired five shares of $3.00 preferred and 395 shares of Class A common. In 1939 she acquired 1,000 shares of $3.00 preferred and 6,918 shares of Class A common, bringing her holdings on July 1, 1939 to 3,505 shares of $3.00 preferred and 8,132 shares of Class A common. Subsequent to that date she made no further acquisitions of stock in the company.

Q. After July 1, 1939, did Mrs. White acquire any additional shares of United Public Utilities Corporation stock of any classes? A. No.

Q. After 1939 did she continue to hold the same number of shares, or did she dispose of any?

A. She disposed of stock in 1939, 1940, 1941, 1943 and 1944.

Q. How were those dispositions made, by sale in the open market, or to any individual purchaser, or how?

A. Some by gift, and the balance through sale through brokers in the open market.

Q. Those which she disposed of by gift went to individuals, I suppose— A. Yes.

Q. (Continuing) —who were beneficiaries or objects of the bounty of Mrs. White?

A. In that particular instance, yes.

Q. Specifically, they were not Middle West Corporation?

A. No.

Q. Or any affiliated companies? A. No.

Q. Or nominees for same. Is that right?

A. They were given to members of the family.

Q. Do you have any record as to the present holdings of Mrs. White now in United Public Utilities Corporation?

A. Yes. The same memorandum that I had prepared on this subject in connection with another matter indicates that she holds 200 shares of $3.00 preferred and 500 shares of Class A common stock.

Defendant's Exhibit 285, which is also referred to as Defendant's Exhibit 91 in White's deposition, was received in evidence. It consists of a letter from White to Kruesi dated November 15, 1933, and reads in part as follows:

As you know, your companies have been receiving the services of the supervisory staff of the Middle West Utili-

ties Company, and in the last few months the Receivers of the Middle West Utilities Company have made substantial additions to the personnel of this organization. In my opinion these services are of great value to your companies, and result in savings that far exceed the fee which they regularly charge. Through a temporary arrangement that I made with the Receivers of Middle West Utilities Company, this service has been rendered to your companies during the past. The Receivers of Middle West Utilities Company now ask that your companies, as well as other operating subsidiaries of our group, pay the regular charge for this service that other operating company subsidiaries of Middle West pay.

I enclose herewith copy of their proposal, which you will note is to be made effective as of September 1, 1933.

I would recommend that your companies execute the enclosed contract, returning the two copies to me—one for delivery to the Receivers of Middle West Utilities Company and one copy for my files. I would recommend also that, at the next meeting of your Board of Directors, you have them ratify the signing of the contract on your part. If you have any reasons why the above arrangements should not be made, I would appreciate your advising me.

Defendant's Exhibit 286, which is also referred to as Defendant's Exhibit 92 in White's deposition, was received in evidence. It reads as follows:

Defendant's Exhibit 286.

Northwestern Public Service Company.

Date November 20, 1933.

Subject Supervision Contracts Middle West Utilities Co.

Location Northern and North Dakota Power & Light Companies.

Mr. S. W. White:

In accordance with recommendation made in your letter of November 15th, I have executed the enclosed contracts

covering the Northern Power & Light Company and the North Dakota Power & Light Company, and are returning both executed copies to you.

At the next Board of Directors' meeting of these companies I will request the Board to ratify the execution of these contracts.

F. E. KRUESI.

FEK: vlb

encl

CC - CLS

Defendant's Exhibit 287, which is also referred to as Defendant's Exhibit 93 in White's deposition, was received in evidence. It consists of a letter from White to Kruesi dated November 29, 1933, pertaining to the same matter as that in Defendant's Exhibit 286 and directing that payments be made under said contract.

Defendant's Exhibit 288, which comprises Defendant's Exhibits 94, 94-A, 94-B, 94-C, 94-E, 94-F, 94-G and 94-H in White's deposition, was received in evidence. It consists of the following letters:

Letter dated December 29, 1934 from White to Strike, which reads in part as follows:

As of the close of business December 31, 1934, the reorganization of United Public Utilities Co. will be consummated and the Company's assets will be transferred to a successor corporation called United Public Utilities Corporation.

The existing arrangement under which the organization of Middle West Utilities Company renders management supervisory services to operating subsidiaries is being continued.

In spite of the discouragements in the public utility business, I am confident that the loyal and efficient group of executives in charge of our subsidiary companies will

make possible the rebuilding of the credit of United Public Utilities Corporation, a steady improvement in the physical condition and effectiveness of our operating properties, and a creditable return to the investors whose capital is tied up in this enterprise.

Letter dated January 13, 1936 from White to Kruesi with copy to Strike. It reads in part as follows:

Herewith is a draft of one possible form of adaption of the agreement covering the allocation of expenses of the Huron central organization.

About the only thing I have done to the agreement is to make it conform to the idea that they merely agree among themselves as to the basis of dividing their expenses rather than entering into an agreement as to what sort of services are to be furnished by the central office.

Letter dated March 2, 1936 from Sandstedt to White. It states that at the last meeting of the directors the Agreement for Allocation of Joint Management Expenses (Exhibit G to the Complaint) was approved by defendant, North Dakota Power & Light Company, Northern Power and Light Company and Knife River Coal Mining Company. It points to a change suggested by Packman and asks for approval thereof by White.

Letter dated March 4, 1936 from White to Sandstedt, which approves the suggested change in answer to his letter of March 2, 1936.

Letter dated February 26, 1937, from White to Strike with copy to Kruesi. It reads in part as follows:

Sometime ago, Mr. D. C. Green, President of Middle West Service Co., informed me of his unwillingness to

have Middle West Service Co. continue to furnish Management Supervision services to operating subsidiaries of United Public Utilities Corporation at cost (which is currently at the rate of about 4/10ths of 1% of gross).

Mr. Green is of the opinion that a proper charge for such services is 8/10ths of 1% of gross, plus certain per diem charges for special services as are rendered by income tax department, travelling auditors, etc. While it is a matter of regret to me to have an increase in the charge for the services rendered by Middle West Service Co. we feel that it is desirable to have those services available to our subsidiaries and we, accordingly, recommend and request that each subsidiary execute and return to us, for delivery to Middle West, one of the attached copies of the revised contract.

Letter dated November 7, 1939 from White to Sandstedt in answer to his letter of November 4, 1939, which is Defendant's Exhibit 280 (R. p. 1300, supra), White states: "I am entirely satisfied with the form of agreement recommended by the Committee on Operations with respect to the effect on interchange capacity agreement of the installation at Bismarck of 4,000 KW. additional generating capacity."

Letter dated December 26, 1939 from McClanahan to Harper and Sanborn. It reads as follows:

We have previously requested from the auditors and treasurers of the subsidiary companies of United Public Utilities Corporation that all monthly reports, whether for this office or Middle West Service Company, be sent directly to me for distribution to the interested parties. The reason for this request is that we desire to have greater control over the number and type of reports that are being prepared by the subsidiary companies.

The balance sheet letters from your subsidiary companies are being sent directly to Middle West Service Company with a copy to this office. We will appreciate

your cooperation in sending these reports and any others which may be handled at the present time in the same manner directly to this office and we will make the proper distribution.

Letter dated August 30, 1940 from White to Sandstedt, reading in part as follows:

As I told you and Beck, last week, I did not know why Otto Stokke had increased the Bismarck capacity rating by only 3,000 K. W. upon completion of the 4,000 K. W. addition, but I was confident that he had a reason. I am glad to have that reason and the explanation sounds reasonable.

That Bismarck addition certainly accomplishes a much needed improvement in the Dakota Public Service Co. ratio of effective capacity to peak demand.

(End of Defendant's Exhibit 288.)

(Read from deposition.)

Q. When you were describing for me the makeup of the United Public Utilities Corporation board of directors, both past and present, I have forgotten whether or not I asked you whether Mr. Nichols was an engineer, so I will ask you now: Is he an engineer?

A. Yes, he is. He is a graduate of Yale-Sheffield scientific school in engineering, was in the public utility business for a number of years with one of the Byllesby companies in Wisconsin, then was in the investment banking business for a period, and has again been in the public utility business for the last several years.

Q. During the course of the operations of your Dakota subsidiaries, I take it you have been familiar with the dividends paid by those companies and received by the stockholders thereof? A. Yes.

Q. Can you state whether or not any of the Dakota subsidiaries paid substantial dividends?

A. Both the North Dakota Power & Light Company

and Dakota Public Service Company paid substantial dividends. Northern Power & Light Company paid no dividends on its stock subsequent to my appointment as receiver of U. P. U. Company on April 15, 1932.

The portions of the cross examination and recross examination by plaintiff from the deposition of White which were offered by plaintiff and were received in evidence over objection (R. 1343 to 1344, supra) are, except for deleted immaterial matters and portions printed elsewhere in this record, as follows:

Q. In your direct examination have you disclosed all of the sources of information which you had concerning facts and opinions relative to these contracts that are the subject of this litigation?

A. To the best of my knowledge, yes. I might amplify that by saying that I have not knowingly withheld any information or sources of information.

Q. You know the contracts that are in suit and are attached to the complaint, don't you? A. Yes.

Q. And in your testimony on direct-examination, have you given all the information and advices that was given to you or United Public Utilities Company, or you as receiver of that company, or to United Public Utilities Corporation, relative to these contracts, by the officers, directors, and employees of North Dakota Power & Light Company?

The Witness: Will you read that slowly?

Mr. Benson: Read that again.

(Question read).

Mr. Royhl: We object to that as indefinite, uncertain, too general, calling for the conclusion of the witness.

The Witness: As I understand that question, it asks whether I have disclosed all the information that came to me or to U. P. U., with respect to these contracts, from the officers and employees of North Dakota Power & Light Company.

Mr. Benson: And directors, was in there.

The Witness: Sir?

Mr. Benson: And directors was in the question.

The Witness: And directors, yes. To the best of my knowledge, I have. Again I will say that I have not knowingly withheld any such information that I may have had. I also might say that I was answering questions, directing my answers to those questions. They seemed to me to be very comprehensive and to cover every item or element in those contracts, and I am not aware of any omission in my answers of things that I knew or of representations that had been made to me.

Mr. Benson: Q. In preparing to testify in this case, Mr. White, apropos of what you have just said, you made a careful search of your files to get any material that you thought would bear on the issues in this litigation? A. Yes, sir.

Q. And, apropos of some of your testimony yesterday, you have attempted to have developed, by the evidence which was offered here, all such evidence and information which you could locate, which you thought had a material bearing on this litigation? I am not interested in pin point stuff.

A. I have not considered myself a competent judge on all of the things that were relevant. I think I have brought all of the stuff noted in going through a tremendous file of correspondence and files, a large amount of which I have brought, but apparently does not have a direct bearing on this case. But I have at no time advanced any suggestions as to which of that information should be developed.

Q. You left that to some one else; you left that to counsel? A. I left that to counsel.

Q. I see. A. And not to my personal counsel, either.

Q. Well, your intention was that there should be a full presentation of everything that you located or that you could think of that was material to this litigation?

Mr. Royhl: The same objection last made in full.

The Witness: That was my intention.

Mr. Benson: You disclosed, in your testimony so far, all the information and advice which you received as receiver of United Public Utilities Company and which you re-

ceived as an officer of United Public Utilities Corporation, from the officers, directors and employees of Northern Power & Light Company, concerning the rates, the rate provisions and the other provisions contained in the contracts involved in this suit, that are attached to plaintiff's complaint?

Mr. Royhl: The same objection last made in full.

Mr. Benson: I am trying to repeat the same question with reference to various companies.

The Witness: All right. Again I find that word "all" a difficult obstacle, but I can say that my answers to the questions that have been asked have been made to the best of my recollection, refreshed wherever possible from supporting material, and that in no instance have I knowingly failed to give effect to all of the advices, reports, information, observations, conversations with or from the officers and directors and employees of Northern Power & Light Company.

Q. Now, when your answer said you not knowingly failed to give effect, you meant you not knowingly failed to produce for the examination in this proceeding any of such communications or information?

A. Yes, I also mean that.

Q. Yes.

A. I have not withheld material which I have discovered in my search.

Q. Now, in talking about the officers, directors and employees of North Dakota Power & Light Company and Northern Power & Light Company, in so far as the officers and directors were concerned, during all of the period from your appointment as receiver down to the merger of North Dakota Power & Light Company and Northern Power & Light Company, those officers and directors were the same persons?

Mr. Royhl: Have you any material—

The Witness: To the best of my recollection—sorry.

Mr. Royhl: Have you any material to refer to?

The Witness: I have a large amount of minutes.

Mr. Stafford: There may have been some minor changes in there.

Mr. Benson: Do you want to answer that outside of minor changes?

Mr. Stafford: You just want it substantial, don't you?

Mr. Benson: Yes.

Mr. Stafford: There may have been one or two changes.

The Witness: To the best of my recollection the officers of North Dakota and Northern were the same and the directors were the same, although there may have been some minor variations at one time [of] another.

Q. So that when you were making the investigations of your records and stirring up your recollections with reference to the officers and directors of North Dakota Power & Light, you were dealing with reports and records and communications from the same individuals as Northern Power & Light, so that you did not have to make separate investigation for communications from Northern Power & Light as distinguished from communications from North Dakota Power & Light? A. No.

Q. You did not have to? A. I did not have to.

Q. Now, there were some—

The Witness: Although, might I add that—although I believe the people in my office did search both North Dakota Power & Light and Northern Power & Light, the files of such material as we had received or copies of those we had sent from or to those companies.

Q. Now, there was some difference in the employees of North Dakota Power & Light Company and Northern Power & Light Company, of course, wasn't there? A. Yes.

Q. The employees in the territory? A. Yes.

Q. Do you recall whether you received any communications from the employees in the territory with reference to the contract or any of the problems dealt with in the contract that are attached to the complaint in this proceeding?

Mr. Royhl: You are covering the entire span, are you, John?

Mr. Benson: Yes.

Mr. Royhl: '32 to '45—'39?

Mr. Benson: That is what I said, yes.

The Witness: Yes, I would say that all of the communications that I received from employees of those companies.

Mr. Benson: I don't know if you got exactly—I was trying to find out whether you got material from people other than the directors and the officers. Will you read the question now, in the light of Mr. White's answer and what I said?

The Witness: A. Yes, I think I did.

Mr. Benson: All right.

Q. Now you searched your records and files for any communications of employees of North Dakota Power & Light other than officers and directors?

A. Not particularly.

Q. You did not have the fact that they were employed in mind? A. No.

Q. You were searching the files for information?

A. I was searching the files for information relevant to these contracts and our relationships with those companies that might be associated with these contracts.

Q. And, if I asked you the same question with reference to communications from the employees of Northern Power & Light, other than officers and directors, your answer would be the same? A. That is correct.

Q. Now, July 1, 1939, the merger of North Dakota Power & Light Company and Northern Power & Light Company became effective, as I understand from the testimony that has been presented here? A. That is correct.

Q. And you did make a search of your files and records in your office to ascertain what communications you had received from the officers and directors and employees of Dakota Public Service Company relative to the contracts involved in this litigation? A. Yes.

Mr. Royhl: Same objection.

Mr. Benson: Q. And you made a search of your files and records in your office for communications which may have come to you from the officers, directors or employees of Dakota Public Service Company with reference to the contracts that are involved in this litigation?

Mr. Royhl: The same objection.

A. Yes.

Mr. Hastings: Could we stop there? What was the company mentioned in the preceding question?

(Record read by the reporter).

Mr. Hastings: You have asked the same question twice.

Mr. Benson: All right.

Q. Now, Mr. White, you have attempted to disclose, in your testimony heretofore given, all the information that came to you from every source, relative to the cost of the energy sold by North Dakota Power & Light Company to Northern Power & Light Company?

Mr. Royhl: The same objection.

The Witness: I have attempted to answer all the questions that were asked me, which seemed to me to have been very comprehensive in their coverage, and in phrasing my replies to those questions, I have omitted nothing material of which I was aware.

Q. Well, you did endeavor to locate everything in your files concerning the cost to North Dakota Power & Light Company of the energy it sold to Northern Power & Light Company?

A. I did. Perhaps it would be appropriate for me to detail these attempts that I have made to locate the information.

Mr. Benson: I don't think so. I am interested in whether you did make a bona fide attempt.

The Witness: All right.

Mr. Benson: And your answer is yes?

The Witness: And my answer to that is yes.

Mr. Benson: All right.

The Witness: But I was merely troubled by this word "all", which is a rather comprehensive word.

Mr. Benson: Let me put it this way then:

Q. You attempted to provide everything that you thought had any bearing on the cost of the energy sold by North Dakota Power & Light Company to Northern Power & Light Company?

Mr. Royhl: The same objection.

A. That is correct, and you have summarized my entire attempt by suggesting that I have made a bona fide attempt to produce all the information that I could find, or material.

Mr. Benson: Now, the energy which North Dakota Power & Light Company sold to Northern Power & Light Company was generated by North Dakota Power & Light Company? A. Yes, sir.

Q. In searching your files and records preparatory to testifying in this case, did you also look for any information and data in those files which you had, with reference to the cost to Northwestern Public Service Company of energy which it generated?

A. Not specifically, and I can't recall that, in giving instructions to my office force prior to the search for those files, that I mentioned Northwestern figures, although I am aware of the fact that part of the material which I have produced, and some part of which has been introduced by the defendant, there is some information on generating costs of Northwestern Public Service Company.

Q. Do you know whether you have more information on those generating costs of Northwestern? You don't recall immediately, offhand? A. I don't recall right offhand, no.

Mr. Benson: Now, I wonder whether, some time when we are in recess, some time during your examination, you might ask your office force to make a search for that?

The Witness: I will be very glad to.

Mr. Benson: All right.

The Witness: I also have in mind that some of the analyses of power costs—

Mr. Benson: Now, let us try—I am trying to speed up this examination.

The Witness: All right.

Mr. Benson: You want to get out and I want to get out.

The Witness: All right, sir.

Mr. Royhl: Did you complete your answer, Mr. White?

The Witness: I merely wanted to say that in this material I have here several of the analyses of power costs of Dakota Public Service Company or its predecessors also include similar analyses of power costs of Northwestern Public Service Company.

Mr. Benson: Yes. Now, will you read his answer, please?

(Answer read).

Mr. Benson: Q. You mean you have some analyses of costs here with reference to the generation of energy by North Dakota Power & Light Company, which have not been offered in evidence? A. I am pretty sure I have.
Q. Can you locate them, please?

Mr. Benson: We will pass that question for the time being and your personal counsel, who is here, can browse through the files in the meantime. Maybe we can shorten this up.

Q. You did not make any particular search to find in your files material concerning the cost to Northwestern Public Service Company of energy generated by it?
A. No, I did not, but I will.
Q. Have you made a careful search to locate in your files everything that you received in the way of information relative to the cost to Northwestern Public Service Company of the interconnection facilities referred to in the contract, Exhibit B to the complaint?

Mr. Royhl: Same objection as last made in full.

The Witness: A. Yes.

Mr. Benson: Q. And did you produce all that you found?
A. All that I found is here in this room.
Q. How long has it been here?
A. Since the beginning of the hearing.
Q. Do you recall whether, at the time your examination was going on, it was your thought that everything that you had with reference to costs of those interconnection facilities to Northwestern Public Service Company was going into the record?

Mr. Royhl: We object to that as calling for the opinion and conclusion of the witness, and immaterial.

Mr. Royhl: Defendant objects to this for all the reasons heretofore urged in full to this line of testimony; for the further reason that no proper foundation has been laid; the witness has not shown himself competent, and as to this defendant it would be hearsay and self-serving.

Mr. Benson: Q. You said you had some material concerning the cost to Northwestern Public Service Company of the interconnection facilities involved in the 1935 contract, Exhibit B to the complaint?
A. I believe there is in my files, among the material which I dug out, some information about the rate on interchanged energy under that 1936 agreement. Is that the question you asked me?

Mr. Benson: My question is directed to what the interconnection facilities cost Northwestern Public Service Company. Now, with that explanation of the question, I am asking you whether you made a search of your files for information which came to you from any and all sources that you could recollect concerning such cost of interconnection facilities.

The Witness: Yes.

Mr. Benson: Q. And you produced all of that information here? A. I have it here.
Q. Well, you produced it, then, didn't you? A. Yes.
Q. And did you call all of that information or any part of it to the attention of counsel for the plaintiff?

Mr. Royhl: Same objection last made in full.

A. I don't recall that I called attention to—attention of plaintiff's counsel to that information. I answered questions about material in my files.

Mr. Benson:

Q. The material which you produced at these proceedings at the beginning of the proceedings is involved in several open folders? A. Yes.

Q. Is contained in several open folders. Those open folders have been here on the desks and anybody could look at them? A. Yes.

Q. I could look at them? A. Yes, sir.

Q. And that was agreeable to you?

A. It would have been.

Q. And counsel for the plaintiff, naturally, had access to them,—or counsel for the defendant, rather, naturally, had access to them? A. Yes.

Q. Because they were in his office? A. Yes.

Q. Did you call to the attention of counsel for the defendant anything in your files relative to the cost to Northwestern Public Service Company of the interconnection facilities—

Mr. Royhl: The same objection last made in full.

Mr. Benson: Q. (Continuing:) —dealt with in Exhibit B to the complaint?

The Witness: Frankly, I don't recall just exactly what there is in my files on that subject. I know that in the material I have brought a cost of those facilities is mentioned a number of times in varying amounts. Many of those amounts, as mentioned in correspondence, are unsupported in my files and I believe that such information as there is does not give the complete story of that cost in any one place, and I don't recall that it does collectively give a complete story, and I don't recall—

Mr. Benson: Will you read the answer, please?

(Record read).

The Witness: (Continuing:) —that I mentioned that fact.

Mr. Benson: Will you read the question, please?

(Question read).

The Witness: I am sorry. I didn't mean to be evasive. Not to my recollection.

Mr. Benson: All right. Now, let us get straightened out on some of your procedure with reference to your files here.

Q. I noticed the statement was made from time to time by counsel for Northwestern that you had produced a document from your files at his request? A. Yes.

Q. Do you know, in any instance, the source of his information as to the existence of that document?

A. I think in every instance he got his information from examination of the files.

Q. When were those files examined, so far as you know, by the attorneys for the Northwestern Public Service Company?

Mr. Royhl: Objected to as immaterial.

Mr. Benson: When?

Mr. Royhl: Irrelevant.

The Witness: Prior to or during the course of the hearing.

Mr. Benson: I mean prior to the hearing.

The Witness: Some were.

Mr. Benson: Q. Some were examined prior to the course of the hearing? A. Yes.

Q. And some were examined during the course of the hearing? A. Yes.

Q. And the examination prior to the course of the hearing was made in the office of the attorney for the Northwestern Public Service Company? A. Yes.

Q. And you brought the files or sent them to the office of the attorney for the Northwestern Public Service Company?

Mr. Royhl: Objected to as immaterial and irrelevant.

The Witness: A. Neither.

Mr. Benson: Q. Well, how did they get to the office of the attorney for the Northwestern Public Service Company?

The Witness: A. They sent for them.

Q. Oh, they sent to your office for them? A. Yes.

Q. Now, do you recall what files they sent for?

A. Such files as I had pulled up to the time they sent for them.

Q. Did they describe those files by titles when they asked for them?

Mr. Royhl: Same objection.

The Witness: A. Yes, I think they did, generally.

Mr. Benson: Q. Where did they get the titles to the files?

Mr. Royhl: Same objection.

The Witness: I did not mean to say that they asked for files according to titles that were on the folders in my filing system.

Mr. Benson: Q. What do you mean by titles?

A. I mean by general classification.

Q. I see. A. A general description.

Q. Has there been disclosed in the evidence in this case all of the facts and opinions on which you based your statement, which was substantially to the effect that you thought, or you were satisfied that the $20,000 per year charge to Northern Power & Light Company for interconnection facilities was fair and reasonable?

Mr. Royhl: Same objection.

Mr. Benson: Read the question to Mr. White.

The Witness: May I have the question? I am trying to frame an answer.

(Question read).

The Witness: I can't say that everything has been disclosed, because I have been answering questions and attempting to give direct answers, but without omitting any information of which I was aware.

Mr. Benson: Q. Well, do you recall now any facts or opinions which you had received from any source, relative to the $20,000 per year charge for interconnection facilities involved in Exhibit B to the complaint, that you would like to produce here? A. No, I do not.

Q. Now, that $20,000 per annum charge, or $1,666.66 per month, is also provided for in Exhibit D to the complaint, that is the July 1, 1939 contract, between Northwestern Public Service Company and Dakota Public Service Company entitled "Interconnection contract". A. Yes.

Q. Now, do you have in mind any facts or opinions which were available to you at the time of your testimony with reference to that contract which you now desire to present?

Mr. Royhl: We object to that as incompetent, immaterial, irrelevant, not binding on the defendant, calling for the opinion and conclusion of the witness and too general.

A. I have no particular desire to introduce any information, I have offered to both the plaintiff and the defendant and have in turn been subpoenaed to produce all information which in general is relevant to these agreements, and I have attempted to produce all such information.

Mr. Benson: Well, I think you—

The Witness: I am not capable of appraising whether the material that has been brought out in the testimony so far gives a complete coverage of the facts, but I have the impression that it does, and some of my testimony has probably been based purely on my recollection, and other parts of it on my recollection as refreshed from documents that went into the record.

Mr. Benson: All right. What I am asking you now is can you now recall any information which you had with reference to the charge of $20,000 per year, or $1,666.66 per month, which you were not asked to testify to in this proceeding.

Mr. Royhl: Same objection as last made in full.

The Witness: I don't.

Mr. Benson: Q. You don't recall now any additional information?

A. I don't recall additional information which might be relevant.

Q. Now, the charge of $1,666.66 per month was referred to in Exhibit B and Exhibit D, Exhibit F, and the supplement to Exhibit F, all being exhibits to the plaintiff's complaint.

Mr. Royhl: Wait, I didn't get that question.

The Witness: Well, it is not—

Mr. Royhl: Wait a minute.

Mr. Stafford: It is not a question yet.

Mr. Benson: All right. Counsel wants to hear the beginning of this question.

(Record read).

Mr. Benson: Q. I would like to ask you whether you had any facts furnished you by others concerning that charge, or any opinions furnished you by others concerning that charge, which you have not produced here,—

Mr. Royhl: Same objection last made.

Mr. Benson: Q. —or concerning which you have not testified about here.

Mr. Royhl: The same objection.

The Witness: Will you read the question?

(Record read).

The Witness: My answer to that question is no, with the exception that I have in my files, for a number of years, a book of memoranda made by Mr. Lakin in the course of his inspection trips over the Dakota properties in 1936 and '41. That book also included some correspondence which he had direct with the operating staff of that property, and it was the basis and included part of the material of his verbal report to me and to the directors of United Public Utilities Corporation as to the desirability and attractiveness of the 1935 interconnection contract, from the

standpoint of Northern Power & Light Company and United Public Utilities Corporation.

Mr. Benson: Q. Now, are there any other sources of information, without characterizing them, that you recall?

A. No others.

Q. All right. Now, you don't know whether Mr. Lakin made this [ir] not, of your own knowledge, made the entries in that book? You don't know of your own knowledge?

A. Those that purport to be his entries I would recognize, because they are in longhand in his handwriting.

Q. You heard his testimony as to his sources of information, didn't you? A. No, I did not.

Q. Oh, you weren't here? A. I was not here.

Q. When his testimony was given? A. No, I was not.

Q. Now, Mr. White, I call your attention to Exhibit C to the plaintiff's complaint. That is a contract dated the 1st day of January, 1938, entitled Interchange Capacity Agreement. You are familiar with that agreement?

A. Yes, sir.

Q. Have you any information as to how the rate of $13.20 referred to in Article VIII was arrived and which information has not been introduced in evidence here—

Mr. Royhl: The same objection last made in full to this line of questions.

Mr. Benson: Q. (Continuing —in your testimony?

A. I have a recollection on that point, and I don't recall whether or not it has been introduced in my testimony.

Mr. Benson: All right.

Q. Was this thing that you recall a written document?

The Witness: I recall it very clearly, and I think that—strike that—and I think now that it does appear in some of the documents that were introduced, although I don't believe the specific answer to your question was—

Mr. Benson: Elicited by counsel?

The Witness: —elicited by counsel from me.

Mr. Benson: Q. That is the responsibility of counsel, isn't it? A. It certainly is, as far as I am concerned.

Mr. Benson: Now, we will show you the exhibits, which were kept by counsel for the defendant—

Mr. Stafford: And have been examined by others during the course of the hearings.

Mr. Benson: Including counsel for the plaintiff. Is there any exhibit that is not in here (indicating)?

Mr. Robinson: Exhibit 2. We withdrew that pursuant to the stipulation.

Mr. Benson: Exhibit 2, and what else?

Mr. Robinson: It starts with 3. Every one was there up to the time I turned it over to you this morning.

Mr. Benson: Now I show you all of the exhibits that have been offered to date in this hearing—now let's keep them separate from your papers there—and will you run through them and indicate the document which you had in mind when you answered my last question?

(Witness looks through the exhibits handed to him.)

Mr. Benson: Read the question, Mr. Reporter, so he can get exactly what was said.

(Record read.)

Mr. Benson: Now, read the current question.

(Question read as follows: "Now I show you all of the exhibits that have been offered to date in this proceeding, and will you run through them and indicate the document which you had in mind when you answered my last question?")

Mr. Royhl: Same objection as last made in full. Indefinite and uncertain.

Mr. Benson: Q. What is the document you had in mind?

Mr. Royhl: Same objection.

The Witness: Defendant's Exhibit 24 id.

Mr. Benson: Q. "Id" means for identification, doesn't it? A. I would judge so.

Q. Well, the "id" is one symbol, "id". A. Yes.

Q. Read the title at the top of Exhibit 24, on the first page.

A. Survey of Power Requirements, Northwestern Public Service Company, Northern Power & Light Company, North Dakota Power & Light Company.

Q. Now, in what portion of Exhibit 24 do you find what you had in mind as a statement or any representation having anything to do in any way with the rate of $13.20?

Mr. Royhl: Oh, we object to that for all the reasons heretofore urged, and an examination concerning a document not now in evidence. And the document itself is the best evidence.

Mr. Benson: Go ahead and answer.

The Witness: I find on page 11, in the fourth full paragraph, at the top of the page, being the third paragraph from the bottom of the [pages], the statement that—shall I read it?

Mr. Benson: Yes.

Mr. Royhl: We object to the reading of the exhibit in evidence, as the exhibit itself is the best evidence of what it contains; and for all the grounds heretofore urged to this line of testimony.

The Witness: (Reading:) "We believe a fair basis would be to assume an investment of $110 per kilowatt and to charge 12% on this investment.

Mr. Benson: Q. Now, Mr. White, do you have any information that is not in the exhibits and that you have not heretofore testified to, which information has to do with how the rate of $13.20 per kilowatt of firm demand per year was arrived at, for use in Article VIII of Exhibit C to the plaintiff's complaint?

Mr. Royhl: Objected to as indefinite and uncertain, and on all of the grounds heretofore urged to this line of questioning.

The Witness: I think the same basis for the $13.20 figure may be mentioned in other places in the material I have produced, and I have an independent recollection of con-

versations in which the fairness of that method of calculation was discussed.

Mr. Benson: All right.

Q. Now, with whom did you have such conversations?
A. With Mr. Strike and I think with Mr. Buell.
Q. Did you have more than one conversation with Mr. Strike concerning this charge? A. That I can't recollect.
Q. Can you recall the time of the conversation? A. No.
Q. Nor the place? A. No.
Q. Do you recall the conversation in detail or just the substance of it? A. Just the substance.
Q. What did Mr. Strike say, according to your best recollection?

Mr. Royhl: Same objection last made in full. No proper foundation laid.

A. That he had suggested a figure that was so low that I couldn't possibly disagree with it.

Mr. Benson: Q. Did you have one or more conversations with Mr. Buell?
A. I don't recall whether, in my conversations with Mr. Buell, a discussion of that item occurred more than once.
Q. Do you recall where that conversation was?
A. No, but probably in Chicago.
Q. Do you recall when it was? A. No.
Q. Do you recall the conversation in detail? A. No.
Q. Or only the substance of it? A. Only the substance.
Q. What did Mr. Buell say?

Mr. Royhl: Same objection last made in full.

A. I don't recall what he said, but I have an overall impression.

Mr. Benson: Well, we will omit that.

Q. Did you make any investigation yourself concerning what would be a fair rate to be inserted in Article VIII of Exhibit C before that document was executed,—any source other than you have disclosed in your cross-examination?
A. I don't recall whether I checked it with Mr. Lakin or not.

Q. Did you go to any other sources than you have disclosed in your cross-examination to date? That is my question.

Mr. Royhl: Go ahead and complete—

The Witness: I cannot state that I did or did not.

Mr. Benson: I see.

Q. Do you have the original Articles of Incorporation of United Public Utilities Corporation?

The Witness: Yes. They are included in our original minutes that are here.

Mr. Benson: You thought that you might be able to locate a pamphlet of the original Articles.

The Witness: I have such a pamphlet.

Mr. Benson: Have you found that?

The Witness: Yes.

(Document handed to counsel).

Mr. Benson: You have produced two copies of the Certificate of Incorporation of United Public Utilities Corporation, in a pamphlet dated on the outside January 1, 1935.

The Witness: Yes.

Mr. Stafford: These are true and correct copies of the charter, aren't they?

The Witness: Yes, just as accurately as a good printing firm could conform them.

Mr. Benson: Will you please mark this document for identification?

(The document was thereupon marked Plaintiff's Exhibit 1 for identification, of 9/19/47.)

Mr. Benson: I will ask counsel whether we may stipulate that the document marked Plaintiff's Exhibit 1 for identification is a true and correct copy of the original Certificate of Incorporation of United Public Utilities Cor-

poration and may be received in evidence in lieu of the original Certificate of Incorporation of that corporation.

Mr. Stafford: If there is any change, why, subject to change on verification.

Mr. Benson: Subject to change?

Mr. Stafford: That is agreeable subject to correction by verification with the original, also subject to the objection that it is immaterial and irrelevant.

Mr. Benson: Let me have Mr. Stafford's full statement.

(Record read as above recorded).

Mr. Stafford: All right?

Mr. Benson: Yes.

Q. You have produced a copy of all documents changing the terms of the original Certificate of Incorporation of United Public Utilities Corporation, have you?

The Witness: A. To the best of my knowledge there is only one such document or change, and I have produced a conformed copy.

Mr. Benson: Mark this Plaintiff's Exhibit 2 for identification.

(The document was thereupon marked Plaintiff's Exhibit 2 for identification of 9/19/47).

Mr. Stafford: Referring to a document marked Plaintiff's Exhibit 2 for identification, where did you receive the document from?

The Witness: I received it from Evans, Bayard & Frick, Philadelphia, general counsel for United Public Utilities Corporation, who prepared it and filed it.

Mr. Stafford: Was it conformed as to dates and signatures when you received it from those lawyers?

The Witness: Yes.

Mr. Benson: It may be stipulated, counsel, that Plaintiff's Exhibit 2 for identification is a true and correct copy of the, what you and I would call an amendment to the

Certificate of Incorporation of United Public Utilities Corporation?

Mr. Stafford: Well, I don't know that you accurately call it a certificate of amendment. It is a certificate of information.

Mr. Benson: Of information.

Mr. Stafford: Yes, we will make the same stipulation on that document as we did with reference to Plaintiff's Exhibit 1 for identification,—subject to the same objections.

Mr. Benson: Plaintiff offers in evidence Plaintiff's Exhibit 1 for identification, and asks that the same be attached to and returned with the deposition of this witness,

Plaintiff offers in evidence Plaintiff's Exhibit 2 for identification, and asks that the same be attached and be returned with the deposition of this witness.

Mr. Stafford: To which the defendant interposes the same objections heretofore stated in the stipulation, which is on the record.

(Copies of said documents offered in evidence as Plaintiff's Exhibits 1 and 2, respectively, are attached).

Mr. Benson: Will you produce the minute book of United Public Utilities Corporation containing the annual stockholders' minutes for 1945?

The Witness: These minutes run up to the meeting of November 2, 1945.

(Handing document to counsel)

I can't state definitely that there was any meeting in 1945 subsequent to those.

Mr. Stafford: We have your own copy, if you want to look at it. Give him his own there. It is the black book.

Mr. Benson: Counsel, may we make the same stipulation with reference to the introduction of the minutes and the method of introducing minutes which we had when the defendant was introducing minutes?

Mr. Stafford: Yes, so stipulated.

Mr. Benson: Now, I will read from the original minutes.

Q. Mr. White, these are the original minutes of the annual meeting of the stockholders of United Public Utilities Corporation, held at Flemington, New Jersey, on April 25, 1945? A. Yes, sir.

Mr. Benson: (Addressing Mr. Stafford): Look at those and see if you find a general resolution approving the acts of the officers and directors of the preceding year.

Mr. Stafford: Not in this one.

Mr. Royhl: You said stockholders' meeting.

Mr. Stafford: They adjourned it apparently. The action taken here is they adjourned it: "It was unanimously adopted by all stockholders to adjourn over to June 8th."

Mr. Royhl: Concerning Plaintiff's Exhibits 1 and 2 and the probable use of the minutes of April 25, 1945, and June 8th, of 1945, of the stockholders of U. P. U. Corporation, the defendant asks that the plaintiff state whether or not such testimony is intended as direct testimony by the plaintiff of this witness or intends the same to be a cross-examination of the testimony of this witness taken by the defendant.

Mr. Benson: It will be offered for each of those purposes.

Mr. Royhl: The defendant now objects and moves to strike out Exhibits 1 and 2 for the reason and on the grounds that same are not a cross-examination of this witness of any matters or things inquired into on the direct-examination of this witness, and, as cross-examination, are incompetent, immaterial, and irrelevant, and improper cross-examination of this witness.

A portion of White's cross-examination is omitted because it appears at page 1344, line 19, through page 1345, line 17th from the bottom, and 1345, lines 25 through 35; and line 11, page 1351, through line 26th from bottom, page 1352 of the record, supra.

Q. In your examination by the defendant's counsel, you made some statement about having made an investigation of Mr. Sanborn. You were referring to Mr. A. B. Sanborn, as to whom you testified in your testimony on direct-examination? A. Yes.

Q. He is the same man who is sometimes called Beck Sanborn? A. Yes, sir.

Q. By "investigation" did you mean you made [in] investigation or you had an interview with Mr. Sanborn?

A. I had an interview with Mr. Sanborn and also saw the results of some inquiry that had been made as to his record and capabilities, such inquiry having been made, as I recall, by Mr. F. E. Kruesi, from some Canadian investment banking firm which owned the control of the electric utility company in British Columbia by which Mr. Sanborn was employed immediately prior to his engagement as president of the three U. P. U. subsidiaries and Northwestern Public Service Company.

Q. Did you ever make an investigation of any kind as to Mr. C. J. Strike?

A. No. By that I mean I made no investigation outside of the organization of Middle West Utilities Company or Middle West Service Company.

Q. Do I understand that you made inquiry of Middle West Utilities Company with relation to Mr. Strike?

A. Yes. When I—

Q. Now, I am trying to get this straight as between these various organizations that we have bumped into in this record, in this testimony. Is that the only investigation you made of Mr. Strike? A. Yes.

Q. Did you make an investigation of Mr. T. T. Parker?

A. Yes.

Q. Did you make that investigation by making inquiry of Middle West Utilities Company officers?

A. Officers, yes, or department heads, capable of expressing an opinion on his capabilities.

Q. Did you make any investigation concerning Mr. C. L. Sandstedt? A. Yes, the same kind of investigation.

Q. By that last answer you mean you inquired of officers and department heads of Middle West Utilities Company?

A. Yes.

Q. Did you make any investigation of the man W. N.

Dunn or N. Dunn, mentioned in your testimony on direct examination? A. No. When he had—

Q. Well, you made no investigation concerning Mr. Dunn? A. No.

Q. Did you make an investigation concerning Mr. G. R. McArthur, concerning whom you testified in your examination on direct-examination?

A. I did, by talking with Mr. Kruesi and Mr. Strike at the time he was proposed for election as vice-president.

Q. Did you make any investigation of Mr. F. E. [Keursi] whom you mentioned in your direct-examination?

A. No, none that I can recall.

Q. Did you make these investigations for the purpose of ascertaining whether these men had a reputation for being frank?

A. I did for the overall satisfying myself as to their capabilities and dependability.

Q. Now, when you speak about dependability, you mean as to whether all facts relative to the operation of the Dakota subsidiaries of U. P. U. would be reported to you?

A. I can't recall of ever directing an inquiry along that specific line.

Q. Did you expect the officers of Dakota Public Service Company, North Dakota Power & Light Company and Northern Power & Light Company and Knife River Coal Mining Company to give you complete and accurate statements of facts when they reported any facts to you?

A. Yes.

Q. And, when they reported any opinions, did you expect them to give you complete and accurate statements of the facts upon which their opinions were based?

A. Well, I expected all representations made to me to be accurate and made in good faith, and I expected sufficient completeness in those representations to warrant me, in my particular capacity, to form an intelligent opinion of what was going on.

Q. Did you expect complete and accurate reports from the Middle West Service Company on all matters which came within their line of service for your Dakota subsidiaries?

The Witness: Read that, will you, please?

(Question read.)

A. Yes.

Q. And you expected the same type of reports from the receivers of Middle West Utilities Company when those receivers were rendering service to you under the conditions which you described in your examination in chief?

A. Yes. I might qualify that by saying that the disorganization and changes that were being made in the Middle West organization by the receivers, and the reorganization of their staff during the receivership, would not justify me in expecting at that time a flow of information in as great volume as I came to expect after that organization became stabilized.

Q. I take it, Mr. White, that you never told any of the officers or directors of your Dakota subsidiaries that they might withhold or misrepresent any facts to you?

A. That is correct.

Q. You did not? A. I did not.

Q. You expected the operating committee under the interchange capacity agreement to honestly and accurately determine the facts to be used in the use of the formula provided in the agreement for determining what the charge would be that would fall on the party or parties to the contract in the succeeding year? A. I did.

Q. And that was true in every contract that had an interchange capacity agreement in it? A. Yes.

Q. And every contract where you had these charges which were fixed at $13.20 per annum per kilowatt?

A. I expected a fair and just determination of all the factors against which the $13.20 charge was to be applied.

Q. Do you have a college degree? A. No.

Q. You went to college, didn't you?

A. Yes, for three years.

Q. What was your class? A. Class of 1908.

Q. The College? A. Harvard.

Q. Academic? A. Yes.

Q. You were asked to produce some copies of your receiver's first report, and I think yesterday some one of them went into evidence, didn't it?

Mr. Stafford: Not the first.

Mr. Benson: What?

Mr. Stafford: Not the first, though he did produce it, and it was examined yesterday. The second and third.

Mr. Benson: Do you have a copy of the first?

Mr. Stafford: No. Did we?

Mr. Robinson: I think we turned it back. I will look.

Mr. Stafford: Are there others available, I mean in the future?

The Witness: Yes.

(Discussion here not recorded.)

Mr. Stafford: I have a copy, Mr. White.

Mr. Benson: All right; I just wanted to be sure. Do you have one?

Mr. Stafford: Let me see. Is it the same thing?

Mr. Benson: Will you please mark this for identification?

(Thereupon said document was marked Plaintiff's Exhibit 3 for identification of 9/26/47.)

A portion of White's cross-examination is omitted because it appears at page 1345, line 36, through page 1346, line 12, of the record, supra.

Mr. Royhl: Objected to as self-serving, and also, as to the defendant, incompetent, irrelevant and immaterial, not proper cross-examination, and no sufficient foundation.

Mr. Benson: Does the claim as to no sufficient foundation go to the fact that this is not a true and correct copy of the receiver's report?

Mr. Royhl: No.

Mr. Benson: Or that it is not certified by the clerk of the court where it is filed?

Mr. Royhl: No.

A portion of the cross-examination of White is omitted because it appears at page 1347, line 2, through page 1347, line 14, of the record, supra.

Mr. Benson: I don't want it to appear in the record that I cut you off with reference to your college, neither do I want it to appear as though you started, and, for some reason against your [schlorship], didn't get through.

The Witness: The reason was financial.

Mr. Benson: All right, that is all I wanted to clear up.

A portion of the cross-examination of White is omitted because it appears at page 1354, line 7, through page 1354, line 36, of the record, supra.

Q. At the time you became receiver of United Public Service Company, all of the stock of that company was owned by—all the voting stock of that company, I think you said, was owned by The Middle West Utilities or Middle West Utilities Company?

A. Practically all of the common stock of United Public Service Company was owned by Middle West Utilities Company.

Mr. Stafford: Wasn't your question United Public Utilities Company?

Mr. Benson: No. The question was United Public Service Company. Read it.

(Record read.)

Mr. Benson: Q. At the time you became receiver of United Public Utilities Company you testified as to the ownership of the stock of United Public Utilities Company by United Public Service Company?

A. Yes, all of the stock of United Public Utilities Company was owned by United Public Service Company.

Q. Do you remember whether any stock other than common stock of United Public Utilities Company had voting rights at that time? A. I don't.

Q. Do you remember whether at the time of the receivership any of the stock of United Public Service Company other than the common stock had any voting rights?

A. I don't. I do recall that, regardless of whether it did or not, the voting control lay in the common stock.

Mr. Royhl: I didn't get that answer.

(Answer read.)

Mr. Benson: Q. At the time you became receiver of United Public Utilities Company did you make an investigation as to the rates then being paid by Northwestern Public Service Company to Northern Power & Light Company for electrical energy?

A. I did some months after my appointment.

Mr. Benson: Now read the question to the witness.

(Question read).

Mr. Benson: Q. The investigation which you made was initiated by the inquiry contained in Defendant's Exhibit 78 for identification?

A. Yes, that is the first investigation of which I have any recollection.

Q. I show you Defendant's Exhibit 3 for identification. Is that the only response you got to your letter of December 30, which is Defendant's Exhibit 78 for identification? A. As nearly as I can recall, yes.

Q. At that time did you make any investigation as to what the rates for such energy were in the month of November, 1932? A: No, I did not.

Q. Have you ever been advised as to what the rates for such energy were in the month of November, 1932?

A. There was a detailed study of those rates made. I don't recall whether that study was based on 1932 rates. I have no recollection of the rate, the energy interchange rate of five mills having varied as between months.

Q. Do you know where that study is that you just referred to?

Mr. Royhl: I object to this as immaterial and not within the issues, there being no inquiry of any rates prior to January 1, 1936. Wholly incompetent and irrelevant and not proper cross-examination.

The Witness: A. I believe it is included either in my files or in one of the exhibits. I think it is in one of the documents that has been introduced.

Mr. Benson: Well, I would like to show the witness all of the exhibits, so that he can take a look at all of them

(Defendant's Exhibits handed to the witness.)

The Witness: I had in mind the intercompany rate analysis which was filed as Defendant's Exhibit 4 for identification.

Mr. Benson: Q. Mr. Stafford, attorney for the defendant in this proceeding, has asked you once or twice to explain something about the coal rates, particularly with reference to the $1.40 rate charged by Knife River Coal Mining Company, per ton, for coal delivered to North Dakota Power & Light Company, and the 75 cent rate charged to Northwestern Public Service Company by the same coal mining company. That is a correct statement of the two rates that your attention was called to by Mr. Stafford's most recent question, I think. A. Yes.

Q. That is your recollection also. You meant that was your recollection also as to the two rates I was talking about? A. I thought he referred to three rates.

Mr. Benson: He did. He also referred to an 85-cent rate. Northern Power & Light Company, wasn't it?

The Witness: North Dakota Power & Light Company, at Bismarck.

Mr. Benson: Oh, at Bismarck, is that right?

The Witness: Yes.

Mr. Benson: Q. Now, getting to the $1.40 rate that we have referred to, for a ton of coal delivered in the bunker of North Dakota Power & Light Company at the Beulah generating station, the Knife River Coal Mining Company got $1.40? A. That is correct.

Q. For a ton of coal delivered in cars at the Beulah mine to be shipped to Northwestern Public Service Company, the Knife River Coal Mining Company got 75 cents; correct?

A. That was correct. I misunderstood the statement regarding the Beulah plant to the extent of saying that as nearly as I can recall the Coal Mining Company delivered that coal to a transfer point, from which the power company operated a conveyor that carried the coal into the bunkers. As I recall that was the exact arrangement. However, that amounted to one mechanical belt from the tipple to the transfer point, where the coal was picked up by another continuous belt and carried into the bunkers. If my memory serves me correctly the Coal Mining Company operated only the first of those belts, or paid the cost of the operation up to that point.

Q. How was the coal loaded into the cars that were shipped to Northwestern Public Service Company?

A. By chutes from the tipple down to the level of the track, where the coal loading machine picked it up and carried it into the cars.

Q. So, for the ton of coal delivered to North Dakota Power & Light Company $1.40 in money dropped into the pocket of the mining company? And for the coal delivered into cars for Northwestern Public Service Company, 75 cents dropped into the pocket of the mining company?

A. Yes.

Q. In your testimony, when you were under examination by Mr. Stafford in this proceeding, Mr. Stafford asked you: "With reference to that coal rate at Beulah, you testified, I believe, that the delivery was accomplished from the Knife River Beulah mine to the Beulah plant by conveyor belt. Was that continuous operation; that is, continuous in the sense that it was not seasonal?" To which you answered: "Yes."

The Witness: Yes.

Mr. Benson: Mr. Stafford then asked you, "And did that possibly have anything to do with determining the rate of $1.40?" To which you answered: "It had all to do with the rationalization of the price, and also was an actual element of additional cost, that the mine was under

obligation to operate throughout the summer, when mines ordinarily did not operate for the sale of lignite. Lignite does not store well. When stored it disintegrates because of the high moisture content, and therefore the selling season on lignite is limited almost entirely to the heating season; but this mine, with its obligation to supply fuel requirements of the Beulah generating station, had to operate during the summer, both the mine and the tipple; and when screenings were not available it had to crush coal to furnish the plant requirements."

During the summer the Knife River Coal Mining Company was furnishing, from this same mine, through the equipment which you have previously described on cross-examination, coal to the Northwestern Public Service Company?

The Witness: Did you ask that as a question?

Mr. Benson: I asked that as a question.

Mr. Stafford: Do you want the question?

Mr. Benson: Yes, read it to the witness.

The Witness: In the years when those rates were applicable I can't say for sure that they were or were not making summer deliveries from the mine to Northwestern Public Service Company.

Mr. Benson: Q. You don't know, then?
A. I don't recall.
May I supplement that answer?

Mr. Benson: You mean you have some more information that has occurred to you?.

The Witness: No.

Mr. Benson: Well then let's let it drop.

A portion of the cross-examination of White is omitted because it appears at page 1354, line 37, through line 28 on page 1355 of the record, supra.

Q. I see. So what you intended to say in the first part of your answer was that you expected that Mr. Stafford would develop that explanation further and give you an opportunity to tell what you have just told?

Mr. Royhl: That is objected to as argumentative, incompetent.

A. Not quite that, but I did not expect that my mere statement that that price was a rationalization or the basis of determining that price was a rationalization, would suffice for a thorough explanation of the subject which I expected before the hearing closed.

Q. You expected, then, some further questions on cross-examination as to that rationalization?

Mr. Royhl: Same objection.

The Witness: I did not—

Mr. Royhl: Just a minute. We object to that as immaterial, and argumentative.

Mr. Benson: No, I think this question is proper.

The Witness: I had no idea when or where, but it is perfectly obvious to me, and it has been at all times that those coal prices had sufficient apparent disparity to—

Mr. Benson: Elicit inquiries?

The Witness: To elicit inquiries.

Mr. Benson: All right.

The Witness: And I was confident that a satisfactory explanation could be made of that disparity.

Mr. Benson: Q. Now, with further reference to the $1.40 price and the 75 cent price on a ton of coal that we have been talking about, the cost to mine a ton of coal sold to North Dakota Power & Light Company was the same as the cost to mine a ton of coal to Northwestern Public Service Company?

Mr. Royhl: Objected to as not within the issues in this case, there being nothing in this case challenging the prices or rates of coal sold by one subsidiary to another, of the U. P. U., and there is no action or pleading now pending challenging the coal rates as between the U. P. U.

subsidiaries, or either of them, and the Northwestern Public Service Company. Incompetent for any purpose.

Mr. Benson: Now, will you read the question to the witness, please?

(Question read.)

The Witness: A. The mining cost would have been the same.

Mr. Benson: Q. Do you know what it costs to deliver a ton of coal to North Dakota Power & Light Company for which it paid $1.40?

Mr. Royhl: The same objection.

A. I can't recall that.

Mr. Benson: Q. Can you recall what it cost to deliver a ton of coal to Northwestern Public Service Company under the arrangement which you have described?

A. I have not described the arrangement with Northwestern Public Service Company.

Mr. Benson: Well, all right, if that is your answer to that.

Q. Do you know what the mining costs were of the coal at the Beulah mine when coal was being delivered to North Dakota Power & Light Company at $1.40 a ton and to Northwestern Public Service Company at 75 cents a ton?

Mr. Royhl: We object to that for all the reasons heretofore urged, and a misstatement on the record. There is no record or evidence that any coal was delivered by Knife River to Northwestern Public Service Company, the evidence being that it was f. o. b. mine.

The Witness: A. I don't recall Knife River Coal Mining Company's mining costs at the time the $1.40 price to the Beulah plant was in effect.

Q. You testified that you had some service contract with either Middle West Company or the receiver of Middle West Company. That is correct, isn't it?

The Witness: A. Yes.

A portion of the cross-examination of White is omitted because it appears at page 1355, lines 28 through 36, of the record, supra.

Q. Do you have a copy of that agreement?
A. I have looked for it, and I have not yet located it.

Mr. Benson: I see.

The Witness: It is in my receiver's files, which are tucked away in a storage vault.

Mr. Benson: I see.

The Witness: I might say, however, that I reported the general features of that arrangement to the court in my first receiver's report.

Mr. Stafford: Plaintiff's Exhibit 3.

The Witness: Upon examination of that report I find that that last statement of mine is not quite correct, because my description of that arrangement is not particularly comprehensive.

Mr. Benson: Q. What page of Plaintiff's Exhibit 3 were you referring to when you made your last answer?
A. Page 30, paragraph 10.
Q. Do you recall any other place where you can get us the information as to the services that were to be furnished under this contract which you say, as receiver, you continued?
A. I seem to recall having seen a letter from Middle West Utilities Company to United Public Service Company, which was dated prior to my appointment as receiver of United Public Service Company. I am still hopeful that I can find that letter in my files. And it occurs to me that the Middle West Corporation, from the files of Middle West Utilities Company, might be able to produce a copy.
I also seem to recall exchanging a memorandum or letter with the receivers of Middle West Utilities Company under which I, as receiver of United Public Service Company, undertook to continue that arrangement for a limited

period. So far I have been unable to find either of such letters, but I still hope to find them.

A portion of the cross-examination of White is omitted because it appears at page 1355, line 37, through line 2 on page 1357.

Mr. Benson: Q. Where was your office when you were appointed receiver of United Public Utilities Company?

Mr. Royhl: Objected to as immaterial.

Mr. Benson: Q. I mean your office that you were occupying the day you were appointed.

The Witness: It was at 20 North Wacker Drive, Chicago, Illinois—

Mr. Benson: No.

A. In the suite—

Mr. Royhl: Go ahead and finish your answer.

The Witness: —occupied by the receivers of Middle West Utilities Company, who—

Mr. Benson: I think you misunderstood me. Where was your office half an hour before you were appointed receiver?

The Witness: Oh,—

Mr. Royhl: Same objection.

The Witness: My office was at 134 South La Salle Street.

Mr. Benson: Q. What building is that?

A. That is the building located at the northwest corner of LaSalle and Adams Streets, and was known at that time as the National Republic Bank Building.

Q. Immediately upon being appointed receiver you gave up your connection with the company of which you were then vice-president? A. Yes.

Q. And went to the office of the receivership? A. Yes.

Q. Now, from the time you became receiver until the present time, have you maintained any offices other than the receiver's office or the office of United Public Utilities Corporation?

Mr. Royhl: Objected to as immaterial and irrelevant.

A. No.

Mr. Benson: Q. Have you been in any business other than the receivership business or the presidency of United Public Utilities Corporation since you were appointed receiver of United Public Utilities Company?

Mr. Royhl: Same objection.

A. Excluding directorships in industrial corporations, I have been in no other business.

Mr. Benson: Q. Have you been engaged in any public utility business since your appointment as receiver of United Public Utilities Company other than the business of the receivership of the three companies you have previously described and the operation of United Public Utilities Corporation and its subsidiaries? A. No.

Q. During that period did you represent any group of security holders in any other receivership of a public utility business?

Mr. Royhl: Objected to as immaterial and irrelevant.

The Witness: No.

Mr. Benson: Q. Were you a trustee of any other public utility business? A. No.

Mr. Royhl: Same objection.

Mr. Benson: Other than United Public Utilities Company, United Public Service Company, and Southern United Gas Company and their subsidiaries? A. No.

Q. During the time subsequent to your appointment as receiver of United Public Utilities Company, your experience in the public utility business had been such as you acquired as president or as receiver of United Public Service Company, United Gas Company, or other subsidiaries?

A. That is correct, as far as experience is concerned. I have done a considerable amount of reading.

Q. Well, what I am trying to get at is your business since you were appointed receiver of those three companies has been exclusively the public utility business? A. Yes.

Q. And in those several years you have picked up some information about the utility business? A. Yes.

Q. The water business? A. Yes.

Q. The ice business? A. Yes.

Q. Manufactured gas? A. Yes.

Q. Natural gas? A. Yes.

Q. And electric business? A. Yes.

Q. You made some statement in your direct examination about where Mr. Kruesi resided? A. Yes.

Q. How long have you resided at your present residence?

A. A little over twenty-six years.

Q. Where was Mr. Kruesi residing at the time you said he was living rather near, but you didn't know him?

A. In the block starting about two blocks away from my home. I don't know the house, but it was within three blocks of my house.

Q. You reside in the same residence today that you resided in about twenty-six years ago? A. Yes.

Q. You have lived there continuously? A. Yes.

Q. Where is Mr. Kruesi's present residence?

A. In Texarkana, Texas.

Q. When did he go there? A. Within the last year.

Q. Well, just prior to his moving there where did he live? A. He lived about a block from me.

Q. You mean in the twenty-six years he changed his residence? A. Yes, sir.

Q. And you did not? A. I did not.

Q. And when he changed his residence he moved closer to your residence, is that it? A. Yes.

Q. He lives right behind you now; if you walk through your back door and across the block, across the street, you would be at the house where Mr. Kruesi lives, is that it?

A. That is almost right. If you walked out my front door and through the block you would come to his back door.

Q. I see. When did you first become acquainted with Mr. Kruesi?

A. To the best of my knowledge at the time of my appointment as receiver.

Q. I don't recall whether you said what his employment was then or not. What was it?

A. He was a vice president of Middle West Utilities Company.

Q. You stated on your direct examination that the sale of power by North Dakota Power & Light Company to Northwestern Public Service Company resulted in the operation of the Beulah generating station at a high load factor. That was the essence of what you said, wasn't it?

A. Yes, sir.

Q. That is what you meant to say? A. Yes.

Q. Who told you that?

A. All of the people in Middle West Service Company who had knowledge of power plant results; all of the people in the joint management of North Dakota Power & Light Company, Northern Power & Light Company, Northwestern Public Service Company, and the load dispatchers at Aberdeen, and the plant manager at Beulah, among others.

Q. Who was the plant manager at Beulah at that time?

A. I don't recall his name at the moment, but he was there for many years both before and after my appointment as receiver.

Q. Do you know when this statement was made by the plant manager at Beulah?

A. In the course of my visits to that plant.

Q. You can't tell what year? A. No.

Q. I see. Did anybody from the office of the receiver or did the receiver of Middle West Utilities Company make any statement to you as to what the load factor of the Beulah generating station was with the load of power sent Northwestern Public Service Company, and what it would have been without power sent to Northwestern Public Service Company?

A. I don't recall right now that I ever received a statement as to what the load factor would have been without the load of Northwestern Public Service Company.

Q. Nobody ever told you that?

A. I don't recall that they did.

Mr. Benson: I see. All right.

Q. Refer to Defendant's Exhibit 6 for identification. I call your attention to the statements beginning on page 49 and running through to the bottom of page 52, those statements beginning under the bold face type on page 49, "Northwestern properties."

Do you have Defendant's Exhibit 6 for identification in your possession now? A. Yes.

Q. Can you tell us whether all of the statements of fact contained in the portion of Defendant's Exhibit 6 to which I have called your attention were furnished to you by others

(Witness looks at documents).

A. In the main, yes. I don't happen to recall the date of my first trip over those Dakota properties, and I am not sure what that—some of the general observations in the report were based on my inspection of the property.

Q. Now, referring to page 50, there is a statement in there:

> "In previous years, and during most of 1932, these United Public Utilities Company subsidiaries were not charged with their full pro rata share of management and divisional office expenses."

Was that statement a statement that someone else made to you and which you put into this report? A. Yes.

Q. But the statement which begins,

> "but, with the consent of your Receiver, these expenses are now being allocated in proportion to the gross earnings of each of the properties."

That was your own statement? Or was it? I didn't mean to put the words in your mouth.

A. That was my statement, yes.

Q. The statement on the same page, reading:

> "The revision of this arrangement will increase combined operating expenses of the three companies by approximately $1,875 a month in 1933."

Was that your own statement or a computation that came to you from the field or from the office in Huron?

A. That is a computation that came to me from the Huron office.

Q. The statement on page 50, under the caption "North Dakota Power & Light Company," with reference to the number of miles of transmission lines was information that came to you from the Huron office? A. Yes.

Q. And the statement as to the number of customers was furnished you by the Huron office? A. Yes.

Q. The statement on page 50:

> "Inter-company arrangements under which this plant supplies energy to Northern Power & Light Company on the south, and that Company, in turn, re-sells part of such energy to Northwestern Public Service Company, permit of an extremely high load factor, at the Beulah plant, thus reducing the unit cost of production and creating a benefit not only for North Dakota Power & Light Company, but, also for the other two companies which take part of the power at prices favorable to them."

Was furnished to you by someone?

A. No, I think those were my conclusions, represented my views.

Q. What facts did you have at the time you made the statement, "permit of an extremely high load factor at the Beulah plant"?

A. As I recall, I had a statement that that load factor was 85 per cent furnished to me from the Huron office.

Q. And that you characterized as stated in what I quoted? A. Yes.

Q. Did you make any audit of Northern Power & Light Company prior to filing your report, Defendant's Exhibit 6 for identification? You—

A. My auditor is Arthur Andersen & Company—

Q. No, did you? A. I personally made no audit.

Q. And had an audit made by whom?

A. Arthur Andersen & Company.

Q. Have they been your auditors continuously since your appointment as receiver, at the present time? A. Yes.

Q. Do you happen to know whether, during all that time, they were also auditors for Middle West Company?

Mr. Royhl: Objected to as immaterial and irrelevant.

A. I think they were during all of that time.

Mr. Benson: Q. Auditors for Middle West Company or Middle West Corporation?

A. Yes. I am quite sure that is correct. I shouldn't misuse the word "quite". I mean to say I am reasonably sure that that is correct.

Q. Had they been auditors for United Public Utilities Company prior to your appointment as receiver?

A. No. Nor according to that same impression of mine had they been auditors for Middle West Utilities Company or its subsidiaries.

Q. Prior to the Middle West receivership?

A. I believe Arthur Andersen & Company had not been in the picture. My only doubt is as to when they started their audit of Middle West Utilities Company and subsidiaries.

A portion of the cross-examination of White is omitted because it appears at page 1357, line 3, through page 1357, line 6th from the bottom.

Mr. Benson: Now, if I were to ask you what conversation you had with Mr. Clark, you would repeat what you said in the foregoing answer?

The Witness: That would cover--

Mr. Royhl: Same objection.

The Witness: —just about the entire conversation.

Mr. Benson: Q. That is all you remember now?

A. That is all I remember now.

Q. When you were in the investment banking business did you sell large amounts of Middle West Utilities Company securities?

Mr. Royhl: Objected to as immaterial and irrelevant.

A. No.

Mr. Benson: Q. Did you sell any of them?

Mr. Royhl: Same objection.

A. I don't recall that I did, of the top holding company, Middle West Utilities Company.

Q. Now, are you speaking as an individual or speaking of sales made by the company with which you were associated?

A. I am speaking of sales made by the company with which I was associated, and my principal reservation is with respect to the Central Republic Company. I don't recall whether that company did or didn't, in the year that it existed, prior to the termination of my association with it, handle any of the Middle West Utilities Company notes, of which I seem to recall a large amount having been issued in that period.

Q. What about the years prior to the year you have just mentioned?

Mr. Royhl: Same objection.

A. The Central Republic Company was not in existence prior to about 1931. Prior to 1931 my connection was with the National Republic Company, of which I was president. And I don't recall that we handled, except for possibly relatively small amounts, securities of Middle West Utilities Company. I do recall that we handled some of the bonds of subsidiary companies of Middle West, not including, however, the bonds of Northwestern Public Service Company.

Q. Did you produce the records showing the amount of securities of United Public Utilities Corporation which were owned by United Public Service Corporation when the two companies came out of receivership?

A. I brought a copy of the plan of reorganization of United Public Utilities Company and United Public Service Company, which was a joint plan of reorganization, and that plan shows, in paragraph 3, sub-section C,—

Mr. Benson: Well, let's see that plan, will you, please?

(Document handed counsel.)

Mr. Benson: Well, my recollection is, from reading the subpoena that was served on ~~you, you were~~ asked to bring the records showing securities of United Public Utilities

Corporation owned by United Public Service Corporation. Am I wrong in my recollection?

The Witness: I don't recall that that was in the subpoena, but, if it was, it would have been very difficult for me to produce that, because presumably that fact would be shown only on the records of United Public Service Corporation.

Mr. Benson: Q. You mean you don't keep any records showing the owners of your United Public Utilities Corporation stock?

A. A record of the owners of United Public Utilities Corporation stock is kept by Provident Trust Company of Philadelphia, transfer agents, from whom we have access once a year to check the holdings of record, of United Public Service Corporation, in the stock of our company.

Q. As I recall, on all of those checks the amount of such holdings—

Mr. Royhl: Just a minute. We object to this as not the best evidence, not proper cross examination, incompetent, irrelevant, immaterial.

Mr. Benson: Q. Is the Provident Trust Company both registrar and transfer agent? A. Yes.

Mr. Benson: All right. Of all of the stocks?

The Witness: Stocks of United Public Utilities Corporation.

Mr. Benson: Q. In your examination in chief you made a statement that, in one of the years, United Public Service Corporation declined to suggest the name of a director to be selected? A. That is correct.

Q. You said that at that time The Middle West Company, The Middle West Corporation was negotiating a sale of its holdings in United Public Service Corporation?

A. That is correct, according to their statement to me.

Mr. Hastings: Wait a minute. In which corporation?

Mr. Benson: United Public Service Corporation. That is correct, isn't it?

The Witness: That is correct.

Mr. Benson: Q. It is United Public Service Corporation, not United Public Utilities Corporation?

A. That is correct.

Q. You said in your testimony that the negotiations which the Middle West Corporation had for the sale of United Public Service Corporation common stock had fallen through. Did you mean to use that terminology or did you mean to say that the Securities and Exchange Commission had refused to permit a sale to be made?

Mr. Royhl: That is objected to as immaterial and irrelevant.

The Witness: A. As I understand it, a contract of sale had been entered into. The buyer wanted to buy, the seller wanted to sell, but the sale was subject to confirmation from the Securities and Exchange Commission and the Securities and Exchange Commission declined to confirm or approve the sale, and therefore the negotiation terminated and the contract of sale terminated.

Mr. Benson: Q. Was that for the reason that the sale was going to be made to bankers?

Mr. Royhl: We object to that as calling for the opinion and conclusion of the witness, incompetent, irrelevant, immaterial, not proper cross examination.

Mr. Benson: Q. Or don't you know?

A. As I recall the Securities and Exchange Commission —I have forgotten the basis on which the Commission turned it down.

Mr. Benson: I see. All right.

Q. Do you remember who nominated Mr. Briggs to be a director of United Public Utilities Corporation?

A. When he was first nominated he was selected by the four directors on the board that had previously been elected by Class A Common stockholders.

Mr. Robinson: By board, Mr. White, do you mean the board of U. P. U. Corporation?

The Witness: The four members of the board of directors of the United Public Utilities Corporation.

Mr. Benson: Q. Who were they? Barroll, White, Nichols, and Lakin? A. Yes, those are the four directors.

Mr. Stafford: At page 91 he says the annual meeting of April 28, 1943.

Mr. Benson: Q. When did he first go on the board?

A. April 23, 1943, he was elected.

Mr. Benson: Q. So the four men who nominated him were Barroll, Lakin, Nichols, and White? That is correct, isn't it?

A. He was selected by those four men as a result of a request of the president of The Middle West Corporation that a nominee be selected by the board to stand for election at the annual meeting of the stockholders by the vote of the holders of Class B common stock, of which United Public Service Corporation held more than 50 per cent.

Q. At the time of his election was Mr. Briggs an investment banker? A. No, he was retired.

Q. He had been? A. He had been.

Q. For many years prior to that?

A. Yes, for many years he was a top executive of the old firm of E. H. Rollins & Son, and I believe that when the control of E. H. Rollins & Son was changed he withdrew, and I recall that he was receiver of a large public utility company or a holding with headquarters in New York.

Q. Do you know whether Mr. Briggs had at any time been a director of any public utilities corporation which was an affiliate of The Middle West Utilities Company?

Mr. Royhl: Objected to as being immaterial and irrelevant, not proper cross-examination, not the best evidence.

A. I have reason to believe that he was not, but I cannot say for sure.

Mr. Benson: Q. You don't know whether he ever had any connection with Illinois Traction Company?

Mr. Royhl: Same objection.

A. Not that I know of.

Mr. Benson: Q. Do you know whether he had ever had any official connection with Illinois Power & Light Corporation?

Mr. Royhl: Same objection.

A. I don't believe he ever had an official connection with that company and I do seem to recall that E. H. Rollins & Son had to do with the underwriting of some securities of that company.

Mr. Benson: Q. Do you happen to know whether or not Mr. Briggs was at any time a director of Missouri Power & Light Company? A. No.

Q. You do not know? A. I don't know.

Q. You really don't know what position he held, if any, in the public utilities field?

A. I don't. I merely know that I have never heard him mention any of those companies which you have named, in our conversations or board discussions.

A portion of White's deposition is omitted because it appears, supra, at page 1357, beginning line 5th from the bottom through line 11 on page 1358.

Q. When United Public Utilities Corporation took over the assets of United Public Utilities Co., there were several subsidiaries of United Public Utilities Co.? A. Yes.

Q. And they then became subsidiaries of United Public Utilities Corporation? A. Yes.

Q. Do I recall that the number of subsidiaries of United Public Utilities Corporation, when it started as an operating holding company, was 21? A. That is correct.

Q. You were an officer and director of each of those corporations?

A. No, I was an officer of only United Public Utilities Corporation. I was a director in most of the subsidiaries.

Q. Now, in connection with your statement as to the scope of your business since you became the president of United Public Utilities Corporation, you have held directorships and offices in other corporations, haven't you?

Mr. Royhl: Objected to as immaterial and irrelevant, not proper cross examination. A. Yes, a few.

Mr. Benson: Q. Were any of those other corporations, corporations in the utilities business? A. No.

Mr. Royhl: Same objection.

Mr. Benson: Q. They have all been in other lines of business? A. Yes.

A portion of White's deposition is omitted because it appears, supra, at page 474, from line 9 through line 4 on page 493.

Q. I notice in Defendant's Exhibit 51 for identification there is a statement in the first line referring to a man by the name of George Davis. Can you tell me who George Davis was or is?

A. Yes. George Davis was an engineer and a member of the staff of Middle West Service Company, who specialized on rate matters but also used to have to do with matters affecting the Federal Power Commission.

Q. All right.

A. (Continuing) He is no longer in the employ of Middle West Service Company, having left there I believe about three years ago. He worked under Mr. Vennard.

Q. I am not sure that the record is clear as to what you did in the way of getting or making service contracts after Middle West Utilities Company came out of receivership.

Will you explain, first, when Middle West Utilities Company came out of receivership, the company that thereafter was called The Middle West Corporation or Middle West Corporation?

A. The Middle West Corporation.

Q. The Middle West Corporation. Now, how soon after that receivership was terminated, that is, the receivership of Middle West Utilities Company, did you make an agreement for service for U. P. U. Corporation and subsidiaries with The Middle West Corporation or some affiliated company?

A. The Middle West Corporation started business on November 27, 1935, as the successor in reorganization to Middle West Utilities Company.

The Middle West Service Company was incorporated on January 28th, 1936, and started business on January 30, 1936. Those dates were furnished to me by one of the officers of Middle West Service Company, the president in fact, upon my inquiry.

At approximately the same time that Middle West Service Company started business, or very shortly thereafter, contracts were signed between the Dakota subsidiaries of United Public Utilities Corporation and Middle West Service Company, which, as I recall, were of the same general character as the contracts that had previously been in effect with Daniel C. Green, trustee of Middle West Utilities Company. There may have been, although I do not recall it, a period in which those contracts were covered by an assignment from the trustee to Middle West Service Company, but I don't recall that there was.

Q. Now, will you tell us what other service agreements were made with Middle West Service Company by United Public Utilities Corporation and subsidiaries thereof, other than the Dakota subsidiaries you have just talked about?

A. When Middle West Service Company started business in January, 1936, United Public Utilities Corporation had been in business about thirteen months, during which period it had had an arrangement with Daniel C. Green, trustee of Middle West Utilities Company, under which the accounting work of the holding company, United Public Utilities Corporation and the treasury work and the statistical work of that corporation were being done by the staff [od] Daniel C. Green, trustee.

Mr. Benson: Just a moment.

Q. You mean that is preliminary to the answer you are going to give to my question? A. Yes.

Q. All right, go ahead.

A. The fee that was paid by United Public Utilities Corporation for those services was, as I recall it, $5,000 a year. That arrangement was continued with Middle West Service Company until December 31, 1936, at which time United Public Utilities Corporation employed Mr. R. McClanahan to take over all of the bookkeeping and

accounting work, and after that date no further services were received by United Public Utilities Corporation from Middle West Service Company except that Middle West Service Company, without charge, sent to United Public Utilities Corporation, copies of general statistical reports, which were also being sent to all companies serviced by them, including the Dakota subsidiaries of United Public Utilities Corporation.

Q. Now, one portion of my question you have not answered: Did Middle West Service Company have any agreements with any subsidiaries of U. P. U. Corporation other than the Dakota subsidiaries? A. Yes.

Q. Were those what are commonly called service agreements?

A. Those were commonly called service agreements, and included, as I recall it, all of the subsidiaries of United Public Utilities Corporation except three electric utility subsidiaries,—three gas subsidiaries in Indiana and one electric subsidiary in Indiana and Knife River Coal Mining Company.

Q. Mr. White, you stated that Mr. McClanahan took over the bookkeeping and accounting of United Public Utilities Corporation? A. Yes.

Q. About the end of 1936 or '37, beginning of 1937?

A. January 1, 1937.

Q. What is Mr. McClanahan's full name?

A. Rodman is his first name.

Q. Rodman.

A. Yes. If he has a second, middle initial, he doesn't ordinarily use it.

Q. What was Mr. McClanahan doing immediately before he came to United Public Utilities Corporation as the accountant?

A. He had been in the employ of Middle West Service Company, in charge of consolidations.

Q. Had he worked for Middle West Utilities Company prior to the receivership?

Mr. Stafford: Prior to April 15th, 1932.

Mr. Benson: Yes.

A. Yes.

Mr. Benson: Q. You mentioned Mr. Peale the other day. I took it from the substance of your testimony that Mr. Peale was now doing the work that McClanahan did.

A. No.

Q. He is not? A. No.

Q. All right. Now, is McClanahan still with you? A. No.

Q. When did he leave?

A. During the first quarter of 1945.

Q. Where did he go?

A. He left us to become comptroller or assistant comptroller of Middle West Service Company.

Q. Is he comptroller now? A. He is now comptroller.

Q. Of The Middle West Corporation?

A. Of the Middle West Service Company.

Q. Middle West Service Company, not The Middle West Corporation?

A. No. He has no relation to The Middle West Corporation.

Mr. Benson: The plaintiff offers in evidence Defendant's Exhibit 7, and asks that the same be attached to and returned with the deposition of this witness.

(A copy of Defendant's Exhibit 7 for identification offered in evidence by the Plaintiff, is attached).

Mr. Benson: Q. In Defendant's Exhibit 7 for identification, Mr. White, you expressed to Mr. Kruesi on the 10th of June, 1935, your regret that you could not attend a meeting in Rapid City. What meeting was that?

A. That was a meeting of all of the divisional managers of Northern Power & Light Company, and North Dakota Power & Light Company, and Northwestern Public Service Company, and I believe that, although only utility operating matters were discussed at those meetings, it was customary to invite the mine manager and the sales manager of Knife River Coal Mining Company, and those two gentlemen may have attended that meeting.

Q. When you said Rapid City you meant Rapid City, South Dakota? A. Yes.

Q. In your testimony you mentioned a meeting at Detroit Lakes, Minnesota, in the fall of 1941. Was that a meeting of the divisional managers of Dakota Public Service Company and Northwestern Public Service Company?

A. Yes. It was of the same type meeting that was held, as was held at Rapid City.

Q. In other words, it was customary at least once a year for the divisional managers of your Dakota subsidiaries and Northwestern Public Service Company to have a meeting somewhere? A. That is correct.

Q. That was attended also by the joint operating staff that was located at Huron, South Dakota? A. Yes.

Q. It was customary at those meetings to have people out from Middle West Service Company? A. Yes.

Q. Sometimes did you have men from The Middle West Corporation out there also?

A. I recall that at one meeting Mr. Oliver E. McCormick attended. Mr. McCormick had to do with treasury matters in Chicago, and I don't recall whether he was an officer of The Middle West Corporation or of Middle West Service Company.

Q. I see. A. He has died since.

Q. How long were these meetings, three days ordinarily?

A. Three days ordinarily, yes.

Q. Mr. White, what was your compensation the first year you were president of United Public Utilities Corporation?

Mr. Royhl: That is objected to as immaterial.

A. $20,000.

Mr. Benson: Q. What is it today? A. $20,000.

Q. What was your annual rate of compensation during the receivership?

Mr. Royhl: The same objection.

A. I have forgotten the details of that arrangement. I had a relatively nominal drawing account, and at the end of the receivership and trusteeship I think that it worked out at slightly over $40,000 a year.

Mr. Benson: Q. Since you became president of United Public Utilities Corporation have you also received, in addition to your salary, a benefit in the way of some sort of a pension or retirement fund?

Mr. Stafford: The same objection, including irrelevancy.

A. Yes. I participated, along with all other employees of the holding company, and all employees of the operating subsidiaries except Knife River Coal Mining Company, in a pension plan.

Mr. Benson: Q. I gather from what you said that the Dakota subsidiaries employees were also in the pension plan at one time? A. Yes.

Q. That same plant that you say you are a beneficiary of? A. Yes.

Mr. Stafford: I renew the objection to the whole line.

Mr. Benson: Q. That plan took in the employees of the other subsidiaries of United Public Utilities Corporation?

Mr. Royhl: The same objection.

A. Yes.

Mr. Benson: Q. Did it take in employees of any companies other than U. P. U. Corporation, the Dakota subsidiaries, and the other subsidiaries of U. P. U. Corporation?

Mr. Royhl: The same objection.

The Witness: Will you read that question, please?

(Question read).

A. The particular plant to which I refer became effective as of October 1, 1940, and included only the employees of Dakota Public Service Company. By a rider to that policy the employees of United Public Utilities Corporation were included under the plan of Dakota Public Service Company.

I believe that at the same time an identical arrangement was made with John Hancock Mutual Life Insurance Company for the employees of Northwestern Public Service Company, but as I recall, the policy or agreement with the insurance company was a separate agreement. I saw that agreement at one time.

I recall that the booklet issued to employees of Dakota Public Service Company bore an imprint to indicate that that booklet was issued only to employees of Dakota Public Service Company.

Mr. Benson: Q. You have not answered about the other U. P. U. subsidiaries.

Mr. Royhl: The same objection.

A. The Dakota pension plan to which I refer was the initial pension plan introduced by subsidiaries of United Public Utilities Corporation.

Subseqnently a similar plan was introduced by the Arkansas Gas subsidiaries of United Public Utilities Corporation, and also subsequently a similar plan [twas] introduced by the eleven Ohio-Indiana subsidiaries.

No such plan was reasonably [fessible] in the case of the ice and cold storage subsidiaries.

Mr. Benson: Q. Did Middle West Service Company handle the matter of securing a pension plan for the Dakota Public Service Company employees?

Mr. Royhl: The same objection.

A. No.

Mr. Benson: Q. Who handled that? A. I did.

Q. You did that yourself? A. Yes.

Q. Middle West Service Company had nothing to do with any of these pension plans that you mentioned?

A. A general exploration of the subject of pension plans or retirement annuities had been made several years previously by Mr. Kruesi.

Q. And what was his position then?

A. He was president of Middle West Service Company.

Q. I see.

A. And I recall that he sent copies of this study to the presidents of all the operating subsidiaries that were serviced by Middle West Service Company.

Q. You mean he sent a general outline of the pension plan? A. That was an academic study.

Q. Yes.

A. And it was prepared by Metropolitan Life Insurance Company. I don't recall that Middle West Service Company, as such, played a part in the adoption of the pension plans.

Q. Was the pension plan of Northwestern Public Service Company a plan that was worked out with the John Hancock Insurance Company? A. I don't know.

Q. You do not know?

A. I do not know what company they insured in.

Q. I see. I gathered that.

A. Many of the Middle West companies had pension plans. I think they vary in character, and I think they are with different insurance companies.

Q. I see.

A. As I recall, the first plan that was arranged with the John Hancock Company was the Dakota Public Service plan, and I had quite a lot to do with the selection that was made.

Q. You are now out of that Plan? A. Yes.

Q. And you are carried under another plan?

A. That rider, if it was a rider that represented the coverage of the United Public Utilities Corporation employees, was transferred from the Dakota Public Service Company contract with John Hancock to the contract between the eleven Ohio subsidiaries and John Hancock.

Q. Does Middle West Service Company or some Middle West organization handle certain types of insurance for your Dakota Public Service Companies?

Mr. Royhl: Objected to as immaterial.

Mr. Stafford: And irrelevant.

Mr. Royhl: Irrelevant.

Mr. Benson: Q. Is that correct?

A. There is an organization called the Bureau of Safety, which is affiliated with Middle West Service Company, which supervises the safety work and makes safety inspections and holds safety meetings of employees, for all operating companies which hold contracts, service contracts, with Middle West Service Company.

Q. Does the Bureau of Safety get compensation for its services from the utilities where it makes the inspections?

Mr. Stafford: The same objection.

A. I don't understand, that they are paid for that safety work. They do, however, handle insurance, both by placing certain policies in the open market, and then they have a small insurance fund which, as I understand, is an insurance company in itself, that carries certain portions of insurance risks.

Mr. Stafford: We renew our objections to all this line.

The Witness: (Continuing) I believe I am correct with respect to my statement that they make no charges for their safety work, unless perhaps, as is customary, they would charge their out of pocket expenses, but I am not too sure.

Mr. Benson: Q. Did you know that your Dakota subsidiaries were having certain types of insurance handled through the Bureau of Safety?

Mr. Stafford: The same objections.

A. Yes.

Mr. Benson: Q. The Bureau of Safety is a separate corporation, is it? A. I think so. I am not sure.

Q. Do you understand that that was owned by Middle West Corporation?

Mr. Stafford: The same objection.

A. That is my impression.

Mr. Benson: Q. And Middle West Corporation owned Middle West Service Company?

A. Middle West Corporation owns Middle West Service Company, and I believe both of those companies are run as non-profit institutions.

Q. Now, you said you thought the Bureau of Safety had an insurance fund which is an insurance company in itself. Do you know the name under which that fund is operated?

Mr. Royhl: Objected to as immaterial and irrelevant.

Mr. Stafford: Improper cross.

Mr. Royhl: Improper cross examination.

A. It has been operated under the name of three individuals, trustees, and those names have varied from time to time, and I don't recall exactly the names that are being used today, but it is my understanding that it has always been exactly the same fund, and that the changes in name—

Mr. Benson: Q. William C. Freeman was one of those trustees, wasn't he?

Mr. Royhl: The same objection.

A. He may be now.

Mr. Benson: Q. Was Mr. Green, who you mentioned in your testimony in chief?

Mr. Royhl: The same objection.

A. I don't recall. He may have been.

Mr. Benson: Q. To whom did you leave the question of determining the amount of insurance that should be carried by the Dakota subsidiaries of U. P. U. Corporation?

Mr. Royhl: The same objection.

The Witness: Will you read that question, please?

(Question read).

A. To the officers of those companies.

Mr. Benson: Q. To whom did you leave the determination as to what types of insurance should be carried by the Dakota subsidiaries?

Mr. Stafford: The same objections. May we have this objection to the whole line of inquiry?

Mr. Benson: Yes.

A. To the same officers, but I might add that I discussed both with the Bureau of Safety and with those officers the adoption of coverage, the necessity therefor, the types of coverage which were not being carried and which in their opinion should be carried, and the adequacy of the amounts of the several coverages.

Mr. Benson: I see.

A. (Continuing) I also had in January of each year a detailed report from the Bureau of Safety, as to the amounts and types of insurance coverage on all operating properties in the U. P. U. system, and the amounts and insurer under those coverages.

Q. During your ownership of the Dakota subsidiaries of U. P. U. Corporation was group life insurance taken out on the employees and the officers of those corporations? A. Yes.

Q. Through whom was that group life insurance arrangement made? A. Marsh & McLennan, I believe.

Q. And did you handle that or did Middle West Service Company or the Bureau of Safety or the insurance trustees that you mentioned, handle it?

A. It was handled by the Bureau of Safety, and all companies, both holding companies and operating companies, provided that group life insurance company under a single blanket contract.

Q. Did the holding company and the operating companies make contributions to the premiums on those policies? A. Yes.

Q. Were any companies included in that group life insurance arrangement other than U. P. U. and its subsidiaries?

The Witness: Will you read that?

(Question read).

A. Yes, as I attempted to state in a previous answer, it is my understanding that all of the employees of a large number of companies were included under a single blanket insurance policy.

Mr. Benson: Q. Well, you are not confusing group life with the pension plan that you talk about, are you?

A. No. That statement that I made would not be true of the pension plan.

Q. All right. Now, you say that there was a single blanket agreement of some kind for group life insurance?

A. That is my understanding, yes.

Q. Now, what were the companies whose employees were insured under that arrangement you have just described?

A. As I understand it, there was a separate subpolicy issued to each corporation, and under that sub-policy individual certificates were issued to each employee of that corporation. I don't know exactly how many corporations had those sub-policies issued to them, but it was my understanding that all or practically all of the subsidiaries of Middle West Utilities Company, or if such subsidiaries were holding companies, the subsidiaries of such subholding company.

Q. When you said Middle West Utilities Company you meant The Middle West Corporation?

A. I meant The Middle West Corporation.

Mr. Stafford: I object to the understanding of the witness, both on the ground that it is a conclusion and hearsay.

Mr. Benson: Now, Mr. Stafford, the request that your objection stand to all this line, you mean to the line of inquiry about the insurance?

Mr. Stafford: That's right; beginning with the Bureau of Safety down to the present point.

Mr. Benson: So now we start out with a new subject, so that that understanding has terminated.

Mr. Stafford: Yes. Right.

Mr. Benson: Q. Did Northwestern Public Service Company install any additional generating capacity from January 1, 1936, to January 1st, 1945?

Mr. Royhl: We object to that. No proper foundation laid, hearsay, and calling for the opinion and conclusion of the witness.

Mr. Stafford: And improper cross examination.

A. I believe they did.

Mr. Benson: Q. Do you recall where that was installed?

Mr. Royhl: The same objection.

A. I recall an installation at Armour, South Dakota, and I think there may have been an installation at Webster, South Dakota, but I don't specifically recall the date of either of those.

Mr. Benson: Q. Do you recall any installations of generating capacity by Northwestern Public Service Company after January 1st, 1945?

A. Well, I believe it was after that date that the 7500 kilowatt addition at Aberdeen was completed.

A portion of White's deposition is omitted because it appears, supra, at page 1358, line 13, through line 27 on page 1358.

Mr. Benson: Q. In your examination in chief, in referring to the minutes of the board of directors of the business that was transacted by the board of directors on June 24, 1937, you referred to a recent survey of available generating capacity of the Dakota properties.

What was the survey of generating capacity to which you were referring?

Mr. Benson: Q. You have not been able to find that?

A. No.

Q. You understood that the meeting that I was referring to as having been held June 24, 1937, was a meeting of the board of directors of United Public Utilities Corporation? A. Yes.

Q. Will you endeavor to locate the document or whatever material it was, that was described in the minutes of the board of directors of June 24, 1937, of United Public Utilities Corporation, which document or material was described as "a recent survey of the available generating capacity of the Dakota properties"? A. I will.

(Thereupon discussion was had off the record.)

A portion of White's deposition is omitted because it appears, supra, at page 1358, line 27, through line 7 on page 1360.

Q. Do you have a copy of that contract now? A. No.

Q. Do you know what has become of your copy of the Chicago power pool contract, to which you have just referred?

A. No, but I think that the copy that I saw belonged to Mr. Buell, that I returned it to him at some subsequent time.

Q. Do you have a recollection now as to the distance

between the stations, the generating stations covered by that power pool agreement? A. No.

Q. Do you recall whether they were 50 miles apart, or 60 miles apart, or a hundred miles apart?

A. No, I don't.

Q. Well, do you recall, not using those exact distances, the circumference of the circle, if a circle were drawn around all the power plants within that Chicago pool?

A. I think that the plant at Dixon, Illinois, which is about 100 miles from Chicago, may have been about the most distant plant to be covered, if it actually was covered in that pool agreement.

Q. Now, the hundred miles that you referred to is 100 miles from Dixon to what point? A. Chicago.

Q. To Chicago? A. Yes.

Q. It is your present impression that the plant in the pool which was most distant from Chicago would be the Dixon, Illinois, plant?

A. If that plant was actually included. I don't recall whether it was or not.

Q. How large a plant was the Dixon, Illinois, plant?

Mr. Royhl: Objected to as not the best evidence, calling for the opinion and conclusion of the witness, and no proper foundation laid.

Mr. Benson: I can't bring the generators into this hearing room.

Mr. Royhl: I realize that. I can't help it.

A. I don't know, but very large in comparison with generating units in the systems with which I had to do.

Mr. Benson: Q. Do you have any recollection as to the approximate k. w. capacity of the Dixon plant? A. No.

Q. Do you recall whether it was larger than 25,000 k. w.?

Mr. Royhl: The same objection.

A. Not specifically, but 25,000 k. w. would hardly be large enough to qualify for inclusion under a power pooling arrangement and to serve Chicago.

Q. What is your best recollection of the smallest generating plant in k. w. capacity that was included in the Chicago power pool?

Mr. Royhl: The same objection.

A. I really have no recollection of those capacities because I used that particular contract only to form an opinion as to the desirability of that form of agreement for our purposes.

Mr. Benson: Q. Do you recall the names of the companies that were in the Chicago power pool?

Mr. Stafford: The same objection.

Mr. Royhl: The same objection, not the best evidence.

A. Yes, I think the Chicago District Generating Company, Commonwealth Edison Company, and Public Service Company of Northern Illinois were included in it; and it seems to me that one of the companies in northern Indiana was also included. I am not too sure of that. In fact I can't be sure of those companies I have mentioned.

Mr. Benson: Q. What company owned the Dixon, Illinois generating station that you had in mind when you mentioned Dixon, Illinois?

Mr. Royhl: The same objection, and for the further reason it is not proper cross examination.

A. I think the Public Service Company of Northern Illinois owned it.

Mr. Benson: Q. Do you know the type of construction of the transmission line from the Dixon, Illinois, generating station to Chicago?

Mr. Royhl: The same objection as stated before, and for the further reason it conclusively appears that this witness has no independent recollection of the detail or facts concerning generating companies or those used incident to and a part of such Chicago pooling capacity contracts.

Mr. Benson: Will you read the question?

(Question read.)

A. No, I don't know.

A portion of White's deposition is omitted because it appears, supra, at page 1360, lines 8 to 16, inclusive.

Mr. Benson: Q. Did you make an examination of the generating station and the transmission lines covered by the contract for the Chicago Power pool? A. No.

Q. Did you ever make an examination of the transmission lines that were covered by the Chicago power pool agreement? A. No.

Q. Do you know what kind of lines they were, as to the type of construction?

Mr. Royhl: The same objection.

Mr. Benson: Q. Don't you know that they were steel tower lines?

A. I have seen some steel tower lines, which I have always assumed to be interconnecting lines between plants that are probably members or parties to the Chicago pool. I have seen steel tower lines leading into Dixon, Illinois.

Q. From Chicago.

A. I don't know where they came from.

Q. I see.

A. I have seen steel tower lines both south and north of Chicago, between Chicago and Waukegan. I know that the Public Service Company of Northern Illinois has a large power plant at Waukegan. I don't know exactly where the steel tower line that I have seen between Chicago and Waukegan, goes.

Q. Do you recall whether or not the agreement which you say you saw, covering the Chicago power pool, contained a description of the construction of the tower lines between the generating stations and the companies involved in the Chicago district pool? A. No.

Q. You say you don't know? A. I don't recall.

Q. Do you recall whether there was any description of the type of generating unit involved in the Chicago district power pool? A. No.

Q. There was no such description in the contract which you have examined? A. I certainly didn't say that—

Q. Well, I didn't mean to—

A. (Continuing) —because I have no recollection at this time as to just what was or what was not.

Q. In the contract?

A. In that contract. I did not examine the contract with any idea of forming an opinion on its desirability for the purposes for which it was written. I examined it solely to see whether or not it had any features provided in it that could profitably be [adpted] in comparable form into a power interchange agreement which was proposed for the Dakota companies.

Q. Did you call Mr. Buell and ask him to furnish you a copy of the Chicago district power pool agreement?

A. I don't recall that I got it.

Q. You reached for it when you found that Buell had followed that document or had referred to that document in his communication to you concerning the agreement which he proposed for your Dakota public service companies?

A. I don't know that I reached for it. I recall that I had it, and the purpose for which I examined it.

Q. Do you recall where you got the Chicago power pool agreement?

A. To the best of my recollection I got it from Mr. Buell.

Q. Do you recall that you returned it to Mr. Buell at any time? A. No, I do not.

Q. Oh, you do not? A. No.

Q. On Monday, September 22nd, you stated that, "At a meeting held in December, 1937, I had with me a copy of the Survey on Power Requirements, which we discussed at that meeting."

Mr. Stafford had previously said: "As a matter of fact, that meeting was held in January, 1938", and asked you would it refresh your recollection by referring to the minutes of the June 15th meeting. Do you recall the testimony?

A. Yes.

Q. What was the Survey of Power Requirements that you say was discussed at the meeting held December, 1937? Do you want to refer to the exhibit?

A. Well, without confirming the date of any meeting, I recall that I took to a meeting a Survey of Power Requirements, a copy of which has been introduced. To the best of my recollection I took it to the first meeting that

was held after I received it. Only by reference to my minutes can I fix the dates.

Q. Well, I am trying to get the Survey of Power Requirements, which you said you had at a meeting held in December, 1937.

A. As to the accuracy or inaccuracy of that statement with respect to that particular meeting, I would have to depend solely on the minutes or my agenda to confirm whether or not it was at a meeting on the date you mentioned, or at the next meeting after, or the meeting preceding it.

Q. Now, let's get this straight, Mr. White. I am not trying to trap you on the date of the meeting, or anything else. I am trying to find out what document you say you had at a meeting. Now, let's read the record.

Quoting from page 457 of the transcript, as furnished to me by the reporter, Mr. Stafford said in his question:

> "Q. As a matter of fact, that meeting was in January, 1938, wasn't it, Mr. White? Would it refresh your recollection by referring to the minutes of the June 15th meeting?"

To which you answered:

> "A. No. At a meeting held in December, 1937, I had with me a copy of the Survey on Power Requirements which we discussed at that meeting, and as a result of that discussion the directors asked me to prepare and send to each director a copy of that survey, and upon my return to the office I had the survey manifolded and sent it to each director by mail."

Now, with the understanding on your part that all I am trying to do is find out what you were talking about when you said you had a copy of the Survey of Power Requirements, can you answer in words of one syllable what document you had before you at that time?

A. The document which I had was the same as Defendant's Exhibit 24 for identification.

Mr. Benson: Q. Who told Mr. Stafford you had a cottage at Detroit Lakes in the fall of 1941?

A. I occupied a cottage for about three or four days in the course of a divisional managers' meeting there.

Q. I say who told Mr. Stafford that you occupied that cottage?

Mr. Royhl: I object to that; immaterial.

Mr. Stafford: Immaterial,

A. I must have.

Mr. Benson: Q. Do you remember when?

Mr. Stafford: The same objection.

A. As I recall, when he asked me to tell him what my participation was in the drafting of the 1941 agreement.

Mr. Benson: Q. Referring to the record of your testimony which has been furnished to the parties hereto by the reporter, Volume 5 hereof, on page 518 you made a statement reading as follows:

> "The second point that I caused to be written into that 1941 agreement was a reconsideration back to 1936 of the basis of the $20,000 annual charge for use of interconnection facilities. In the 1936 contract, interconnection contract, which was superseded in 1939—"

Thereupon Mr. Stafford interrupted with the question:

> "Q. By the 1939 interconnection contract, is that right?"

And you said:

> "A. By the 1939 interconnection contract, which was drawn to reflect the effect of the merger, it was provided that Northern Power & Light or Dakota Public Service, as the case might be, should pay an annual charge of $20,000 a year for the use of the interconnection facilities.
>
> "When Northwestern asked for a ten-year term on the 1941 agreement, I insisted that on the formula of 3-1/2 per cent for taxes, maintenance and renewals, and 5 per cent annual interest on the investment in the interconnection facilities, all balance of the $20,000 a year payable under the interconnection contract, or previously paid, subsequent to January 1, 1936, should be applied to the amortization of the 50 per cent por-

tion of the cost of those facilities, allocated to Northern Power & Light Company or Dakota Public Service Company as the case might be."

Where did the 3-1/2 per cent for taxes, maintenance and renewals originate?

A. To the best of my recollection it originated as part of a formula which was suggested by Mr. Sandstedt as a fair basis for determining how long that $20,000 use charge on those terminal facilities should be continued without reduction.

A portion of White's deposition is omitted because it appears, supra, at page 1360, lines 17 through 30.

Q. And where did he give you that figure? Was that in Detroit Lakes, Minnesota?

A. I think that it was at Detroit Lakes. I am not sure just when we arrived at a lower figure. I recall that—

Q. Well, this recollection as to Detroit Lakes, you are now referring to the meeting that you testified to on direct examination? A. Yes.

A portion of White's deposition is omitted because it appears, supra, at page 1360, beginning line 13th from the bottom, through line 21 on page 1361.

Q. Now, can you state when this 3½ per cent figure was first arrived at or first suggested?

A. At the time when we were discussing the 1941 agreement, and I believe in advance of the Detroit Lakes conference.

Q. Can you recall where that 3½ per cent figure was first suggested? A. No.

Q. Can you recall, or is your statement correct that your best recollection is that it was suggested by Mr. Sandstedt the first time you heard it? A. Yes.

Q. Do you remember who was present when he first suggested the 3½ per cent figure? A. No.

Q. Can you remember when the 5 per cent annual interest was first suggested as a part of the formula that you have described?

A. Not specifically, no, as to time or place, but I have the impression that it was suggested at the same time as the 3½ per cent figure.

Q. And is it your recollection that that 5 per cent figure was suggested by Mr. Sandstedt?

A. That is my recollection, yes.

Q. And you don't remember who was present when he first suggested that?

A. No; the circumstances under which the formula was suggested—by that I mean what the occasion was on which the matter was discussed.

A portion of White's deposition is omitted because it appears, supra, at line 21 on page 1361 through line 39 on page 1361.

Q. And when was that formula prepared, or when was that problem worked ont month by month?

A. Prior to the Detroit Lakes meeting.

Q. Do you have here a copy of the figures Mr. Sandstedt worked out for the retirement of either the $325,000 or any other figure? A. Yes.

Q. May I see it?

A. Yes (handing document to counsel).

Q. Now, you have handed me a document which says at the top, "Interchange contract," is that right? A. Yes.

Q. That deals with the retirement of a fund of $162,500, does it? A. Yes.

Q. Do you know when this document you have handed me was worked out?

A. No, but it is the best of my recollection that it was worked out prior—is there a date on it?

Mr. Benson: (Handing document to the witness).

A. (Continuing) —to the Detroit Lakes meeting, and during the summer of 1941.

Q. You discussed this document that you handed to me with Mr. Sandstedt at the meeting in Detroit Lakes, Minnesota? A. I cannot state specifically that I did.

Q. Do you remember whether you had this document at the Detroit Lakes meeting? A. No, I don't remember.

Q. You don't remember that? A. No.

Q. Well, you have examined Exhibit F to the complaint, which is the 1941 contract, haven't you? A. Yes.

Q. I call your attention to Article V, Section 3, of Exhibit F to the complaint, and ask you to read it. (Handing document to the witness.)

Mr. Robinson: Mr. Benson, for the sake of the record will you indicate whether it is Article V, Section 3, of the 1941 agreement or the 1943 supplement? They both are part of Exhibit F to the complaint.

Mr. Benson: It is the 1941 agreement.

Q. You have read that, have you? A. Yes.

A portion of White's deposition is omitted because it appears, supra, at page 1361, line 40, through line 8, page 1362.

Mr. Benson: Q. I see.

A. And in 1941 we were engaged in rewriting an agreement into which we were combining, with certain changes, into a single agreement the matters that were covered by an interconnection agreement of 1939 and a capacity interchange agreement of 1939.

Q. You testified to that on direct examination didn't you? A. Yes.

Q. Don't you recall? A. Yes.

Q. Now, I show you a document consisting of seven pages, entitled, "Interchange Contract," and marked on the first page Plaintiff's Exhibit 6 for identification. That is the document you handed to me some time ago in this hearing this morning, when we started talking about Mr. Sandstedt's method of figuring out the retirement of a

certain amount of money, employing the 3½ per cent figure and the 5 per cent interest. A. That is correct.

Q. Now, can you tell me whether Plaintiff's Exhibit 6 for identification was before you at the Detroit Lakes meeting? A. No, I cannot.

Q. You have no recollection when you first received Plaintiff's Exhibit 6 for identification? A. No.

Q. Have you any records in your files which will refresh your recollection as to when you first received Plaintiff's Exhibit 6 for identification?

A. I have nothing in my files to indicate with any degree of certainty as to just when I received this.

Q. What is your best recollection as to when you received Plaintiff's Exhibit 6 for identification?

Mr. Benson: Let the record show witness's counsel asked for the privilege of interrupting the examination.

A. My counsel has just called to my attention that there is in my files a letter dated October 16, 1941, which is a covering letter for that particular document.

Mr. Benson: May I have the letter to which you have referred?

Mark this Plaintiff's Exhibit 7 for identification.

(Said document was thereupon marked Plaintiff's Exhibit 7 for identification of 9-27-47.)

Mr. Benson: Q. I show you Plaintiff's Exhibit 7 for identification and ask you if that is the covering letter to which you just referred? A. It is.

Mr. Benson: The plaintiff offers in evidence and asks that it be returned with the deposition and as a part of the deposition of the witness now under examination, Plaintiff's Exhibit 7 for identification and 6 for identification.

Mr. Royhl: No objection.

(Copies of said documents offered in evidence as Plaintiff's Exhibits 6 and 7 are attached).

Mr. Benson: Q. In Plaintiff's Exhibit 7 the writer makes the statement, said Exhibit 7 being dated October 16, 1941:

> "I intended to go over the interchange agreement with you in Biloxi, but didn't have the opportunity."

Were you in Biloxi, Mississippi, on October 16, 1941, or thereabouts?

A. I was in Biloxi, Mississippi, attending a meeting, which Mr. Sandstedt also attended. I don't recall the date of that meeting, but after reading Mr. Sandstedt's letter I am confident it was sometime before October 16th and after the first week in September, both in 1941.

Q. What was the meeting at Biloxi?

A. The meeting at Biloxi was of all the executives of the operating subsidiaries of The Middle West Corporation.

I was also invited, and as I recall, there were several executives of large manufacturing companies, and there was a public relations man who represented the entire electric industry in the country. I believe the president of the Edison Electric Institute was there.

Q. Was there anybody down there from the joint office at Huron besides Mr. Sandstedt?

A. I think Mr. Sanborn was there, too. I don't recall any others.

Q. Did McArthur go down there?

A. I don't recall that he did.

Q. And the expenses of Sandstedt and Sanborn were paid by Northwestern Public Service Company, or were they paid by The Middle West Corporation?

Mr. Royhl: Objected to as incompetent, irrelevant, immaterial, not proper cross examination; not the best evidence, no proper foundation laid, not being shown that this witness knew anything about that detail.

Mr. Benson: Is that an objection or a suggestion?

Mr. Royhl: That is an objection, right in the record, on the ground of foundation.

A. I believe it was customary for Mr. Sanborn and Mr. Sandstedt to charge their expenses, their traveling expenses, to [joing] management expenses, and I would assume that these traveling expenses to Biloxi were so charged and prorated between the companies that were—

Mr. Benson: Q. You really don't know what happened?

A. I don't know.

Q. Now, this meeting down at Biloxi was a sort of private Edison Electric Institute meeting of the Middle West companies?

Mr. Royhl: Objected to as argumentative, and for all the reasons and grounds heretofore urged.

A. I have never been to a meeting of the Edison Electrical Institute, but I have heard about those meetings; and I believe that at this particular meeting in Biloxi the discussions and talks were very much better attended, that the conduct of those present was much more seemly than would prevail at a large national convention.

A portion of White's deposition is omitted because it appears, supra, at page 495, line 4, through line 39 on page 498.

Q. Did you state on direct examination that Central Electric & Telephone Company was at one time negotiating for the purchase of Northwestern Public Service Company?

A. Yes.

Q. I don't remember whether you stated it or whether it was in some of the minutes at your directors' meetings.

A. I am quite confident that I so stated in this hearing.

Q. During the time the negotiations were pending between Central Electric & Telephone Company and whoever proposed to sell Northwestern Public Service Company, did you have any talk with Mr. Sanborn as to what he would do if Northwestern Public Service Company was sold? A. I don't recall such a conversation.

Q. Do you know whether the negotiations concerning the sale of Northwestern Public Service Company involved any change in the status of Mr. Sanborn?

A. No. I don't know that they did or did not.

A portion of White's deposition is omitted because it appears, supra, at page 1362, line 9th from the bottom, through line 39 on page 1362.

Q. Do you remember who those men were who came from Central Telephone & Telegraph? Were they J. B. Gallagher and Judson Large?

A. Judson Large was one. I think a Mr. Phillips, who was an operating man, was another, and I think the third was the attorney of those two gentlemen in Chicago.

Q. You don't know J. B. Gallagher?

A. No. I don't recognize the name, and I don't recall the name of that particular attorney, if J. B. Gallagher is an attorney.

A. (Continuing) I do not recall the name of Mr. Gallagher nor do I recall the name of the third person who came in to see me, but to the best of my recollection there were three men who came.

Mr. Benson: Q. Did you have any talk with A. B. Sanborn about the reasons for your delaying the execution of the July 1, 1941, agreement?

A. Well, if I did I don't recall that at this minute.

Q. I will show you Defendant's Exhibits 49 and 50 for identification. I don't know that they will assist you in refreshing your recollection, but they may (handing documents to the witness).

A. I now recall this letter. That letter does refresh my recollection.

Q. Now, does that letter refresh your recollection as to any conversations or communications with Mr. Sanborn concerning delay because of the pendency of the Northwestern sale, such communications or conversations having taken place prior to January 9, 1942?

What I am trying to find out, Mr. White, is whether you had conversations with Mr. Sanborn from the time you were in Detroit Lakes in the fall of 1941, and prior to the writing of this letter, Defendant's Exhibit 49.

A. Only to the extent that such conversations are implicit in that letter.

Q. Do you recall whether Mr. Sanborn made any protest because the 1941 contract was not being signed?

A. No.

Q. Do you recall that anybody in the joint staff in Huron made any protest because the July 1, 1941, contract was held up pending these negotiations for sale? A. No.

Q. No suggestions were made by any of the general staff at Huron to you as to what situation Dakota Public Service would be in if Northwestern was sold to Central Telephone & Telegraph, and you had only the 1939 contract with the 18 months' cancellation provision in it?

A. If they were, I don't recall what those suggestions consisted of.

Q. When I have used the term, "Central Telephone & Telegraph Company" I misnamed the company in my questions. Did you understand I was talking about Central Electric & Telephone Company?

A. Yes, I thought, with the exception of this last statement of yours, you had used "Central Electric & Telephone Company."

Q. I show you Defendant's Exhibit 52 for identification. Will you please read that? (Handing document to the witness).

You have now read Defendant's Exhibit 52 for identification? A. Yes.

Q. Do you have before you a copy of the complaint in this case? A. Yes.

Q. Will you look at the 1941 contract, Exhibit F? You have located Exhibit F to the complaint, have you?

A. Yes.

Q. Defendant's Exhibit 52 for identification came into your possession about February 2, 1942? A. About, yes.

Q. I call your attention to the third paragraph of the first page of Defendant's Exhibit 52 for identification.

In that paragraph is found the following language:

"The new agreement has an added equitable provision which might become effective in the future if either party should desire to make comparatively heavy additions to its generating capacity."

Can you point out to me the added equitable provisions referred to in that language?

A. As I recall, that wording referred to the ten-year term that was provided in that 1941 agreement.

Mr. Benson: I will explain to you what bothers me, and why I asked you this question. I have examined that contract and I cannot find anything which fits in my mind the phrase "an added equitable provision which might become effective in the future."

The Witness: The added provisions of a ten-year term and the limitation to 25 per cent for billing purposes.

Mr. Benson: Q. Oh, I see.

A. The system reserve to be used was agreed to be a mutually desirable provision of that contract, to protect either party as and when they added capacity to their share of the system.

Q. All right. I call your attention to the Defendant's Exhibit 55 for identification, the last paragraph. Will you please read that (handing document to the witness)?

A. (Witness examines document.) I have read it.

Q. I take it you are no more familiar with the formula for figuring that $93,000 than you were with the formula for figuring the amortization of the $325,000 figure involved in my first question about formula.

Well, let me put it this way: Did you use any formula to verify the $93,000?

A. Presumably that $93,000 figure would have been easily and immediately verified from a schedule showing the monthly payments that were incorporated into the 1941 contract.

Q. Now, will you answer my question? Read it.

(Question read).

A. I think I have previously testified that I knew of no formula for computing the amortization of any given amount under that contract.

Q. All right. The meeting of the board of directors held November 22, 1935, was held in Boston, according to the evidence in the record.

Mr. Royhl: 1935?

Mr. Benson: 1935; it was held in Boston.

Q. What was the purpose of holding the meeting in Boston?

Mr. Royhl: Objected to as immaterial and irrelevant.

A. We had a Boston director on our board, and in agreeing in advance on a date to that meeting I personally had called attention to the fact that that date would coincide very closely with the date of the Harvard-

Yale football game, which I was very anxious to see and at company expense.

A portion of White's deposition is omitted because it appears, supra, at line 40 on page 1362, through line 2 on 1364; at line 14 on 467 through line 11 on 469; at line 3 on 1364 through line 10 on 1364; and at line 26 on 467 through line 11 on 469.

Q. Now, Mr. White, I would like you to explain to me something that sounds strange on the record.

Do you recall that on February 7, 1941, you increased B. P. Stevenson's salary from 70 to 77.50 a month, as of February 1st, 1941? A. Yes, sir.

Q. How does it happen that you increased his salary $7.50?

Mr. Royhl: That is objected to as irrelevant, incompetent and immaterial.

A. United Public Utilities Corporation paid 15 per cent of Mr. Stevenson's aggregate salary as an employee of that Wilmington joint office. The lower figure was 15 per cent on his salary before the raise. The seven dollars and some cents difference was 15 per cent of his aggregate increase.

Mr. Benson: Q. Now, do you recall that in April, 1941, you raised Gail Belden's salary from $50 to $105?

Mr. Royhl: The same objection.

A. The explanation will be the same.

Mr. Benson: Q. Did you raise Gail Belden from 105 to 116 subsequent to that, and would the explanation be the same?

Mr. Royhl: The same objection.

Mr. Benson: Q. (Continuing) We did and it is?

A. If we did, it is.

Q. Do you recall hiring a man by the name of Kenneth Oakley? A. Yes.

Q. He went to work for the United Public Utilities Corporation when? A. When Mr. McClanahan left.

Q. Well, all right. Don't bother about the exact time. Can you tell me what Mr. Oakley's previous experience had been?

A. He had been in the accounting department of the Commonwealth Edison Company; he had been with a public accounting firm and with several industrial companies.

Q. When was he with Commonwealth Edison?

A. Immediately before he came to us.

Q. Is Commonwealth Edison an affiliate of Middle West Corporation, or is Middle West Corporation an affiliate of Commonwealth Edison Company?

Mr. Royhl: Same objection as made before.

A. I believe there is no relationship between those two companies.

Mr. Benson: Q. Although they have at times in the past been officered by the same individuals?

Mr. Royhl: The same objection.

A. I cannot confirm that.

Mr. Benson: Q. Don't you remember about the Insull days?

A. Oh, yes. They did have a common officer at the top, namely, Mr. Samuel Insull.

Q. You testified concerning the maintenance by Northwestern Public Service Company of an office in Huron, South Dakota, in addition to the office occupied by the joint management. Was that what is commonly called in the utility business a division office and a store to sell merchandise? A. Yes.

Q. During your testimony you referred to periodic receipt of operating and financial reports. Those were made by members of the joint staff at Huron? A. Yes.

Q. During your testimony you told that reports, letters, communications, various documents, sometimes came directly to you and sometimes came to you through Middle West Service Company.

I don't suppose you made any examination of the files

of Middle West Service Company to ascertain that all communications which originated at Huron, relative to the business transactions between Northwestern Public Service Company and your Dakota subsidiaries came to you? A. No, I did not.

Q. I don't remember whether you were able to advise us, when I first asked you for the identification of H. Babbitt, whose name appears on Defendant's Exhibit 67 for identification? A. No, I was not able to identify H. Babbitt.

Q. Now, do you recall what H. Babbitt's business was at that time, or did you later in the examination identify Babbitt as dispatcher?

A. No. I have not identified him at all.

Q. As a load dispatcher?

A. And I don't now identify him.

Q. You do not?

A. No. If he is so identified on that exhibit, I didn't do it.

Mr. Benson: No, he is not.

Q. Do you know whether, at the time the call was made to you by the president of the Chicago bank, asking whether you would be willing to be receiver of United Public Utilities Company and the other companies, those companies were indebted to the Chicago bank with which you were then affiliated?

A. I received no intimation that they were, and I can certainly state definitely that United Public Service Company or United Public Utilities Company or Southern United Gas Company were not indebted to any bank.

Q. At the time Mr. Philip Clarke called you and asked you whether you would be receiver of United Public Utilities Company do you know whether Middle West Utilities Company was largely indebted to Mr. Clarke's bank?

A. No, I do not know.

Q. You didn't know then? A. I didn't know then.

Q. And you don't know now? A. And I don't know now.

Q. And you never did know, at any time?

A. No. I did not know about the loans at the City National Bank & Trust Company because I was neither an officer nor a director of that bank, but my connection was solely with its investment affiliate, which was located in a separate building.

I have recalled since I testified, however, that it certainly did not look very good when I couldn't remember whether or not I was a vice president of the National Bank of the Republic, and I recall now that I was a vice president of that bank subsequent to the formation of the National Republic Company, and continued in that office throughout the remaining life of that bank, having charge of the purchase of its entire bond portfolio.

Q. Were you requested in the subpoena served on you by the plaintiff to produce the document showing when control of North Dakota Power & Light Company and Northern Power & Light Company was acquired by United Public Utilities Company? Look at your subpoena if you want to make sure.

A. Before I answer that I will have to look at the subpoena.

Now, will you read the question?

(Question read).

A. Yes, I was, and I have brought a record to show the date of that transfer.

Mr. Royhl: Q. Was that the U. P. U. Company or U. P. U. Corporation? A. Corporation.

Mr. Benson: Q. Mr. White, do you have the general ledgers and other accounting records of United Public Utilities Company? A. I think so.

Q. Where are such records of United Public Utilities Company which you took possession of when you became receiver of that company?

A. They should be in my storage vault.

Mr. Benson: Well, now will you make a note of a request to get the data showing the date when United Public Utilities Company acquired the control of North Dakota Power & Light Company and Northerr Power & Light (addressing Mr. Voland)?

Mr. Voland: Yes, I will.

Mr. Benson: Q. Do you remember when United Public Utilities Corporation became a subsidiary of the Middle West Corporation? A. Yes; on July 1, 1945.

Q. That was by reason of the retirement of the United Public Utilities Corporation collateral trust bonds?

A. Yes, and the resulting change in the voting power under the provisions of the original certificate of incorporation.

Q. That is, the voting power of the Class B common stock? A. That is correct.

Q. Do you recall whether, when United Public Utilities Corporation became a subsidiary, as you have described, of Middle West Corporation, there was a change in the rate Middle West Service Company would thereafter charge United Public Utilities Corporation and its subsidiaries?

A. I do remember that a change in that charge became effective as of July 1, 1945.

Q. When you became a subsidiary of Middle West Corporation, as you have described, the Middle West Service Company was then obligated to serve United Public Utilities Corporation and its subsidiaries at cost?

A. Well, of course, it was never obligated under any arrangement, to serve—

Q. No, but I mean—

A. (Continuing) —United Public Utilities Corporation, but it was obligated to serve the subsidiaries of United Public Utilities Corporation at cost.

Q. And was it due to the fact—I don't want to get confused in the record, that somebody has to straighten out later, but was it due to the fact that United Public Utilities Corporation became a subsidiary of Middle West Corporation that Middle West Service Company was required to serve The U. P. U. Corporation's subsidiaries at cost?

A. Yes.

Q. And when that event occurred, July 1, 1945, the current charge for service to U. P. U. subsidiaries dropped from .8 of a per cent to .6 of a per cent of the gross, subject to refund upon the determination of the actual cost?

A. That is correct.

Q. Do you recall a company or a corporation called Allied Service Company? A. Yes.

Q. What was that company?

A. As I recall, Allied Service Company, with headquarters in Kansas City, Missouri, was a subsidiary of Middle West Utilities Company, and it either owned and operated

ice manufacturing plants or it owned the securities of ice manufacturing companies.

Q. When you became receiver of United Public Service Company did you find that Allied Service Company was the owner of bonds of United Public Utilities Company?

Mr. Royhl: That is objected to as not the best evidence, incompetent, irrelevant and immaterial under the [issued] in this case.

A. As I recall, it was the owner of a note of United Public Utilities Company, that was secured by first lien bonds of United Public Utilities Company.

Q. Now, did you get the bonds back? A. No.

Q. What disposition was made of the note held by Allied Service Company, and of the bonds held by Allied Service Company?

Mr. Royhl: The same objection in full, not proper cross examination.

A. Under the plan of reorganization of United Public Utilities Company, which was consummated at the close of business December 31, 1934, the note of United Public Utilities Company, payable to Allied Service Company, was cancelled, but the 451,000 first lien bonds held as collateral thereto were treated in the same manner as all other bonds of United Public Utilities Company; that is, those bonds received the same treatment under the plan that was accorded to all the rest of the outstanding bonds of United Public Utilities Company.

Mr. Benson: Q. Did Allied Service Company then receive stock of United Public Utilities Corporation?

Mr. Royhl: The same objection as last made, in full.

A. Yes.

Mr. Benson: Q. Did it receive 4,510 shares of preferred stock?

Mr. Royhl: The same objection.

A. Yes.

Mr. Benson: Q. And did it receive 4,985 shares of voting trust certificates on Class A common stock?

Mr. Royhl: The same objection.

A. No. Under the formula of the plan, it received for those bonds the same number of shares of common stock that it received of preferred stock.

Mr. Benson: Q. Well, do I understand from that, that Allied Service Company received 4,510 shares of Class A Common stock?

Mr. Royhl: The same objection.

Mr. Benson: Q. (Continuing) or did it receive voting trust certificates for 4,510 shares of Class A common stock?

Mr. Royhl: The same objection.

A. It received voting trust certificates for that amount of Class A common stock, in exactly the same manner and in the same ratio that all other bondholders received under the reorganization plan.

Mr. Benson: Q. Well, are you unable to tell me now, in view of the statement you made as to the holding of the note of $451,000?

A. No. That was in the amount of $470,000.

Q. $470,000? A. Yes.

Q. And the collateral was $451,000 of bonds of United Public Utilities Company?

Mr. Royhl: Same objection.

A. That is correct.

Mr. Benson: Q. Did Allied Service receive 4,510 shares, or voting trust certificates for 4,510 shares of the Class A common stock of United Public Utilities Corporation?

Mr. Royhl: The same objection.

A. Yes, if it held onto its bonds—

Mr. Benson: Q. That is—

A. (Continuing) those $451,000 of bonds, which they held—

Q. It would have entitled them to one share of preferred and one—

A. Would have entitled them to ten shares of preferred stock and ten shares of Class A common stock in the form of voting trust certificates, for each $1,000 bond.

Q. Did Allied Service Company, in the reorganization of United Public Utilities Company, receive any other securities—

Mr. Royhl: Same objection.

Mr. Benson: Q. (Continuing) —than the voting trust certificates and the preferred stock? I am trying to ascertain whether Allied Service Company received some collateral trust bonds—

Mr. Royhl: The same objection.

Mr. Benson: Q. (Continuing) —or was there nothing like that issued by U. P. U. Corporation?

A. Yes. Under the plan of reorganization of United Public Utilities Company, a holder of a first lien bond of that company of say $1,000 par value, received $500 of new collateral trust bonds of United Public Utilities Corporation, a 5 per cent ten year interest script certificate in the amount of 15 months interest on the old prior lien bond of United Public Utilities Company, which he had held, and also ten shares of preferred stock of United Public Utilities Corporation, and ten shares of common stock of the United Public Utilities Corporation, in the form of voting trust certificates.

Q. Did Allied Service Company [received] $225,500 par value of the collateral trust bonds of United Public Utilities Corporation?

Mr. Royhl: The same objection as last made, in full.

A. They did if they presented those bonds; that is the amount of bonds, of new bonds, that they would have been entitled to receive if they retained the ownership of their old bonds and presented them for exchange, under the plan.

Mr. Benson: Q. Do you have a final or interim report of your receivership showing the court what you distributed to Allied Service if anything? A. No.

Q. I don't mean [to] you have it here before you.

A. No, I don't have it, because the court appointed a bank to make those exchanges.

Q. What bank?

(Thereupon discussion was had off the record.)

Mr. Royhl: May I have the same objection to all this line of questioning?

Mr. Benson: Yes.

(Record read.)

A. To the best of my knowledge, Allied Service had never deposited any of its bonds with a bondholders protective committee, and on that assumption its bonds would have been presented to City National Bank & Trust Company of Chicago for exchange, under the plan.

Mr. Benson: Q. Mr. White, during the administration of your receivership was some arrangement made with City National Bank & Trust Company of Chicago for creditors to deposit evidences of indebtedness against United Public Utilities Company, with that bank?

A. I recall that an arrangement was made for the deposit with that bank of stocks, preferred stock of our company, to be represented by the so-called Bard Committee, and that a similar arrangement was made for the Provident Trust Company of Philadelphia to receive deposit of bonds, to be represented by a bondholders protective committee that was entirely separate and distinct from the Bard Committee.

Q. Some time ago, in the examination, I asked you whether you made any distribution of securities of United Public Utilities Corporation to Allied Service Company, and you said that you did not, as receiver.

A. I did not make the distribution directly to them. To make it still clearer, I might add—

Mr. Benson: Just a moment.

Q. Was there a bank in Chicago from whom Allied Service Company could have secured securities of United Public Utilities Corporation in return for the obligations of United Public Utilities Company? A. Yes.

Q. What bank?

A. City National Bank & Trust Company.

Q. You don't know whether Allied Service Company presented any obligations of United Public Utilities Company to that bank? A. No.

Q. You have testified that Herbert L. Nichols, or H. L.

Nichols was a member of the board of United Public Utilities Corporation? A. Yes.

Q. And he has been, continuously since its incorporation? A. Since January 1, 1935.

Q. Did you know Mr. Nichols before he became a member of your board of directors? A. Yes.

Q. Was he associated in business with you? A. No.

Q. Did you testify on direct examination concerning his business in the City of Chicago? A. Yes.

Q. Mr. Nichols is now chairman of the board of Southwestern Public Service Company? A. Yes.

Q. With his office at Dallas, Texas? A. Yes.

Q. Do you know whether Southwestern Public Service Company was created to take over properties that belonged to, any properties that belonged to a subsidiary of Middle West Corporation?

Mr. Royhl: Objected to as incompetent—

Mr. Benson: Q. (Continuing) Or Middle West Utilities Company?

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination, and not the best evidence.

A. To the best of my understanding it was created to take over properties that formerly belonged to Community Power & Light Company, which I believe had no relationship to the Middle West Utilities Company system or the system of Middle West Corporation.

Mr. Benson: Q. That was a Hulswith Company?

A. I cannot say.

Q. Or a Fitkin Company?

A. I don't recall that it was either.

Q. Did Southwestern Public Service Company buy utilities from Middle West Corporation or a subsidiary of Middle West Corporation?

Mr. Royhl: The same objection.

A. I know of one instance in which Southwestern Gas & Electric Company has recently purchased some isolated [propertties] which the Securities and Exchange [Commissioned] ordered one of the subsidiaries of Central & Southwest Corporation to dispose of.

Mr. Benson: Q. Do you know of an instance where Southwestern Public Service Company bought operating utilities from West Texas Utilities, which was a subsidiary of Central & Southwest Utilities?

Mr. Royhl: The same objection.

A. I think that that was the name of the subsidiary that was the seller to Southwestern Public Service Company.

Q. You paid Mr. Nichols a salary? A. We did.

Q. As an officer of—

A. (Continuing) We did for a while pay him a salary of $50 a month as vice president.

Q. Was that under some arrangement for splitting joint office expenses in Wilmington, Delaware?

A. No. It was a straight salary, and in the same amount that we paid to Mr. Barroll as secretary of the company.

Q. Do you have the by-laws of United Public Utilities Corporation here? A. Yes.

Q. Are they the originals?

(Thereupon discussion was had off the record).

Mr. Benson: May we have the same stipulation as to the by-laws that we have as to the minutes?

Mr. Robinson: Yes.

Mr. Benson: I will read from the minute books, from that portion thereof entitled, "United Public Utilities Corporation by-laws", paragraph numbered 17 thereof, reading as follows:

"President"

"17. The president shall be the chief executive officer of the corporation. He shall preside at all [meeting] of the stockholders and, unless a chairman of the board of directors shall have been appointed, he shall preside at all [meeting] of the board. Subject to the control of the board of directors, he shall have the general powers and duties of supervision and active management of the business of the corporation usually vested in the office of president of a corporation. He shall see that all orders and resolutions of the board are carried into effect, subject, however, to the right of the directors to delegate

any specific powers, except such as may be by statute exclusively conferred on the president, to any other officer or officers of the corporation. He shall be ex-officio a member of the executive committee. He shall execute bonds, mortages and other contracts requiring a seal under the seal of the corporation. He shall have superintendence and direction of all other officers of the corporation, other than chairman of the board of directors, if any, and shall see that their duties are properly performed, and shall have the power to select and appoint such other agents and servants of the corporation as in his discretion are necessary in addition to those selected by the board of directors, and to remove all such additional [agent] and servants and make new arrangements to fill the vacancies. He may delegate any of his powers to a vice president of the corporation."

I offer in evidence the quoted portion from the by-laws.

Mr. Royhl: Objected to as immaterial and irrelevant.

Mr. Benson: Q. Mr. White, have you submitted, and has there been introduced in evidence, all reports made by Major Buell concerning the generating capacity and additions required to generating capacity of the Dakota subsidiaries?

A. In so far as I am aware of such reports, yes.

Q. That is, you intend that they should be introduced?

A. Yes, and I am quite sure that all reports that he issued are included.

A portion of White's deposition is omitted because it appears, supra, at page 1364, line 11, through line 36 on page 1364.

Mr. Benson: Q. Do you have any of those budgets here—

A. No.

Q. (Continuing) —that would have reference to the Bowdle transformer station? A. No.

Q. Do you remember anything about the type of construction of the line from Barnard to Leola, when you

took possession of the Northern Power & Light Company, at the time of the receivership?—

The Witness: Will you read the question?

(Question read)

Mr. Benson: Q. (Continuing) Of the United Public Service Company? A. No.

Q. Have you ever known what the type of that line was, the type of construction?

A. I recall going to Barnard. I don't recall going west from Barnard to Leola or Wetonka. I knew that there was a line out there, but I cannot recall whether I ever drove along it or not.

Q. So you do not know that you ever knew what the size of the wire was on that line? A. No.

Q. And to the best of your recollection now you never have known anything about how heavy the insulation was on that line? A. No.

Q. Did you ever know anything about the size of the poles on that line? A. No, not that I can now recall.

Q. Under Exhibit C to the complaint and under Exhibit E to the complaint, which are the two interchange capacity contracts, there is a provision in Exhibit C, Article I, Section 8, reading as follows:

"The term 'Company system maximum demand,' with respect to any party, for such month as hereinafter designated shall mean the demand (in kilowatts) made upon the system of such party during that half hour in such month in which demand was greater than in any half hour previously recorded."

Do you want to read that Section 8? Right here (Indicating). (Handing document to witness.)

Did you individually select the half hour interval mentioned in Section 8? I assume you did not. A. I did not.

Q. Now, did anybody explain to you how the determination would be made during a half hour interval?

Mr. Royhl: We object to this, for the reason that the contract specifically provides for such maximum demand period; incompetent, irrelevant and immaterial.

A. I can recall that in one of the drafts of those contracts it had been suggested that a 15 minutes demand

be used, and that there was some discussion between Mr. Buell and Mr. Stokke as to whether a 15 minute demand or a 30 minute demand was the more appropriate.

Mr. Benson: Q. What do you mean by the word "appropriate"?

A. More representative as a basis for determining the demand that was to be used for calculating the system demand or the demand of either party in the system, and that I had a talk with Major Buell on that subject. That seems to be about the extent of my recollection.

Q. Now, when you said "In the preparation of those agreements", did you mean that there was a discussion during the preparation of Exhibit C or during the preparation of Exhibit E, or did you mean somewhere in the discussion of both of them, and you cannot state where or when, there was that discussion with reference to the time when either one of those contracts was made?

A. That is correct; the latter one of those two.

Q. You cannot place it?

A. I could not place the time or the place, whether it was over the telephone, between Major Buell and me. My impression is that a discussion of the point was conducted between Mr. Buell and Mr. Stokke, and that Mr. Buell was taking exception to Mr. Stokke's idea, that in the course of taking exception to it he told me that he was taking exception to it and told me the reason for it. That is my impression, but whether that was just an isolated point that was under discussion at the time, or whether it was part of a general discussion of the whole contract, I could not say.

Q. When you finally came to execute or enter into Exhibit F, the interval changed from 30 minutes to 60 minutes. Do you recall anything about the reason for changing from the 30 minute interval in the prior contracts to the 60 minute interval in Exhibit F?

Mr. Royhl: Will you refer to the section? Section 7.

Mr. Robinson: Section 7.

Mr. Benson: What?

Mr. Robinson: It is Article I, Section 7, Exhibit F.

Mr. Benson: Article I, Section 7.

A. I don't recall discussions in which I participated nor do I recall discussions out of which that hourly period resulted.

Q. Now, when you said, "That hourly period, you are referring to the hourly period which you have just read in Section 7 of Article I of Exhibit F? A. Yes.

Q. Now, to quote exactly from the exhibits to the complaint, I will quote from Exhibit C, Article I, Section 8:

"The term 'Company system maximum demand', with respect to any party, for such month as hereinafter designated shall mean the demand (in kilowatts) made upon the system of such party during that half hour in such month in which demand was greater than in any half hour previously recorded."

I will now quote from Section 9:

"The term 'interconnected system maximum demand', with respect to any party, for such month as hereinafter designated shall mean the arithmetical sum of Company system maximum demand during that half hour in such month in which such combined demand was greater than in any other half hour."

Then I will call your attention to Section 8 and 9 of Article I of Exhibit E to the complaint.

(Witness examines document).

You have examined those Sections 8 and 9? A. Yes.

Q. Now, I refer to Exhibit F to the complaint, Article I, Section 7, and ask you to read that section 7. (Handing document to the witness.)

(Witness examined document).

Q. You have read that Section 7, have you? A. Yes.

Q. Can you tell us why in Exhibit F, in Section 7 of Article I, the interval mentioned in each instance where any interval is mentioned is an integral hour or refers to an integral hour— A. No.

Q. (Continuing) —instead of the interval in Sections 8 and 9 of Article I of Exhibit C, and Sections 8 and 9 of Article I of Exhibit E to the complaint?

A. I have no further recollection on that, no.

Q. Mr. White, I interrogated you previously about whether you had any connection with the reorganization

of any public utilities other than the companies of which you were receiver. Did you have some connection with a public utility or an ice company in the south for which Mr. Young of Chicago was the attorney in reorganization? I am trying to refresh your recollection and see whether that brings up anything? A. It does not.

Q. You did not represent any committee or security holders? A. No.

A portion of White's deposition is omitted because it appears, supra, at page 1347, lines 15 through 26.

Q. Do you recall anybody in the joint management at Huron telling you how the 30 minute or half hour—I say "half hour"—I don't know whether I am technically correct when I say "30 minutes"—maximum demand of the companies and the maximum system demands of the companies, under Exhibits C and E to the complaint, were determined; by what devices or arrangements?

A. I don't recall.

Q. You do not recall that anybody ever discussed that with you from the joint management? A. No, I don't.

Q. Mr. White, will you produce the exhibit which shows several ink notations on one of the contracts between Northwestern Public Service Company and one or both of your Dakota subsidiaries?

Mr. Royhl: Exhibit 47.

(Document handed to counsel).

Mr. Benson: Q. You have now handed me Defendant's Exhibit 47 for identification? A. Yes.

Q. I don't recall whether the examination in chief shows where you got this Exhibit 47, where this Exhibit 47 came from when it came to your hands.

Mr. Royhl: He testified that he received those from Buell. No,—47 came from Sandstedt.

Mr. Stafford: He said on chief, John, at page 505 that he received 47 from Sandstedt, but he can't recall the date.

Mr. Benson: Where is page 505? Volume 5?

Mr. Stafford: Volume 5, yes.

Mr. Benson: It now appears, Mr. White, from the statement of counsel, that you have testified that you got Exhibit 47 from Mr. Sandstedt.

Mr. Stafford: That is at page 505 of the transcript.

Mr. Benson: Q. In response to some one of my questions when I was asking where your office was before you became receiver, you made reference to an address 20 North Wacker Drive. What was it you were about to tell me about where your office was located, as receiver?

A. When I went over to pick up my duties as receiver of United Public Service Company, the receivers of Middle West Utilities Company—or, rather, the management of Middle West Utilities Company, immediately prior to the appointment of receivers for Middle West Utilities Company, had trimmed down their organization very substantially and they had a large amount of vacant office space under lease. I was invited to use one of those vacant rooms until I could make arrangements for quarters of my own, and my secretary and I, and a little later Mr. Peale, occupied a two-room suite,—well, as I recall it, for two or three months. Shortly after their appointment, the receivers of Middle West Utilities Company cut down on the space occupied by their staff, readjusted their leases, and I had to move. So I leased, from the 20 Wacker Drive Building Corporation, a small suite in the same building, where I could have ready contact with the Middle West staff members for [operatin] information on our subsidiaries.

Q. Was that small suite on the same floor or floors as the Middle West Receiver's offices?

A. No, Middle West receiver's officers were at the south end of the 21st floor and I was at the north end of the 22d floor.

Q. Have you continued to occupy that same space from the time you moved into this office at the north end of the 22d floor to date?

A. Yes, I have continued to occupy mine. There have been some changes in the Middle West.

Q. Has the Middle West Service Company continued to occupy offices on the 21st floor of 20 Wacker Drive from the time you have described to date?

A. No. During the war the army had all of the 21st floor and several floors below that.

Q. Where did Middle West Corporation have their offices during the time the army was in the building?

A. Well, I think the Middle West Corporation had their offices on the—Middle West Corporation had their offices on one floor of the tower and Middle West Service Company had their offices on two other floors of the tower. I think together they covered a range of ten or twelve floors, or more.

Q. You mean the Middle West offices were spread on ten or twelve floors, or more?

A. What I meant to say is that there were ten or twelve or more floors intervening between the top and the bottom office of Middle West or Middle West Service Company.

Q. I see. Did you make any other joint arrangements with Middle West Utilities Company or its receivers at the time you moved into the suite which you rented from the Middle West Utilities Company?

Mr. Royhl: Objected to as immaterial and irrelevant, and for the further reason that it assumes that there were joint arrangements and there is a misstatement of the record and fact.

Mr. Benson: Q. Well, Mr. White, did you have some agreement with the Middle West Utilities Company concerning use of their telephone number when you went in and rented space from them?

Mr. Royhl: Same objection last made in full.

A. Yes. Yes, the use of their telephone number, which were merely an incident to the use of their telephone switch board and interconnecting system, which interconnecting system gave me a direct contact with the operating men who were serving in an advisory capacity on the operations of our subsidiaries.

Mr. Benson: Q. How long, after you began this use of Middle West in reconnecting telephone system and switch board, for how long a period after you began that did you continue to use the same switchboard?

Mr. Royhl: Objected to as immaterial and irrelevant.

A. I have continued it up to the present time.

Q. Did you say, in your testimony in chief, that you were acquainted with William C. Freeman?

A. If I was asked that question, I did.

Q. All right, are you acquainted with William C. Freeman? A. Yes.

Q. Do you know what position he had with The Middle West Corporation before he became president?

A. I believe he was vice president.

Q. Were you ever [association] in business with William C. Freeman?

A. Yes. Mr. Freeman was a vice president of the National Bank of the Republic when I became associated with that bank in July, 1922, and was at that time either an assistant cashier or assistant vice president, he having been in the employ of the bank for a number of years. He later became vice president of the bank and, at my request, he was transferred to the National Republic Company, of which I was president, and became a vice president of the National Republic Company.

Mr. Royhl: I move to strike this out as incompetent, and irrelevant for any purpose.

The Witness: He continued as vice president of the National Republic Company for several years, when, upon merger of the National Republic Company with the Central Illinois Company, he did not continue his connection with that merged investment subsidiary, but went with the Central Republic Bank and Trust Company as a trouble shooter on messy loans.

Mr. Royhl: I move to strike out the answer of the witness as incompetent, irrelevant and immaterial.

Mr. Benson: Q. Did Mr. Freeman become an officer of the Central Republic Bank and Trust Company?

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial; not the best evidence; not within the issues of this case, no foundation laid.

A. To the best of my recollection, he did.

Mr. Benson: Q. Do you know what his duties were with the Central Republic Bank and Trust Company?

Mr. Royhl: Same objection.

A. I was not an officer, director or employee of that bank, but in various casual conversations with Mr. Freeman at that time—

Mr. Royhl: And for the further reason that it is self-serving and hearsay.

The Witness: (Continuing) I understood that he was working on loans of the bank where the borrower was having difficulty meeting his obligations, the time having been along in 1931.

Mr. Benson: Q. The Central Republic Bank and Trust Company came into existence about 1931?

A. That is my recollection, yes.

Q. Do you know when Mr. William C. Freeman left the Central Republic Bank and Trust Company?

Mr. Royhl: Same objection last made in full to this line of testimony.

A. I don't recall the date. I could make a rough estimate.

Mr. Benson: Q. Well, do you know where he went when he left the Central Republic Bank and Trust Company?

Mr. Royhl: Same objection last made in full.

A. Yes.

Q. Where?

A. He was assigned by several of the Chicago banks to represent those banks in finding out just what was going on in Middle West Utilities Company and to protect the interests of those banks as represented by the loans which they had to Middle West Utilities Company. That was my understanding of it at the time, as to the reason why he came over and took an office in the Middle West offices. I recall that subsequently, at the request of those banks, he was elected an officer of the Middle West Corporation.

Mr. Royhl: I move to strike out the answer of the witness for all the reasons urged in the objection itself, and for the further reason that it is not responsive.

Mr. Benson: We will resist the motion. May it be understood that we resist all motions you make in this deposition?

Mr. Royhl: I will readily concede that, for the record.

Mr. Stafford: We have the same understanding?

Mr. Benson: Correct.

Q. Mr. White, will you state whether, to the best of your recollection, there has not been offered in evidence in this case all of the preliminary drafts of the interconnection contract between Northwestern Public Service Corporation and Northern Power & Light Company, which contract is dated the 7th day of October, 1936, which preliminary drafts came to your attention, or the attention of United Public Utilities Corporation?

Will you read the question, please?

The Witness: I understood it.

Mr. Benson: Oh, you got it?

The Witness: No, I can't state specifically that all of the preliminary drafts of those contracts have been introduced.

Q. You mean of that contract, don't you?

A. Of that contract.

Q. All right. Have you been able to locate any other preliminary drafts in addition to those that have been introduced? A. No.

Q. Now will you state whether, according to the best of your information and belief, all preliminary drafts of the interchange capacity agreement dated the 1st day of January, 1938, between Northwestern Public Service Company, North Dakota Power & Light Company, and Northern Power & Light Company, which contract is Exhibit C to the complaint, and which came to your attention or to the attention of United Public Utilities Corporation, have been offered in evidence in this proceedings?

A. I have brought all of the preliminary drafts that I was able to find in my files.

Q. That is not quite the answer to my question. Are there any preliminary drafts of the interchange capacity agreement which have not been put in evidence?

A. I believe there are here some additional copies of preliminary drafts, but I also believe that they are unmarked or unedited copies of the same draft which has been introduced, with interlineations and changes.

Mr. Benson: All right. May I see the exhibits, Mr. Robinson?

Mr. Robinson: Surely. ([Handling] documents to Mr. Benson.)

Mr. Benson: Will you mark the letter one number and the attached document another number?

(Thereupon said documents were marked, respectively, Plaintiff's Exhibits 8 and 9, each for identification, of 9/29/47.)

Mr. Benson: And will you also mark these?

(Thereupon said documents were marked, respectively, Plaintiff's Exhibits 10, 11 and 12, each for identification of 9/29/47.)

Q. I show you Plaintiff's Exhibit 12 for identification and Plaintiff's Exhibit 9 for identification, and ask you whether those are all of the preliminary copies of the 1938 interchange capacity agreement between Northwestern Public Service Company, North Dakota Power & Light Company, and Northern Power & Light Company which you have been able to find in your files?

A. Yes, they are.

Q. Except for the reporter's identification marks on Plaintiff's Exhibit 12 for identification, that exhibit is in the same condition as when you received it, is it?

A. It is with the exception that on page 8, Article VIII, Section 1, line 5, the Arabic numerals 15 as originally mimeographed have been changed to 10, in blue pencil, and in the righthand margin also appears, in blue pencil, the amount $1.10, both of which are in my handwriting.

Recross Examination.

By Mr. Benson:

Q. What was the bank with which you were first associated?

A. The bank was the National Bank of the Republic, with which I became associated in July, 1922.

Q. Was Herbert L. Nichols ever a vice president of any bank with which you were associated or your security company affiliated with?

A. No. To the best of my knowledge he was never associated with a bank.

Q. He was with Sargent & Lundy for awhile?

A. Not that I know of.

Q. Now, what was the first company you say you knew he was connected with in the utility business? Did you say Community Power & Light Company? A. No.

Q. You know he was associated with that company?

A. I know that when he was in the investment banking business he had considerable to do with the formation of that company.

Q. That company went into receivership?

A. Yes, or went into reorganization of some kind.

Q. Was that company a subsidiary of the American Commonwealth Power Company? A. I cannot tell you.

Q. You don't remember the history of the American Commonwealth? A. No. I think that—

Mr. Benson: All right. Never mind.

Q. You mentioned a memorandum that you said you had had concerning your wife's securities transactions in United Utilities Corporation securities. A. Yes.

Q. That memorandum was on the desk in front of you beginning the first day you were called for examination in these proceedings? A. Yes.

Q. During the course of your examination, both by attorneys for the defendant and attorneys for the plaintiff, in answer to questions, you often produced from your files material that had not previously been called to your attention by counsel for either of the parties, isn't that right?

A. Yes.

Q. Excluding six volumes of minutes of the meeting of the United Public Utilities Corporation and the—

Mr. Stafford: He didn't produce those.

Mr. Benson: What?

Mr. Stafford: He didn't produce those volumes for us.

Mr. Benson: Q. (Continuing) —and the copy which you had of the minutes of those meetings, and the ledger of United Public Utilities Company which you produced, and the transcripts of testimony before the Securities and Exchange Commission, if you pile up the material that you say you had in this room out of your files, one folder on top of the other, about how many inches of material is there, in [heighth]?

A. I would say that including six inches occupied by the annual audit reports, which were never used or referred to, and a book on reorganization proceedings, that the aggregate [heighth], including folders and empty envelopes, is about 18 inches.

Q. In your conversation with Mr. Charles Rundall, to which you have referred here, being the one you had with Mr. Rundall, and not referring to the time Mr. Rundall and Mr. Hastings were in your office, you exhibited to Mr. Rundall no records of your corporation, did you? A. No.

Q. You just gave him a narrative story of your recollection of various events? A. That is correct.

Q. When Mr. Rundall and Mr. Hastings were in your office the only records that were submitted to them were your carbon copies of the minutes of the corporate proceedings? A. That is correct.

Q. And did you say that you requested them to not make complete and verbatim copies of the proceedings?

A. I had not previously so stated, but at that particular time I had no clear idea of what was ahead, and I had reservations in my own mind as to the corporate propriety of allowing other people to examine our minutes. Up to that time I had not consulted personal counsel about any of this, and I merely told Mr. Rundall that without knowledge as to the proprieties in that direction, while I was very glad to have him get an idea of what was in there, and take notes on those minutes, that until I could get some advice on the subject I would prefer that he do not make verbatim copies.

Q. You were absent from the hearing room when Mr. Lakin testified? A. Yes.

Q. Did Lakin ask you for this book that has been talked

about as his memorandum or booklet or folder, or did you produce it for him?

A. As I recall it, when Lakin was first asked to testify, he told me over the telephone that he was having some difficulty collecting the records and files together.

Q. Well, what I am getting at is: Did he ask you for the booklet? A. I told him that I had it.

Q. When he came to Chicago he asked you for it, was that it? Do you recall anything about what happened?

A. I cannot recall specifically that he did ask me for it. It was on my desk when he came in.

Q. Counsel made reference to a figure in Mr. Lakin's book, extracted two pages. I am referring to Defendant's Exhibits for identification 79 and 80. Counsel made reference to a figure of $284,351, on Defendant's Exhibit 80.

Mr. Stafford: And some cents.

Mr. Benson: Did you mention the cents?

Mr. Stafford: I think so.

Mr. Benson: All right, $284,351.72.

Q. Do you recall that? A. Yes.

Q. Now, when you testified concerning that figure, you were looking at Defendant's Exhibit 80 for identification, weren't you? A. Yes, I think so.

Q. Referring to Defendant's Exhibit 80 for identification, and looking particularly at the side of that sheet, on which the reporter's identification numbers appear, the figures on that sheet and the writing on that sheet are not in your handwriting, are they? A. No.

Q. The sheet, I believe you testified, is in the same condition as when you first saw it?

A. As far as I recall. I am not aware of any changes that have been made on it since it came to me.

Q. I call your attention to the initials "O. K." on that sheet. Are those initials in Mr. Lakin's handwriting?

A. I think—yes.

Q. You have seen his writing for a good many years?

A. Yes.

Q. And they were on there the first time the sheet came into your possession? A. To the best of my knowledge, yes.

Q. When you raised the coal rates to Northwestern Pub-

lic Service Company they were also raised to Dakota Public Service Company and to others to whom Knife River was selling coal, were they not? A. Yes.

Q. And when the rate was raised in the forepart of 1945, you raised the rate to all customers, didn't you?

A. Well, there had been some rate changes, but I believe part of those raises were subject to regulatory ceilings.

Q. Well, I think that is a matter of common knowledge; but you did not go to the ceiling on the price to Northwestern Public Service Company, did you?

A. I believe the point was made by Mr. Purchas in the course of those discussions, that we went above the price that was permitted under the then existing regulations, and we had considerable discussion as to the propriety of their paying such a price, and it was part of the discussion that the price of $1.25 had to be cleared with the regulatory authorities.

Q. Your intention in putting load on the [Buelah] plant was that you would put load on for the purpose of making money? A. Yes.

Q. And you stated something about a generator spinning vigorously in the Aberdeen plant, the time when you were out there? A. Yes.

Q. I wonder if you can describe what you mean by that?

A. Well, I mean that the generator was in operation.

Q. Can you tell by standing in the Aberdeen plant when the generator is running, whether it is generating a heavy load or whether it is not?

A. No, I cannot. I don't know whether it is generating a load. I can tell whether it is generating.

Q. You can tell whether it is generating? A. Yes.

Q. It always revolves at the same rate, doesn't it?

A. When it is operating I believe it does.

Q. Well, you are not sufficiently experienced in power plant operation to know whether a generator is carrying a load or not, just by looking at the generator, are you?

A. No.

Q. Nor by any other observation of the generator, nor by any of your senses? You would have to ask somebody, wouldn't you?

A. Normally, although I could go to the switchboard and look.

Q. You wouldn't be sure then that you knew what the particular generator in Aberdeen was doing, would you?

A. I might be very much at sea.

Q. Mr. Belden has been secretary of Middle West Corporation for some years prior to going to the joint office at Wilmington, Delaware, hadn't he?

A. Well, he had been an officer of that company. I do not specifically recall what it was. He had been in the Chicago office for some years.

The court received in evidence testimony offered by defendant from the Official Report of Proceedings before the Securities and Exchange Commission, Docket No. 59-38, entitled "In the Matter of United Public Utilities Corporation et al.", being a record of evidence taken at Philadelphia, Pennsylvania, on May 15, 1942, before William W. Swift and on May 16, 1942, before Richard Townsend, Trial Examiners of the Securities and Exchange Commission, which testimony together with the page references to said Official Report are as follows:

(Page 389.)

Direct Examination,

By Mr. Scheetz:

Q. Mr. Sandstedt, what is your position with the Dakota Public Service Company and Knife River Coal Mining Company? A. Vice President and treasurer.

Q. Of both companies? A. Yes, sir.

Q. How long have you been in the employ of those companies? A. Approximately 13 years.

Q. And in what capacities?

A. For the past four years I have been vice-president and treasurer. Before that I was secretary and treasurer. During the entire period of my employment with those companies I have had a general knowledge of all of the operations and I functioned in the capacity of assistant general manager.

Q. At the present time what is the scope of your duties, besides your ordinary executive duties as vice-president and treasurer?

A. Well, I generally supervise all of the operations under the president.

Q. You are also an officer of Northwestern Public Service Company, are you not?

(Page 390):

A. Yes, sir. I hold that same office with Northwestern Public Service Company, the office of vice-president and treasurer.

Mr. Davis: May the record at this time show that the Northwestern Public Service Company is not part of the United Public Utilities Corporation system but is a subsidiary in the Middle West Utilities Corporation system.

Mr. Scheetz: That is correct.

The Witness: Yes, sir, that is correct.

By Mr. Scheetz:

Q. Now, I show you Respondents' Exhibit No. 57 and ask you to explain what that is and also how it was made up, and give the mileage scale which is now applicable to the map.

A. Exhibit 57 is a one-line diagram of the combined systems of the Dakota Public Service Company and Northwestern Public Service Company.

The exhibit shows a line extending from Gettsyburg in a northeasterly direction to Frederick. The territory north of that line is the territory served by Dakota Public Service Company. The territory south of that line is the territory served by Northwestern Public Service Company.

This exhibit is a photostatic copy of a one-line diagram that has been reduced to one-half size. Therefore, the scale of miles on the exhibit is incorrect and instead of one inch to 20 miles this exhibit should be corrected

(Page 391):

to one inch to 40 miles.

Mr. Scheetz: I will offer Respondents' Exhibit No. 57.

The Examiner: All right, let it come in.

(Respondent's Exhibit No. 57 was received in evidence.)

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Vol. V
TRANSCRIPT OF RECORD

(Pages 1489 to 1984)

Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER,

vs.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 17, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

Vol. V.

Pages 1489 to 1984, Inclusive.

RECORD.

United States Court of Appeals,

EIGHTH CIRCUIT.

No. 13,887.

CIVIL.

NORTHWESTERN PUBLIC SERVICE COMPANY, A CORPORATION, APPELLANT,

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MONTANA-DAKOTA UTILITIES CO., A CORPORATION, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

FILED DECEMBER 20, 1948.

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Mr. Scheetz: Now, Mr. Examiner, having introduced that map to show the electric system of the Dakota Public Service Company, I am going to digress to present testimony on the Knife River Coal Mining Company, which operates a coal mine at Beulah, North Dakota.

By Mr. Scheetz:

Q. Mr. Sandstedt, give briefly the history of the Knife River Coal Mining Company.

A. The Knife River Coal Mining Company was organized in 1922. At approximately the same time the power plant of the Dakota Public Service Company at Beulah was constructed. It is my understanding that the then owner of the Knife River Coal Mining Company and the Dakota Public Service Company, which was then the Hughes Electric Company, entered into the coal business for the principal purpose of supplying the power plant of Dakota Public Service Company with fuel.

Mr. Davis: I think the record might well show that there were two predecessor companies to the Dakota Public Service Company.

(Page 405):

Q. Will you proceed with your description.

A. Most of the capacity, generated capacity of the Dakota Public Service Company is located at the extreme north end of the system. The only reason for locating such a high percentage of the generating capacity at Beulah was the location of the mine in relationship to the power plant, and of course, that provides a very low cost of fuel.

By reason of this joint operation the mine has been free, entirely free of labor troubles that are generally associated with the mining industry. We have a very low labor turnover at the mine. in fact, it is lower than for the electric company.

The miners receive annual vacation with pay on exactly the same basis as the electric company employees. They receive group insurance.

(Page 412):

Q. I wanted to know the answer to such a question, we will let that stand.

Consider the situation where the mine was in the hands of foreigners.

A. Well, I don't think the arrangement would be nearly as satisfactory as it is at the present time. I think the owner of the mine would have the natural incentive to charge the Beulah plant as much as the traffic would bear, and I can't see any alternative except Beulah would have to pay the freight as long as it was under the cost of delivering coal from some other location which would be Zap, and possibly you would get your coal somewhat cheaper than it could be delivered from some other location, but there would be that to consider, and I also feel that the hazards of interruption would be greatly increased.

For that particular power plant, an uninterrupted supply of coal is absolutely essential because a high per centage of the generated capacity of the entire system is installed in that power plant and we don't have adequate storage capacity to protect the power plant in case of an interruption to the coal supply for any length of time.

(Page 432):

Q. Now, turn to joint stipulation, page 100. I direct your attention to the substantial increase in energy generated at the Bismarck plant in 1941 as compared with the amount generated in 1940. Will you please explain that increase?

A. In 1941 there was installed—in 1940 there was installed in the Bismarck plant a 4,000 kw turbo-generator unit. This unit went into service in the latter part of 1940 and for that reason there has been a substantial increase in the kilowatt hour output of that plant in 1941 as compared with 1940.

Q. Did the increased use of Bismarck have any effect on the Dickinson plant?

A. In 1940, the Dickinson plant, the Dickinson internal combusion engine plant, generated 580,000 kilowatt hours. In 1941 the generation at this plant was reduced to 204,000 kilowatt hours. The Bismarck plant is a more economical unit than is the Dickinson plant, and for this reason part of the load was transferred from Dickinson to Bismarck.

Q. Now, will you state whether the data set forth on Exhibit No. 62 is accurate?

A. Yes, the data set forth on Exhibit No. 62 is accurate.

Mr. Scheetz: I offer Exhibit No. 62 as supplemental to the information appearing in joint stipulation under the caption, "Generating plant" beginning on page 99.

The Examiner: Any objection?

Mr. Davis: No objection.

The Examiner: Without objection, the description of the property just identified by the witness will now come in as Respondent's Exhibit No. 62.

(Respondent's Exhibit No. 62 received in evidence.)

By Mr. Scheetz:

Q. Now, I show you a document captioned "Dakota

(Page 434):

Public Service Company," consisting of four pages, and designated Respondent's Exhibit 63. It may be noted that this exhibit carries in the upper righthand corner a reference to the corresponding page of the joint stipulation to which the data refers, and bears on material appearing in the joint stipulation, commencing with page 100 through page 106.

The classification of data in the joint stipulation on those pages falls into the divisions:

(1) Generating plants, beginning at the foot of page 99.

(2) Production and disposition of electric power, at the top of page 102.

(3) Power generated and interchanged, beginning at the foot of page 102.

(4) Relating to the material captioned, "Electric rates," beginning at the foot of page 104 and more particularly to the ratios of expense on page 106.

Now, turning to page 100 of the joint stipulation, will you explain the material on the corresponding page of Exhibit No. 63 which relates to the 1940 data set forth in the joint stipulation?

A. The exhibit shows the 1941 next kwh generated, cost of generation and the cost in mills per kilowatt hour in comparison with the year 1940. It will be noted that

(Page 435):

approximately 8,700,000 kilowatt hours were generated. The average cost per kilowatt hour was decreased from 6.23 mills in 1940 to 5.14 mills in 1941. The installation of the new turbo-generator in the Bismarck plant made possible this increased system generation at a lower cost per kilowatt hour.

Q. Will you turn to page 101 in the joint stipulation and explain the data on the corresponding page of Exhibit 63?

A. The tabulation on page 101 of the joint stipulation shows comparative generating costs for the Beulah plant, the Beulah and Bismarck plants of Dakota Public Service Company, the Aberdeen and Mitchell plants of Northwestern Public Service Company, and the Kidder and Washburne plants of the Otter Tail Power Company.

Page 101 of Exhibit No. 63 shows the 1941 statistics in comparison with 1940. It will be noted that the generation at the Beulah station has been slightly decreased while the generation at the Bismarck station has been approximately doubled.

I also wish to call your attention to the fact that no adjustment was made for steam sold in 1940, and no figures showing the average B. T. U. per kilowatt hour.

In 1941, this is just what has been made, and the average B. T. U. per kwh output has been decreased from 51,300 in 1940

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to 23,800 in 1941. Part of this decrease is due to the increased efficiency of the Bismarck station, but a substantial portion of the decrease is due to the different bases of comparison.

Q. Is there anything more you wish to add to your comments as to page 101?

A. I might add that the 1941 figures for Northwestern Public Service Company were obtained from the company's records and the 1941 figures for the Otter Tail Power Company were obtained from the records filed with the Public Service Commission of the State of North Dakota.

Q. Now, will you turn to page 102 and make a similar explanation of the material?

A. Page 102 of the joint stipulation shows kwh generated and interchanged energy received and the disposition of that energy for the year 1940.

Page 102 of Exhibit 63 shows comparative figures for the year 1941.

It will be noted that total generation has been increased approximately 8,700,000 kilowatt hours, while interchanged energy received has been decreased approximately 600,000 kilowatt hours, making an increase in the total kilowatt

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hours to be accounted for of approximately 8,000,000 kilowatt hours.

It will also be noted that energy transferred to Northwestern Public Service Company increased from approximately 7,000,000 kilowatt hours to 11,300,000 kilowatt hours.

The reason for this increase in transferred energy is due to the increased capacity in the Bismarck generating station.

Q. Now, will you explain page 103 of Exhibit 63?

A. I believe this exhibit speaks for itself. It merely shows the interchange of energy between Northwestern Public Service Company and Dakota Public Service Company, and the cost.

It will be noted, however, that there is a change in the firm capacity charge, from $12,685 in 1940, to $4,277 in 1941. This item is covered by the firm capacity and interchange agreement between the two companies, and that difference is due partially to the increase in generating capacity in the Bismarck plant, and partly due to the difference in the peak demands of the two systems in 1941 as compared with 1940.

Mr. Scheetz: Will you mark this Exhibit 64?

By Mr. Sheetz:

Q. Addressing your attention to page 103, you will

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note in the third whole paragraph the statement that under the agreement—referring to the interchange agreement

of 1940—each company provides effective generating capacity in the same ratio to its peak annual 30-minute demand.

Am I correct in my understanding that that contract has been changed and that 1941 it would be in the ratio to the peak annual 60-minute demand?

A. That is correct, yes. That contract was revised as of July 1, 1941.

Q. Now, I show you a document captioned "Northwestern Public Service Company, Dakota Public Service Company," dated July 1, 1941, and designated Respondent's Exhibit No. 64, and ask you whether that is the contract in effect for 1941 corresponding to the contract referred to on page 103 under joint stipulation for 1940?

A. That is correct.

Q. Before I ask you to explain the operation of that contract will you turn to page 106 of Exhibit 63, and explain that data in relation to the 1940 data on page 106 of the joint stipulation?

A. On page 106 of the joint stipulation the operating ratios for the various activities are shown for Dakota Public Service Company, Northwestern Public Service Company, and Otter Tail Power Company.

Page 106 of Exhibit 63 shows the 1941 ratios of operat-

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[——].

The Examiner: That is the annual average use, is it?

The Witness: That is the annual average use, yes, sir.

The Examiner: Well, why is it so low?

The Witness: Well, that development is low in comparison with Otter Tail, but considering the type of territory we serve and the fact that we have natural gas competition in most of our territory, we think that development is fairly good, and taking those facts into consideration our development is probably just as good as Otter Tail's.

By Mr. Sheetz:

Q. Is the eastern end of North Dakota a richer farming territory than your territory?

A. The east part of the State of North Dakota—and Otter Tail's territory is in that section of the state—is located in the Red River Valley, and while they have been affected by drought during the past eight or ten years, to some extent they have not been nearly as seriously affected as the territory served by Dakota Public Service Company, which is further west.

Q. Will you refer again to Exhibit 63 and state whether the information set forth in that exhibit is accurate, subject to the right of Commission counsel to verify data taken for the Otter Tail Power Company?

A. The 1941 figures on this statement were prepared by me personally, and to the best of my knowledge and belief

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they are correct. For Dakota Public Service Company and Northwestern Public Service Company these figures were taken from the company's records, and for Otter Tail Power Company these figures were taken from records on file with the Public Service Commission of North Dakota.

Mr. Scheetz: I offer therefore supplemental to the Joint Stipulation Exhibit No. 63, subject to the right of verification already mentioned, and also the respondents' Exhibit No. 64.

The Examiner: Any objection?

Mr. Davis: No objection.

The Examiner: The four sheets heretofore identified as Respondents' Exhibit 63 will now come in as Respondents' Exhibit No. 63 and the copy of the interchange agreement will come in as 64.

(Respondents' Exhibits 63 and 64 received in evidence.)

By Mr. Scheetz:

Q. Now, will you describe the operation of the electric system of the Dakota Company, and the Northwestern Company in combination under the contract introduced as Exhibit No. 64?

The Examiner: What is the difference, first, between the 30-minute peak and the 60-minute peak? When does the

30-minute peak occur. When did it [accur] for the year 1941,

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and when did the 60-minute peak occur?

The Witness: The reason for the change, Mr. Examiner, was due to the fact that we could not accurately determine the 30-minute peak for the two systems, and it was necessary to locate employees at various points of interchange and we had to guess as to the day and the hour when that peak might occur, and as a result we often missed the boat. However, in our power plants, we do measure the 60-minute peaks, and it is a matter of record on our log sheets, and as long as the characteristics of the two systems are the same, the same type of territory and approximately the same kind of town, it was considered fair to both companies to change to the 60-minute basis.

The Examiner: Does the 60-minute peak occur on the same day for both companies?

The Witness: We didn't try to determine the date that the 30-minute peak occurred last year; however, the 60-minute peak occurred on December 15 between the hours of five and six p. m., and that became the basis of billing under this contract for the year 1942.

The Examiner: And December 15, the peak was on the system at the same time, between 5 and 6 p. m.?

The Witness: No, that December 15 date was the peak hour—strike that, please.

On December 15, between 5 and 6 p. m., the peak for the

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combined systems.

The Examiner: The joint systems?

The Witness: The joint systems.

The Examiner: The system peak?

The Witness: The system peak.

The Examiner: You don't have any diversity of any magnitude between the two systems?

The Witness: Well, there probably is some diversity, yes, because the diversity between the two systems is one of the things that makes it economical and feasible to operate the systems, the two systems as a joint system, but for the purpose of billing under the contract, I don't think diversity would be any factor.

By Mr. Scheetz:

Q. Has this agreement, Exhibit No. 64, been filed with the Federal Power Commission?

A. Yes, that agreement was filed with the Federal Power Commission, and it has been approved by the Commission as a rate schedule.

Q. Will you proceed to describe the operations?

A. The systems of Dakota and Northwestern are connected at three points. They have been operated as an interconnected system since 1930. The interconnection facilities consist of a line from Highmore to Gettysburg, approximately 62 miles, 38 kv line from Aberdeen to

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Ipswich, a distance of approximately 28½ miles, a 38 kv line from Aberdeen to Barnard, a distance of 20 miles, with substations and switching facilities at Aberdeen and substation and switching facilities at Gettysburg.

The total investment in these facilities was approximately $303,000, and the entire investment was made by Northwestern Public Service Company. Under the agreement it was assumed that one-half of that investment, or $151,724, is chargeable to Dakota, and the contract provides that Dakota will pay Northwestern $20,000 a year and that is payable on a monthly basis, $1,666.66 per month starting January 1, 1936.

Prior to January 1, 1936 there was no written agreement in effect, and therefore this charge started as of that date. This monthly payment of $20,000 covers—I mean this annual payment of $20,000 covers maintenance, operation and taxes at the rate of 3½ per cent of Dakota's portion of the investment, and also interest at the rate of 5 per cent. The balance of the $20,000 under the present contract applies against the amortization of the principal, and on this basis the entire principal will be amortized in July 1950.

After that date, the monthly charge will be reduced to $442.53 which covers one-half of the operation, maintenance and tax item. I might add at this point that the

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contract that was in effect prior to July 1, 1941, provided the same annual charge of $20,000, but there wasn't any termination date provided and no portion of that item applied against the amortization of the principal.

We feel that this agreement is advantageous to both companies.

The Examiner: You are speaking for both companies, are you, I mean you are vice president of both?

The Witness: I am vice president of both companies, yes.

Mr. Davis: Mr. Examiner, it was pointed out this morning before you came that these two companies are not associated companies, and this gentleman is vice president of both companies.

The Examiner: They don't have a common parent then?

The Witness: No, Northwestern Public Service Company is a subsidiary of Middle West Utilities, and Dakota Public Service Company is a subsidiary of United Public Utilities Corporation.

Mr. Davis: Could you have arms' length bargaining under those circumstances?

Mr. Scheetz: I will ask him all those questions in due course, Mr. Davis. He is now describing the operations.

The Witness: We feel that this agreement, and this method of operation is advantageous to both companies. The Dakota Company has a power plant at the mouth of the

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mine which is owned by Knife River Coal Mining Company, and for that reason fuel costs are comparatively low. On the other hand, Northwestern Public Service Company's fuel costs are quite high. This interconnection

makes it possible for the Dakota Company to operate that plant at a high capacity, or a high load factor. It is normally operated at approximately 85 per cent of its capacity on an annual basis.

The fuel costs at the Beulah station are approximately 2.2 mills per kilowatt hour, and this energy is sold to Northwestern at 5 mills per kilowatt hour. There is considerable profit in that transaction to the Dakota Company and the 5 mill rate makes it practicable and profitable for the Northwestern Company to buy that energy.

I might add that the flow of energy from Dakota to Northwestern is on an off-peak basis. I mean by that that during off-peak hours this Beulah station is operated at a high load factor and the energy is transferred to Northwestern.

Mr. Davis: Not firm power?

The Witness: No, that is dump power. On the other hand, Dakota has very little reserve capacity, and during peak periods, the movement of energy is from Northwestern into Dakota; however, the rate is still 5 mills per kilowatt hour.

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Mr. Davis: In other words you buy firm power from Northwestern, Northwestern only buys dump power from Dakota.

The Witness: Well, the combined systems are operated as a single system, and the generation is at the most economical plant regardless of ownership. This 5 mill rate was adopted after a careful study as a means of allocating the savings to both of the companies and in times of emergency the flow of energy might be from Dakota to Northwestern, but it is normally the other way, from Northwestern to Dakota during peak periods, but the contract doesn't provide—it just provides a single rate, whether it is firm power or dump power.

Ordinarily the energy transferred from Dakota to Northwestern we consider dump power, and the energy transferred from Northwestern to Dakota would be considered firm power because it is usually over the peak.

The Examiner: The power that Northwestern generates and that you buy, do they get their increment cost of that?

The Witness: Yes, they get considerably more than their increment cost out of that power. The increment cost would be approximately the fuel cost, or 2.2 mills per kilowatt hour. Of course, there would be the line losses to consider, but even after taking those line losses into consideration they would not.

The Examiner: (Interrupting) The Northwestern fuel

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costs are as low as 2.2?

The Witness: The fuel costs in Dakota's Beulah plant are 2.2 mills per kilowatt hour.

The Examiner: And what were the fuel costs of Northwestern?

The Witness: Well, they will vary by plants. The fuel costs would be approximately 6 mills per kilowatt hour.

By Mr. Scheetz:

Q. Mr. Sandstedt, this contract is also a capacity contract, as I understand it, and I wish you would elaborate on the feature of pooling of reserves afforded by the contract. A. I will do that.

In addition to providing an interchange of energy between the two companies, this contract also provides for pooling the generating capacity. By reason of this arrangement, less reserve capacity is required for the combined system than would be the case if each of the companies were operated independently and they pro ded their own reserves.

I might explain that by stating that it is normally assumed that a company requires reserve capacity equivalent to the largest unit. In other words, if the largest unit on the system is out of service, provision must be made to take care of operations during that period.

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Dakota Public Service Company have 13,955 kilowatts of effective capacity. Their system peak for the year 1941

was 12,850 kilowatts. Their largest unit is a 3,500 kilowatt generating unit in the Beulah plant, so it can be seen that if it was not for this interchange agreement Dakota would not have sufficient reserve capacity to carry the system in the event of emergency.

Another big advantage to Dakota is due to the fact that most of Dakota's generating capacity is located at the extreme north end of their system. The points of interconnection with Northwestern Public Service Company are at the extreme south end of their system.

The Examiner: A distance of how far, would you say?

The Witness: The distance from Beulah to Aberdeen is approximately 280 miles.

Now, if Dakota Public Service Company operated independently it would be necessary for them to install some generating capacity in the south end of their system, and of course, by doing that their generating costs would be substantially increased because that is a considerable distance from any fuel supply.

By Mr. Scheetz:

Q. Mr. Sandstedt, were not you in error when you said that the largest unit of the Dakota system was 3,500?

A. I was in error. The largest unit is a 4,000 kw

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unit at Bismarck. That is a new unit that was just installed last year.

The largest unit on Northwestern's system is a 5,000 kilowatt unit, and if Northwestern did not have an interchange agreement it would be necessary for them to carry at least that much reserve capacity and possibly more.

By Mr. Davis:

Q. You mean the difference, that is, 1,000?

Mr. Scheetz: No.

The Witness: No. You would have to provide enough reserve to carry the system in case the largest unit of 5,000 kw was out of service, so you would have to provide a minimum of 5,000 kilowatts of reserve capacity.

However, by operating the two systems as a single interconnected system, the 5,000 kilowatt reserve would take care of both systems. If they were operated independently on that basis, 9,000 kilowatts would be required.

By Mr. Scheetz:

Q. Mr. Sandstedt, can you translate that into the cost per kilowatt of installed capacity?

Mr. Davis: You mean the necessary reserve?

Mr. Scheetz: No; the additional investment necessary to carry that reserve capacity.

The Witness: Well, if Dakota were operated independently, a minimum additional capacity of 3,000 kilowatts

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would be required.

Mr. Davis: How many?

The Witness: A minimum of 3,000, and that additional capacity would have to be located at the south end of the system. The investment would probably be in the neighborhood of $150 to $170 per kilowatt. I would estimate the investment to be approximately $500,000.

Mr. Scheetz: Mr. Reporter, will you please mark these Exhibits 65 and 66.

(The documents referred to were marked as Respondents' Exhibits 65 and 66 for identification.)

By Mr. Scheetz:

Q. Mr. Sandstedt, briefly, what is your basis for the estimate you just gave? Have you had any recent experience with that very question?

A. Well, yes. We recently installed a 4,000 kilowatt unit with boiler equipment in Bismarck. The installation cost was something in excess of $150 per kilowatt. Our average for the entire system is in excess of $150 per kilowatt.

By Mr. Davis:

Q. Who installed that for you?

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A. Sargent & Lundy, of Chicago.

By Mr. Scheetz:

Q. In your opinion, would that additional investment on the Dakota system be able to earn a return, and if so, what would be your estimate?

A. No, sir. In my opinion, the return would be less than it is at the present time for the reason that regardless of the efficiency of that unit the costs would not compare with the present costs at the Beulah plant, and in order to protect service it would be necessary to generate a considerable proportion of the energy in that plant that is now generated in the Beulah plant.

Q. I show you an exhibit captioned, "Dakota Company, hourly generation by plants and hourly flow of power between Dakota Company and Northwestern Company on a typical day in 1941", designated Exhibit No. 65. and also a graph captioned, "Annual production costs, net kwh output, Dakota Public Service Company", designated Exhibit No. 66.

Will you take those two exhibits and explain what they are and make such comments as you have to make?

A. Exhibit No. 65 was prepared from our log sheets to show the movement of energy between the Dakota Company and Northwestern on a typical day.

On the day in question, 30,900 kilowatt hours were transferred from Dakota to Northwestern and 700 kilowatt

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hours were transferred from Northwestern to Dakota.

The flow varied from 2,300 kilowatt hours, from 2:00 to 3:00 p. m., from Dakota to Northwestern, to 200 kilowatt hours from Northwestern to Dakota between the hours of 5:00 and 6:00.

Mr. Scheetz: I offer Respondents' Exhibit No. 65.

The Examiner: Any objection?

Mr. Davis: No objection.

The Examiner: The tabulation for the typical day will come in as Respondents' Exhibit 65.

(Respondents' Exhibit 65 was received in evidence).

Mr. Davis: May I ask a couple of questions here, or would you rather wait until we are finished?

Mr. Scheetz: Well, I guess we are almost through with this part of it. However, if you have got something you want to ask on this, go ahead.

Mr. Davis Yes, I have a question or two on this Exhibit 65.

By Mr. Davis:

Q. This Exhibit 65, if I understand it correctly, would indicate that for only three hours on this typical day did the Dakota system receive energy from the Northwestern sy m is that right?

A. Yes, sir, that is correct.

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Q. When you say "a typical day in 1941," does that mean typical throughout the year?

A. Well, we tried to pick a day when conditions were normal. There wasn't any equipment out of service on either system, and there weren't any lines out of service.

Q. Would you say this represents a flow chart that would be fair to both companies?

A. Yes, that was our intention to, in making up that chart, pick a day when no unusual conditions existed.

Q. And if I understand this flow chart correctly, it would seem to me that if anything, the Northwestern system is relying on you much more than you are relying on them for power?

The Examiner: Let's get that. What was your highest intake from Northwestern on any day in 1941?

Mr. Davis: He hasn't got it on any day. He says this is a typical normal day, and he has got it here that three hundred was the highest at any particular hour, 300 kilowatts, so if you look at this typical day flow chart, it would seem that whereas Dakota sends into the North-

western system 2,300 kilowatts as a maximum for any one day—

The Witness: One hour.

Mr. Davis: One hour, the maximum of any one hour you receive from Northwestern is only 300 kilowatts.

The Witness: That is true. As I previously

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stated, we operate both systems as a single integrated system, and the most efficient power plants are operated that way. Dakota Public Service Company does have a deficiency in generating capacity.

Mr. Davis: But you go on with that. Let's look at this contract which is Exhibit No. 64. Now, some place in here you provide for this capacity charge where Dakota is paying Northwestern a capacity charge of a certain figure for firm power.

For the year 1942, that charge will be $17,199.70.

The Witness: That is correct.

Mr. Davis: All right. In the year 1941, it was $12,685.

The Witness: I believe that is correct, yes.

Mr. Davis: All right. And yet it seems from your flow charts that the advantage of anything is all with Northwestern Public Service.

The Witness: I don't see how you—

Mr. Davis: (Interrupting) They rely on you for much more power—I can't use the word "you" because he is sitting on both sides of the table when he buys and sells power.

Now, isn't the advantage all with the Northwestern system in so far as this interchange contract is concerned, when Dakota agrees to pay Northwestern a firm charge and yet

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your flow chart indicates, if anything, Northwestern relies more strongly on Dakota than Dakota relies on Northwestern?

The Witness: That is not true. You have drawn an entirely wrong conclusion from that chart. If you will notice that the flow of energy during off-peak periods, the flow was from Dakota to Northwestern, while during the peak periods of the day the flow was from Northwestern to Dakota; in other words, Northwestern Public Service Company carried part of Dakota's peak on that typical day.

Mr. Davis: Let's look at the chart for a minute.

Mr. Scheetz: Let him [furnish] the answer. He can not answer that question in a minute. He has answered it already in his direct examination, and he will answer it again.

The Witness: This contract provides that the two systems will pool their generating capacity and the company with the deficiency of generating equipment will pay the company with an excess of generating equipment a firm capacity charge of $13.20 a year per kilowatt.

For the year 1941 Dakota Public Service Company had a deficiency of 1,303 kilowatts and paid Northwestern a charge of $17,199.60, but that charge has nothing whatever to do with the energy charge of 5 mills per kilowatt hour.

As I stated two or three times, the two systems are operated as a single system, and it is economical for

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Northwestern Public Service Company to buy energy from Dakota at 5 mills per kilowatt hour and it is economical for Dakota to sell energy to Northwestern for 5 mills per kilowatt hour; in other words, on that basis there is a profit to both parties; however, it isn't economical for Northwestern to sell energy to Dakota for 5 mills because their fuel costs are more than 5 mills.

Mr. Davis: Neverthless, doesn't the contract provide for some adjustments in the light of experience, the experience record of interchange regardless of the demand available if the two systems are operated as one system, and if you are attempting to work out a very equitable basis for your interchange agreement, there should be some basis for adjustment on the experience records?

The Witness: We never thought it was necessary to make any adjustment on an experience basis for this reason: In order to operate under this contract it is necessary to have free interchange of energy. Northwestern Public Service Company can't take energy from Dakota if the cost was more than their fuel cost in their own plants.

Mr. Davis: You have already told us that the two systems were operated as one, that that had been your basic premise.

The Witness: That's right, as far as these power plants and transmissions lines are concerned.

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Mr. Davis: Let us assume that the two systems were owned by one company. There wouldn't be any provision for a demand charge between the divisions, would there?

The Witness: It wouldn't be necessary if it was owned by one company.

Mr. Davis: All right, if they are operated by one division, why should there be any difference? Why should there be any difference?

The Witness: That happens to be two corporations.

Mr. Scheetz: Wait a minute.

Mr. Davis: Let me ask one more question. I wish you wouldn't interrupt me. I want to get something down in the record. You said you were finished with this phase of it. Mr. Examiner, I submit it is my privilege to cross examine at this point.

Mr. Scheetz: Mr. Examiner, first of all, this is still direct examination and it is true I have invited Mr. Davis to ask questions as he will. The reason I want to object to this question, or at least I want to hear it, is because I think it makes an assumption which is not appropriate to the facts.

The Examiner: Let him start over again.

Mr. Davis: Who negotiated this contract, Exhibit No. 64?

The Witness: This contract was negotiated by

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Northwestern Public Service Company and Dakota Public Service Company.

Mr. Davis: All right, let's get down to parties—who were the people negotiating?

The Witness: However, before this contract was signed, it was submitted to the directors of United Public Utilities Corporation and the directors of Middle West Utilities Company.

Mr. Davis: All right, I am still asking you, who were the persons, the principal living persons who negotiated the contract. I see it is signed by Mr. Sanborn as president of Northwestern Public Service Company and yourself as vice president.

The Witness: That is correct. It would be necessary for officers of a company to sign such contract.

Mr. Davis: Of course. Will you tell me, then, the same two men, the living persons who negotiated the contract?

The Witness: Mr. Sanborn and myself, of course were involved in the negotiation of this contract.

Mr. Davis: What do you mean "involved"? Actually you two men negotiated the contract between yourselves?

The Witness: That was a matter of negotiation between ourselves and between the officers and directors of the Middle West Utility Company representing the stockholders of that company, and between the officers and directors of

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the United Public Utilities Corporation representing that company.

Mr. Davis: All right. Now, who were the attorneys that drafted the contract, attorneys for Middle West Service Company, weren't they? They are your common service company?

The Examiner: Wait just a minute now. You have given him a question.

Mr. Scheetz: You are so eager to prove they have got a common directorship. I would like to make a statement at this point.

The Examiner: Just a minute. There are two questions to the witness. Let the witness answer them.

Mr. Scheetz: I plan to cover this whole subject when we get to it.

The Examiner: We are in it now, I guess. Would you like to have those two questions, Mr. Witness?

(The question was read.)

The Witness: Well, the contract was drawn up in rough form by Mr. Sanborn and myself. After several discussions with Mr. White, the president of United Public Utilities Corporation, and Mr. Buell of Middle West Service Company was also in the negotiations of this contract.

Mr. Davis: Who?

The Witness: Mr. Buell.

Mr. Davis: Who is he?

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The Witness: The engineer with the Middle West Service Company.

Mr. Davis: Service Company?

The Witness: Yes. And the contract as to legal form was checked first by our company attorneys, and I believe it was checked by the legal department of the Middle West Service Company representing the Middle West Utilities Corporation, and I believe it was also checked, I know it was checked by Mr. White, and I believe it was checked by Mr. Scheetz.

Mr. Scheetz: That is entirely correct.

Mr. Davis: Has the Federal Power Commission a proceeding pending regarding the question of interlocking relations between the two companies?

The Witness: Not that I am aware of, no.

Mr. Davis: Have you received any information which would put you on notice that an inquiry on that score is being made?

The Witness: No, sir, I haven't seen any information to that effect.

Mr. Davis: Has the Federal Power Commission ever questioned the arrangement of interlocking officers between the two companies?

The Witness: They have never questioned me, no.

Mr. Davis: Have they ever questioned anyone to your

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knowledge in the two systems?

The Witness: Not to my knowledge.

The Examiner: Will you tell the Examiner why this was not a direct interchange of power on an increment cost, or on a savings of increment cost of the two companies?

The Witness: Well, that is the basis of the contract, on the basis of savings to the two companies. That 5 mill rate was not grabbed out of the air. That 5 mill rate was adopted after a careful study.

The Examiner: You told us about the increment cost at Beulah, the fuel cost, 2.2 mills.

The Witness: Yes.

The Examiner: What was the increment cost of power generated by the Northwestern?

The Witness: About 6 mills.

The Examiner: About 6 mills?

The Witness: Yes. It is economically feasible for Northwestern to buy power at 5 mills rather than generate at a fuel cost of 6 mills.

The Examiner: Exactly.

The Witness: And it is economically feasible for Dakota Public Service Company to sell power to Northwestern for

5 mills that they generate at 2.2 mills. There is a profit for both companies, and the whole purpose of this contract was to distribute the benefits on an equitable

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basis.

The Examiner: For instance.

The Witness: They used their best judgment in drawing the contract on that basis.

The Examiner: Are you familiar with the Ring interchange agreement?

The Witness: No, sir, I am not.

The Examiner: That was on a straight increment cost. Would not an interchange agreement based on straight increment cost rather than on any demand charge or capacity such as you have in this contract be fair for both companies?

The Witness: Well, we do not think so because as far as capacity is concerned it is necessary to install capacity in quite large blocks. At times the system might be in balance and at other times one company will have more capacity than the other company, and the whole purpose of this contract was to make a savings for the two companies and the contract was drawn on the basis of allocating that savings on an equitable basis between the two companies.

The Examiner: I cannot quite follow you, inasmuch as you have testified there was no diversity between the two companies.

The Witness: I did not testify there was no diversity. I said there was a diversity between the two companies.

The Examiner: Well, I did not understand.

The Witness: And that was one of the reasons that made it feasible and practical to operate the two systems as a joint system, in order to take full advantage of that diversity.

However, I cannot see that the diversity has any effect on either the capacity charge or the energy charge under

the contract because both companies will benefit by utilizing that diversity factor.

The Examiner: Now will you state for the record just why you think a capacity charge is fair and reasonable to both companies.

The Witness: Well, I would be glad to do that. I think the easiest and clearest way to state that is to give our 1941 figures, which will be the basis of billing in the year 1942.

The installed generating capacity at December 31—and this is effective capacity—for Northwestern Public Service Company was 20,290 kilowatts. For the Dakota Company it was 13,955 kilowatts. The total for the system was 34,245 kilowatts.

The maximum demand for the year 1941 was 15,990 kilowatts for Northwestern, and 12,850 kilowatts for Dakota. The combined demand was 28,840 kilowatts. The difference

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between the demand and the installed capacity is the reserve of each system. Northwestern had 4,300 kilowatts reserve; Dakota had 1,105 kilowatts reserve. The combined reserve for the two systems was 5,405 kilowatts. That reserve is 18.741 per cent.

Now, the assumption is that if the combined systems need that reserve of 18.74 per cent, that each company should provide their proportion of that reserve. Northwestern Public Service Company had a reserve of 26.89 per cent. In other words, they had quite a high reserve. The Dakota Company had a reserve of 8.6 per cent. The required reserve for Northwestern would be 18.74 per cent, which is the actual reserve for the system. On that basis, Northwestern [have] an excess of 1,303 kilowatts. They have provided 1,303 kilowatts more than their share of the reserve.

Well, if Northwestern provides 1,303 kilowatts more than their share, Dakota would have a deficiency of 1,303 kilowatts. Therefore, Dakota pays Northwestern a firm capacity charge of $13.20 per kilowatt per year, which is our estimate of the carrying charges.

The Examiner: You mean $10 a year per kilowatt; is that it?

The Witness: $13.20 per year per kilowatt of reserve.

(Page 467):

The Examiner: I see.

The Witness: That happens to be the situation at this time.

However, if Dakota installed more capacity or, on the other hand, if their peak demand decreased, their picture would change. The contract provides that that charge be changed each year and it be based on actual conditions existing. In other words, it is based on the installed capacity and the demand of each system.

Does that explain it satisfactorily?

By Mr. Davis:

Q. But still and all, the contract does not provide for any adjustment for actual use by each system, actual delivery of power by each system?

A. Yes, at the rate of 5 mills per kilowatt hour. The system that delivers energy to the other system receives 5 mills per kilowatt hour for that energy, but that is entirely separate from the firm capacity charge.

Q. For the year 1941 I observe that Dakota delivered 11,314,400 kwh to the Northwestern system?

A. That is true.

Q. While Dakota received only 1,380,684 kilowatts from the Northwestern system?

A. Yes. We try to operate the Beulah station at maximum capacity because it is profitable for Dakota to

(Page 468):

generate the maximum in that station and to transfer any excess over their own requirements to Northwestern Public Service Company at 5 mills per kilowatt hour. That is a profitable arrangement for Dakota.

Q. Was not any consideration given to adjusting that capacity or demand charge in the light of the experience record as to the amount of energy delivered or received?

A. Well, the amount of kilowatt hours received has nothing to do with the reserve capacity requirements of

each party. The energy transferred is an entirely different proposition.

Q. Is that open to question or is that a very settled scientific principal?

The Witness: I do not think I would attempt to answer that question.

By Mr. Davis:

Q. Well, when you enter into a contract of this kind you must have some idea as to what is done in other similar situations throughout the country or throughout the industry?

(Page 469):

A. We are familiar with some power contracts, but I think in operating under a contract of this kind and under this kind of arrangement there are so many problems that are not common to any other contract or any other system—

Q. (Interposing) Well, power pools are a common thing throughout the country, are they not?

A. That is probably true, and the power pools that you have in mind are probably cases between larger companies or companies with approximately the same power costs. Here, however, is a case where the cost of generation is entirely different. Dakota has lower power costs; Northwestern was high costs, and this contract was designed to operate the combined systems at the maximum efficiency and to allocate any savings in that kind of operation equitably between the two parties.

The Examiner: Let me ask you there: Do you have one load dispatcher?

The Witness: We have two load dispatchers.

The Examiner: You mean each company has a load dispatcher?

The Witness: No, sir. There is one load dispatcher; that is, there is a common load dispatcher for both systems who takes care of the combined system.

The Examiner: Is there one fellow that says, Beulah is going to shut down now and tells somebody down at—

(Page 470):

Mr. Davis: (Interposing) Aberdeen.

The Examiner: (Continuing) Aberdeen to come in?

The Witness: Yes, sir.

The Examiner: And who is that man?

The Witness: Well, he is a joint employee.

The Examiner: Paid by both companies?

The Witness: Yes, he is paid by both companies.

The Examiner: And where is he located?

The Witness: He is located at Aberdeen, which is the point of interchange. He does the dispatching for the entire system.

The Examiner: He is the man who can say, "Aberdeen come in and Beulah shut down"?

The Witness: Yes, sir.

The Examiner: And does he figure the increment costs at all?

The Witness: No, sir.

The Examiner: He does not do that?

The Witness: No.

The Examiner: In other words, he is bound by the contract?

The Witness: He is bound by the contract, although he is familiar with the contract and he is familiar with the operating costs of each power plant and he is instructed to operate the most efficient power plants regardless of

(Page 471):

ownership, taking into consideration protection to service. Sometimes it is necessary to operate inefficient plants in order to protect the service, but the load dispatcher usually will operate the most efficient power plants and operate them at maximum capacity regardless of ownership.

By Mr. Davis:

Q. How much salary are you paid by Northwestern Public Service Company?

A. Well, that depends on the gross revenues. My salary is allocated on the basis of gross revenue and that would fluctuate depending on the company's gross revenues.

Q. What percentage of your salary is received from Northwestern Public Service Company?

A. Well, I can give it to you for last year.

Q. All right, and similarly the percentage received from the Dakota Public Service Company.

The Examiner: Do you object?

Mr. Scheetz: Yes, sir.

The Examiner: I will sustain the objection.

Mr. Davis: Do I have an opportunity to be heard?

The Examiner: You will have plenty of opportunity to cross examine the witness, but not to be heard on this point.

All right, proceed, Mr. Scheetz:

(Page 472):

Mr. Scheetz: I think Exhibit 65 had been received.

The Examiner: Yes, Exhibits 65 and 66 were received in evidence.

The Examiner: Very well.

By Mr. Scheetz:

Q. Now, Mr. Sandstedt, will you explain Exhibit 66?

A. Exhibit 66 is a chart showing the kilowatt hours generated, the total production costs, fuel costs, power plant labor costs, power plant maintenance, and miscellaneous power plant expenses for the Dakota Company for the period 1931 to 1941, inclusive.

That chart shows that the generation of that plant has increased from approximately 30,000,000 kilowatt hours in 1931 to 60,000,000 kilowatt hours in 1941. The total production cost per kilowatt hour has decreased from approximately 8 mills to approximately 5 mills per kilowatt hour in 1931 to 1941. Fuel costs have decreased from 4½ mills to 3.8 mills during this period.

One of the principal reasons for the decrease in cost of power for the Dakota Company is the operation under this joint agreement. In other words, the Beulah plant operates at a high percentage of its capacity and is a low cost plant and that reduces the system power costs substantially.

(Page 473):

The interconnection with Northwestern Public Service Company at the south end of Dakota's system makes it unnecessary for Dakota to operate inefficient and high cost equipment, except in emergencies.

Of course, if you have a sleet storm you will operate any of your equipment, but if it was not for this interconnection the Dakota Company would have to operate some of their higher cost equipment a greater percentage of time and their total power costs would be increased by reason of that.

Q. Are you able to vouch for the accuracy of the data set forth on Exhibit 66? A. I am, yes

Mr. Scheetz: I offer Respondents' Exhibit No. 66.

The Examiner: Any objection? (No response.)

Without objection, the chart will now come in as Respondent's Exhibit No. 66.

(Respondents' Exhibit No. 66 was received in evidence).

By Mr. Scheetz:

Q. Mr. Sandstedt, will you turn to page 107 of the Joint Stipulation and address your attention to the material captioned "Steam heating". The Dakota Company is in the business of furnishing steam heating to customers in that territory?

(Page 475):

Mr. Scheetz: Mr. Davis and I have gotten along very well as long as we have kept our examination to the topic under consideration, but he is a little over anxious on this question of interlocking arrangements.

The Examiner: I take it that the new Examiner coming in has not caused all the strife?

Mr. Scheetz: No, I do not think so, but we have not had the same over-anxiousness in the previous testimony.

Mr. Davis: The occasion has not presented itself.

The Examiner: Supposing you go ahead and cross-examine him with reference to power, Mr. Davis.

Mr. Davis: All right.

By Mr. Davis:

Q. Now, earlier in your direct testimony you mentioned something about a contract providing for the payment of $202,000 a year. What was that in regard to, again, to refresh my memory?

A. Well, that is the contract that is on file as an exhibit. What is the exhibit number of that?

Mr. Appel: 64.

By Mr. Davis:

Q. Oh, yes, it concerns this line [what] was built between Gettysburg and—what is the other end of that line?

(Page 476):

A. Highmore. That is covered under Article 5, Section 3, of the agreement.

Q. All right.

Now, I believe you testified that Northwestern Public Service Company constructed the line.

A. That is true, the line and all of the interconnection facilities.

Q. When you say they constructed, you mean they paid for the construction?

A. They paid the cost of all of the interconnection facilities. That line was constructed back in 1931.

Q. All right.

Now, what is the basis, again, for the payment by Dakota for the use of those facilities?

A. Well, Dakota paid Northwestern $20,000 a year. The basis of that is 5 per cent interest on the unpaid portion of Dakota's share of the investment—

Q. (Interposing) What was the total investment, first?

A. $303,449.26.

Q. All right. Will you go on from there, Mr. Sandstedt?

A. Well, it was assumed that Dakota's portion of that investment was $151,724.63.

Q. You mean exactly 50 per cent?

(Page 477):

A. Exactly 50 per cent.

Q. Why was it computed to be exactly 50 per cent?

A. Well, it was assumed that the benefits to the two companies were equal and both companies should pay their proportionate share of the cost of the interchange facilities.

Q. Regardless of which company receives more power from the other?

A. Well, that does not have anything to do with it, I do not think, as far as the number of kilowatt hours received from one company to another is concerned.

This contract, as I previously stated a number of times, was to provide an efficient and economical operating arrangement for both companies.

Q. So the whole thing could operate as one system?

A. From a power pool standpoint, yes.

Q. All right. So the Dakota Company is to share the cost 50-50? A. Yes.

Q. All right.

Now let us hear what the $20,000 a year is for.

A. The $20,000 a year that Dakota pays Northwestern includes maintenance, operation, and taxes, on that line and that is computed at the rate of 3-1/2 per cent per annum and interest at 5 per cent per annum. That interest is computed on the unpaid balance, and that was worked out on

(Page 478):

amortization basis. The balance of the $20,000 that is not required for interest, maintenance, operation, and taxes, goes against the amortization of the investment, and in working that out on an amortization basis the investment is decreased each month; therefore the amount of the interest is decreased each month and that investment is completely amortized in July, 1950. Thereafter, the Dakota Company will pay Northwestern only the operation, maintenance, and tax, charges.

Q. The 3-1/2 per cent? A. The 3-1/2 per cent.

(Page 479):

Q. Three and a half per cent computed on half of the total investment, $150,000? A. Yes.

Q. Now, then, about operating expenses. Did the Northwestern Public Service pay all the operating expenses on the line?

A. Yes, sir, that is correct. Northwestern Public Service Company paid all operating expenses, taxes, and takes care of all maintenance costs.

Q. Has there ever been an attempt to compute how close that three and a half per cent comes to the actual expenses for those various items I have mentioned, maintenance, taxes, and so forth?

A. That three and a half per cent was based on our actual operating expense. It was not subject to revision in the contract at the time that charge was fixed. It approximated the actual operating expenses for this kind of investment on a mileage basis, and considering the amount of the investment on the sub-station; in other words, a study was made at that time to determine the approximate operating cost.

Q. I would like you still to answer my question—has any attempt ever been made since the date the contract was entered into to find out how close the three and a half per cent charge is to the actual cost by the Northwestern

(Page 480):

Public Service of maintaining that line.

A. I don't recall that this study had been made, although it might have been.

Q. You never thought of attempting to make it?

Mr. Scheetz: This contract was dated July 1, 1941, and the year hasn't run yet.

Mr. Davis: The same contract has been in effect since 1930 or '31?

The Witness: No, the original contract, up until last year, the contract did not provide amortization of the investment. It merely provided a flat $20,000 per year charge to cover fixed charges, operating expenses, taxes, and all items, but in negotiating this new contract it was con-

sidered equitable to amortize that investment. In other words, instead of letting it run forever, to amortize it on some sort of a basis, and this new contract was—that basis was made retroactive to the date of the original contract which was January 1, 1936, and I might add right there that prior to January 1, 1936, Dakota Public Service Company did not pay any of the cost, interest, operating charges, or anything else on this line.

By Mr. Davis:

Q. Well, what was the date the line went into operation? A. 1930.

(Page 481):

Q. Well, between 1930 and 1936, Dakota Public Service Company had a free ride? A. That is right.

Q. How come Northwestern was so magnanimous with their facilities?

A. Well, Northwestern Public Service Company entered into this thing under the assumption a contract would be negotiated, and in those days there wasn't as much thought paid to matters of that kind as now is the case.

Q. As a matter of fact, the two companies were in the same system at that time which probably explains the reason for it, both had a common parent at the time, didn't they?

A. I don't recall whether the control of United Public Utilities was at that time in—

Q. You know it was under United Public Service Company, which was a subsidiary of Middle West Utilities, don't you? A. Yes, that is probably true.

Q. So the contract of 1936 was entered into after the receivership of the old United Public Utilities Company, and the reorganization which followed in 1936?

A. That is true, yes. For a period there both companies, Middle West and United Public Utilities were in receivership.

Q. Do you know specifically how much of the $20,000

(Page 482):

per year applies to amortization?

A. Well, that changes each month.

Q. All right, how much does it start out to be?

A. I don't recall. That was worked out on an amortization statement, and I do not have that paper with me.

Q. You didn't start from 1930, though?

A. No, it started January 1, 1936.

Q. How was the 5 per cent interest rate determined?

A. That was determined to be the reasonable interest rate for that kind of an investment in that territory.

Q. You are vice president of Northwestern Public Service Company? A. That is correct.

Q. What is the funded debt of the Northwestern Public Service Company? A. $6,000,000.

Q. And what interest coupon does the debt bear?

A. Four per cent. However, we have six and seven per cent preferred stock outstanding, and it averages about five per cent.

By Mr. Scheetz:

Q. I asked a question that was lost somewhere in the shuffle about steam-heating. Addressing your attention to page 107 of the joint stipulation, will you describe the steam-heating business conducted by the Dakota Company, first describing the facilities and the manner of their use, and second, describe the operation in the business.

Mr. Scheetz: Mr. Reporter, will you mark this Exhibit Number 67?

By Mr. Scheetz:

Q. In this connection, I show you a document captioned "Dakota Public Service Company, steam-heating system,"

(Page 498):

Proceedings.

The Examiner: All right, let us proceed.

Whereupon—

C. L. SANDSTEDT,

previously sworn, resumed his testimony.

Direct Examination—Resumed.

By Mr. Scheetz:

Q. Mr. Sandstedt, have you anything more that you would like to say about the interchange agreement?

A. Well, yesterday when we adjourned I had the impression that there might be some misunderstanding with respect to this agreement.

I might add this, that this is a three part agreement. It covers kilowatt hours, kilowatts, and interchange facilities.

When you speak of kilowatt hours you are speaking of the use of kilowatts of capacity, and the selling company is selling labor, coal and operating expenses.

Kilowatts is installed capacity. That is investment. I believe the record shows that I estimated in our territory that the investment in power plant capacity to be in the neighborhood of $150 per kilowatt. The company with a deficiency of capacity pays the company with an excess carrying charges on the kilowatts of capacity.

The interconnection facilities are an entirely

(Page 499):

different matter. These facilities were provided by Northwestern Public Service Company and Dakota merely pays rental on those facilities, consisting of interest and carrying charges and operating expenses.

Q. Now will you describe the functions of the engineering committee under the interchange agreement. First state its composition.

A. This agreement is administered by a committee designated as an operating committee. It consists of two people—one member who is representing Northwestern Public Service Company and the other member representing the Dakota Public Service Company.

In case the two members are unable to agree, they will select a third party who shall be mutually agreeable to them, and the decision of the third party is considered final and binding.

The Examiner: Has there ever been a disagreement?

The Witness: No, sir.

By Mr. Davis:

Q. But the contract does not say whether or not they could select a representative of the Middle West Service Company?

A. No, it does not specify who that third party shall be.

Q. I suppose they might?

(Page 506):

And I think if you have any further cross-examination on the power pool or any other matters relevant to the examination so far, you can cross-examine if you care to.

Mr. Davis: I would like to defer my cross-examination until he completes the rest of the story.

Mr. Scheetz: Mr. Examiner, the next testimony will be addressed to the subject of management and supplements the material set forth under the caption "General and Management" on page 111 of the Joint Stipulation.

First I would like to have incorporated by reference Item 16 of 1941 U-5-S to the extent necessary to show the names of the directors and officers of Dakota Public Service Company and Knife River Coal Mining Company, and also to show their addresses.

By Mr. Scheetz:

Q. Mr. Sandstedt, am I correct in stating that of those directors and officers, Messrs. Sanborn, Sandstedt, and McArthur are directors of the Dakota Company, Knife River Company, and also Northwestern Company? A. Yes, sir.

The Examiner: They are the only common directors?

Mr. Scheetz: Yes.

By Mr. Scheetz:

Q. Are they also officers of those three companies?
A. Yes, sir.

(Page 507):

Q. They hold the same corresponding offices?
A. The same office in each company, yes.
Q. Now, am I also correct in saying that Mr. Buckmier is a common director in Northwestern and Dakota?
A. Yes, sir.
Q. Does he also hold a corresponding office in both companies? A. Yes, sir.
Q. Now, Mr. Sandstedt—
A. (Interposing) Mr. Buckmier is also an officer of Knife River Coal Mining Company, but not a director.
Q. Now, am I correct in stating that none of the other

directors of any one of those companies is a director of any other company in the group? A. Yes, sir.

Q. Now, how many directors does Northwestern have?

A. Seven.

Q. And how many directors does Dakota have? A. Five.

Q. And is Samuel W. White a director of the Dakota Company? A. Yes, sir.

Q. How many directors does Knife River have?

A. Three.

Q. And they are Messrs. Sandborn, McArthur and Sandstedt? A. Yes, sir.

Q. So then, the entire Board of Directors of Knife River are included in the directors of Dakota and Northwestern?

A. Yes, sir.

Q. Of the five directors of Dakota Company, four of them are directors of Northwestern? A. Yes, sir.

Q. How many directors does Northwestern have?

A. Seven.

Q. Four of whom are directors of Dakota? A. Yes, sir.

Q. So that the majority of the Board of Northwestern and of Dakota are common directors? A. Yes, sir.

Mr. Scheetz: Mark these exhibits 68 and 69, please.

(The documents referred to were marked as Respondents' Exhibits 68 and 69 for identification.)

Mr. Scheetz: May the record incorporate by reference Exhibit H-1 1939 U-5-S, which is a document entitled, "Agreement for Allocation of Joint Management Expenses", and is the document paraphrased on page 112 of the Joint Stipulation?

(Page 509):

The Examiner: And is now on file in Docket 30-7—

Mr. Davis: (Interposing) Hyphen 2.

The Examiner: (Interposing) Hyphen 2.

By Mr. Scheetz:

Q. Mr. Sandstedt, the Dakota Public Service Company and Knife River Coal Company have a joint office with Northwestern Company at Huron, South Dakota, is that correct? A. Yes, sir.

Q. Now I show you a document entitled "Organization

Chart, Dakota Public Service Company, Knife River Coal Mining Company", designated Exhibit 68, and a second document captioned, "Dakota Public Service Company, Divisional Organization Chart", designated Exhibit No. 69.

Will you explain these charts?

A. It would possibly be a little clearer if I explained Exhibit 69 first.

The property of Dakota Public Service Company is operated on a division and a district basis. It is subdivided into three operating units, consisting of the Bismarck Division, Dickinson Division, and the Mobridge Division.

Under these division offices, district offices are also maintained and operated.

Exhibit 69 shows the division and district setup.

(Page 536):

Q. Now, Mr. Sandstedt, are there not times when the executive staff is confronted with problems affecting the interests of all three companies or just Northwestern and Dakota Company?

A. Yes, that is probably true to a certain extent in an arrangement of this kind. However, most of these items of a routine nature are taken care of by the joint office agreement and the interchange capacity and energy contract.

However, there are times when matters do come up that affect the interests, where there might possibly be a conflict of interest between the three companies.

Q. Well, in such situations where you are acting in a multiple capacity, your obvious problem is to see that the several interests are fairly treated?

A. That is true, yes, sir.

Q. And you, for example, are on both sides of the fence in such situations?

Mr. Davis: Will he answer that question.

(Page 537):

The Witness: Yes, sir.

By Mr. Scheetz:

Q. Now, what is the procedure followed by the management when you have problems affecting the several com-

panies, first taking for illustration a major problem like the interconnection agreement and the interchange agreement about which you testified yesterday?

A. This agreement came up for revision last year. A revised agreement was entered into on July 1, 1941. The reason for the revision of the agreement was due to the fact that it was necessary to install additional capacity somewhere on the system, and by reason of this fact the entire agreement was studied and whatever other adjustments that were considered feasible were made.

Q. Well, now, who made the study?

A. The study was originated by the executive officers of the operating companies. This study consisted of a forecast of power requirements and that presented the problem as to which company should make the investment, where the power plant capacity should be located, the size of the power plant, and other problems in connection therewith.

After our original forecasts were prepared, we presented the problem to the officers of United Public Utilities Corporation and also to the Middle West organization. The engineering staff of Middle West Company went

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over the problem with us and it was finally agreed that the capacity would be located in Aberdeen.

Under the terms of the original contract it seemed that certain inequalities would develop if this capacity were located in Aberdeen without making some adjustment.

Northwestern Public Service Company sold its electric properties in Nebraska in 1940 and that year the bonds of Northwestern were refunded and part of the proceeds of that sale were absorbed in the bond refunding, that is, the process from the sale of the Columbus property.

A short time after the refunding, it was considered advisable to also sell the North Platte electric property. The sale price was $1,550,000, and part of the proceeds of that sale were used to purchase the gas properties in Grand Island and Kearney, Nebraska, from the Central Power Company, who had recently sold their electric properties to the Public Power district.

Northwestern, however, had a substantial amount of cash on hand which was on deposit with a trustee, and

considering the fact that additional generating capacity had to be installed some place on the system it was finally decided that the feasible location for this generating capacity should be at Aberdeen for the reason that Aberdeen is approximately the center of the electric system of the two companies and Aberdeen is also the principal point of

(Page 539):

interconnection between the Dakota Company and Northwestern.

Q. Well, Mr. Sandstedt, then the agreement was referred to the officers of the holding companies? A. Yes, sir.

Q. And was the agreement approved by the holding companies prior to its execution?

A. Yes, sir. It was not approved in the form originally submitted, however.

Q. It came back in different form?

A. It came back several times before it was finally approved.

Q. But after a period of consideration and negotiation, it was finally approved? A. Yes, sir.

Q. Now, is that the procedure which is generally followed in the negotiation of contracts between the companies?

A. Yes, sir, in the negotiation of contracts and other important matters that might develop.

Q. And, of course, as an officer of these companies you have the problem of considering such situations and deciding about their reference to the holding companies?

A. Yes, sir.

Q. And that involves a question of judgment as to the degree of the problem?

(Page 561):

It seems to me that the owner of the Knife River Mine would have an incentive to charge the power plant as much as the traffic would bear. The Zap Mine being the closest competitive point of obtaining coal, the price would probably be somewhere between the present price and the price that coal could be obtained for at Zap.

The Examiner: That is assuming that the mine is no longer a captive mine and that the Knife River Mine and the Zap Mine prices were both regulated by the Bituminous Coal Division?

The Witness: The Bituminous Coal Division does not regulate prices on lignite coal.

The Examiner: That is exempt?

The Witness: Lignite coal does not come under the Guffey Act.

By Mr. Davis:

Q. Now, Mr. Sandstedt, let us come down to the organization which you have at Huron for the combined operation of the three companies.

Tell, us, if you can, to what extent you feel that that organization is adequate for all of the problems which you are obliged to contend with from time to time for that combined operation.

A. Within the past few months we have lost several of our key employees of the organization, and due to the

(Page 562):

increasing number of reports by various governmental bodies that is required we find that our present force is strained to complete all of its normal functions.

Q. By that you mean that you are carrying a larger burden than you normally should?

A. We probably are understaffed at the present time because we have replaced some of our men with girls just recently. The men either went to join the armed forces or went to the defense jobs.

Q. All right.

Now, to what extent does that organization at Huron rely on the services of the Middle West Service Company?

A. We feel free to call upon members of the Middle West Service Company whenever in our judgment we feel that we need outside assistance. That might be in rate matters, it might be construction, location of equipment, and matters of that kind.

By Mr. Davis:

Q. What I am trying to find out, Mr. Sandstedt, is how much you rely on the services of the Middle West Service Company?

A. That, of course, depends on the problems. During some periods we have a number of problems coming up. During

(Page 563):

other periods we get along without their services. That would vary by years considerably.

(Page 564):

By Mr. Scheetz:

Q. Be a little more specific, if you can. Take, for example, the location of the new capacity. Did you use the services of Middle West on that?

A. I assume you refer to the capacity that was recently installed in Bismarck?

Q. That is right.

A. Yes, we did use the services of Middle West Service Company on that job.

Q. Who in particular?

A. Principally Mr. Buell, who is the chief engineer of the service company, and Mr. Gazin, his assistant. They made several trips to the property during the course of that installation.

By Mr. Davis:

Q. Well, in your opinion, is there any duplication of functions between the staff which you have at Huron and the services which allegedly are furnished by the Middle West Service Company?

Mr. Scheetz: I object to the form of the question.

Mr. Davis: If I strike "allegedly" will you withdraw your objection?

Mr. Scheetz: Well, you use your own judgment. Certainly.

Mr. Davis: All right, strike "allegedly", and then see if you can answer it.

(Page 565):

The Witness: Will you repeat the question?

(Pending question read.)

The Witness: I will qualify my answer, or rather, elaborate on it. We have one man in the central office who is in charge of all power plants, and he is capable and qualified but he just does not have the time to take care of major construction problems along power plant lines.

By Mr. Davis:

Q. What is that man's name?

A. Mr. Stokke, production superintendent. He is responsible not only for the electric power plants, but also all gas plants and all gas distribution systems.

The matter of rates happens to be under my supervision. I am also quite busy and when rate matters come up I feel free to call on the services of the Middle West Service Company because they have qualified rate experts.

The Examiner: Well, you were talking about this man Stokke not being competent on major new plant construction and in that instance you go to the Service Company.

The Witness: I did not mean to infer that. I think Stokke is competent, but he just does not have time to get into major construction work.

The Examiner: All right. On major construction, then, you go to the Service Company?

The Witness: Yes.

(Page 566):

The Examiner: But you also go to an independent firm of engineers in Chicago, or at least you did in one instance?

The Witness: Yes.

The Examiner: Well, why did you do that?

The Witness: The Service Company assists us in making the original layout. They advise us as to the type of plant we should build and the location of that plant. After that decision is made a consulting engineer is usually re-

tained and the actual construction of the plant is turned over to a consulting engineer or to architects and contractors.

The Examiner: Well, the independent engineer in Chicago that you retained, on what basis was that—6 per cent of cost, or something of that kind?

The Witness: I am not sure of the exact basis, but I think it was probably somewhat higher than 6 per cent.

I might add there that the Middle West Service Company, that is, the engineering department of the Middle West Service Company, do not have a staff of sufficient size to handle the construction problems of all of the companies in the Middle West system.

The Examiner: Well, now, on this new plant that you recently built, you engaged the firm in Chicago and you paid them something over 6 per cent of the cost for supervision and the building of the plant. How much did you pay the Middle West for selecting the location?

(Page 567):

The Witness: Well, their fee is on a revenue basis. They get the same fee regardless of what they do.

The Examiner: Whether they do the building or not?

The Witness: Yes, sir.

Mr. Scheetz: Mr. Examiner, there is in the testimony the Middle West Service contract, which was testified to yesterday extensively by Mr. White as to its origins, and that covers all the operating subsidiaries in this holding company's system except Knife River, and the compensation is based on a percentage of revenue.

Is that correct, Mr. White?

Mr. White: That is correct, adjusted revenue.

Mr. Scheetz: Adjusted revenue, yes.

The Examiner: Go ahead, Mr. Davis.

By Mr. Davis:

Q. If you had not contracted with the Middle West Service Company, what would you be obliged to do under the

circumstances where you consult the service company at the present time?

A. That would be a matter of judgment when some particular occasion arose.

Under the present arrangement we feel free to consult the Service Company staff on most any problem that comes up, and in certain instances we could probably rely on our own judgment in case we had no connection with the Service Company.

(Page 568):

In other words, if they were of sufficient importance, I assume that we would hire outside expert advice.

(Page 569):

Mr. Davis: Proceed with the cross.

Thereupon—

C. L. SANDSTEDT

resumed the witness stand and testified further as follows:

Cross-Examination (Cont'd).

By Mr. Davis:

Q. Coming back, Mr. Sandstedt, to Exhibit 64—

A. That is the interchange capacity contract?

Q. Yes. A. Yes.

Q. On the past page of that exhibit it indicates that the operating committee for the two companies are respectively Mr. C. C. Stokke of Northwestern Public Service Company and J. W. Chesire for the Dakota Public Service Company. Are both of those men joint employees of both companies?

A. Mr. Stokke is a joint employee. Mr. Chesire is an employee of the Dakota Public Service Company.

Q. Now, what are Mr. Stokke's duties on the organization chart; in other words, is he a superior of Mr. Chesire as far as operating authority is concerned?

A. Yes. Mr. Stokke is in charge of all the power plants

(Page 570):

and Mr. Chesire is the chief engineer at the Bismarck, North Dakota, plant.

Q. Am I correct, then, if I say that Mr. Stokke is the man

who fills the position of production superintendent on Exhibit 68? A. Yes, sir.

Q. And Mr. Chesire comes in what position?

A. He is the chief engineer of the Bismarck power station. That is the lefthand column of that organization Chart.

Q. That is the second box from the left in the first column of the lefthand side of the chart under the field organization of Dakota Public Service Company? A. Yes, sir.

Q. Do you have any difficulty with the fact that you have a superior and a subordinate appearing on the same committee for two different companies in a situation of this kind?

A. Well, we have not had any difficulty. Of course, we do have a comparatively small organization and those two men seem to be the best qualified in the entire organization to prepare an exhibit of this kind.

Mr. Chesire was formerly the chief load dispatcher of the system, and of course Mr. Stokke is familiar with all the requirements. The preparation of this exhibit is more or less a mechanical detail.

(Page 574):

A. I am referring to the company's log sheets showing the hourly generation in each plant.

Q. You are not referring to charges which are already on the books of account?

A. No, sir. I am referring to power plant records.

Q. So if any question arose as to the accuracy of the power plant log records on that, would it come under the jurisdiction of this committee? A. Yes.

However, those records are prepared on a daily basis by the engineer in each power plant and if there was some question in regard to those records it would come under the jurisdiction of this committee and they would decide the matter if they felt that any mistake was made.

Q. If the gesture has any emptiness it is because of the mechanical operation of those records in that respect, is it not? A. Yes, sir.

By Mr. Davis:

Q. Now, Mr. Sandstedt, will you look at page 4 of Exhibit 64, and also at the same time at page 1 of Exhibit 63?

You will observe that in the column describing the station generating capacity rating under Dakota Public Service Company, that Beulah has a rated capacity of 6000 k. w.?

(Page 575):

A. Yes.

Q. And Bismarck 5250 k. w.?

A. You are referring to Exhibit 63, now?

Q. No; I am referring to Exhibit 64, page 4 of the exhibit. That is correct, is it not? A. Yes.

Q. All right.

Now, on page 1 of Exhibit 63, under 1941, you will observe that under the column entitled "peak load kw.", that the Beulah station actually delivered 6500 kw. and the Bismarck station delivered 6000 kw.

Now, if that is supposed to represent the effective capacity of those respective stations then what credit if any was given to the fact that the Beulah and Bismarck stations actually delivered the equivalent of 6500 and 6000 kw. respectively, of capacity?

A. All of these stations will carry some overload. I think that the Beulah station is capable for short periods of carrying probably a 20 or 25 percent overload, and at some time during the year the station will probably carry an overload.

However, this interchange agreement provides that the stations will be rated at their effective capacity, but that effective capacity will never be more than the name-plate rating.

(Page 576):

Now, if you will read paragraph B—

Q. Well, I am reading the last sentence, which reads: "In case the operating committee shall determine, however, after fully investigating and by unanimous agreement that a generating station should be rated on some basis other than the sum of the manufacturer's name-plate ratings, such other ratings shall be used for the purpose of this agreement."

A. Now, if you read the next paragraph—

Q. "For the purpose of this agreement and until such

time as there has been a change in station or company generating capacity that may warrant a change in rating of any individual station or the total 'company generating capacity', it is agreed by the parties hereto that the 'station generating capacity' and the 'company generating capacity' of each party shall be as hereinafter set forth."

A. And then the company generating capacity for each company is set forth and that becomes the basis of billing under this contract, until some change takes place, and at that time if a change did take place then the operating committee would determine a new rating for the power plant in question.

Q. Well, does that imply that because these two plants that I have mentioned, namely, the Bismarck and Beulah plants, delivered a higher amount of kw. capacity than the contract

(Page 577):

gave as their respective ratings, that an adjustment would follow with respect to the so-called reserve capacity provision?

A. No, that does not follow because the Aberdeen plant or the Mitchell plant might carry a heavier load for a short period of time than the name-plate rating.

However, that would not have any effect for billing under this contract.

Q. Well, do not you think it would be more fair if some balancing of this whole arrangement with respect to the actual peak load delivered by the respective plants would be called for?

A. The basis of billing under this contract depends on the total system peak demand of each of the parties. That does not mean a single power plant; that means the demand that that system places on the interconnected facilities of the entire system, and the rated capacity of each of the parties is to determine the reserve equipment that each of them have and the generating capacity, that is, the effective generating capacity is set forth on page 4 of this exhibit.

Q. That is what I have been looking at all the time, namely, page 4.

A. That is true. That is the effective generating capacity.

Q. All right.

A. And that does not change except as some change in

(Page 578):

the physical equipment is made. If new equipment would go in service for either of the companies or should be taken out of service, then there would be a change, but otherwise this company generating capacity would be constant.

Q. Well, is that the fact? Is not the effective generating capacity determined by the capacity delivered? A. No.

Q. Well, that is only because of the arbitrary definition in this contract. How about as a matter of fact?

A. As a matter—

Q. I mean without regard to your definition, is not the full effective capacity of a particular station what it actually delivers over a period of time by experience?

A. No, that would not be considered the effective capacity of that plant. Most any plant will carry an overload for short periods of time.

As I previously stated, the Bismarck plant might be capable of carrying a 25 per cent overload for a day or so, but that would not mean that the effective capacity of that power plant would be 25 per cent more than its rating because the plant could not be operated on that basis continuously.

Q. Then, how did you arrive at this particular rating of effective capacity on page 4? A. The contract provides—

Q. I wish you would not rely so much on what the contract

(Page 579):

provides, as to how you arrived at the basis for the terms of the contract. I know what the contract provides, as I can read it.

A. I am going to explain that right now, in my own words. The contract provides that the name-plate rating will be used except as there is some reason for using something less than the name-plate rating, and I think that it is customary practice to use the name-plate rating for the generating capacity of a station, except as there is some reason for using a lesser rating.

In the case of Beulah—

Q. Lesser or higher, for that matter? A. Never higher.

Q. Never higher? A. No, sir.

Q. Mr. Fornili, my [coleague] here, who is an engineer, says there are many instances where they can very well assign a higher rating than the name-plate rating.

A. We could probably have done so in this case. We could have rated all of the power plants 25 per cent over their name-plate rating, and even if that was done consistently the answer would not be any different than it would be using the name-plate rating.

Q. Well, if you did it for all the plants on both sides of the system of course it would not be any different.

(Page 580):

A. Well, if the Beulah plant is capable of carrying a 25 per cent overload for a short period of time, the Aberdeen plant would be equally capable of carrying an overload, providing they had sufficient boiler capacity. Also, the Mitchell plant would be capable of carrying an overload.

Now, I did not complete my answer to your last question, and if you do not mind I will continue.

The Bismarck plant is rated at 5250 kilowatts for the purpose of this agreement. The name-plate rating of that power plant is 6250 kilowatts. It is rated at 1000 kilowatts less than the name-plate rating. The reason for that is that the Bismarck plant does not have sufficient boiler capacity to carry the entire load.

Q. But it actually did carry 6000, according to this Exhibit 63, so apparently the boiler capacity was sufficient to carry 6000.

A. That might be true for short periods of time, but the steam heat system requires part of that boiler capacity and we just do not have steam capacity in that station to carry the full load of those generators 365 days a year for 24 hours a day. There are certain times that that plant cannot carry the full load.

Q. In other words, in the summer months, when there is no steam load, you would have no difficulty at all in carrying that extra load; in the winter you might have some trouble.

(Page 581):

is that it?

A. Well, you would have trouble at any time.

If you will notice on Exhibit 63, the peak load carried on that plant was 6000 kilowatts, while the rated capacity is 6250 kilowatts. It is my impression that that was a test run, because that plant normally carries about between 4000 and 4500 kilowatts.

However, the same thing is true of the Aberdeen plant. For that purpose of this agreement, the Aberdeen plant is rated at 6250 kilowatts. The installed capacity nameplate rating is 7750 kilowatts.

Q. By the way, do you happen to have available the same information with respect to the peak loads of the Northwestern Public Service Company generating stations?

A. No, I do not have that available, but the peak load carried as shown by Exhibit 63 does not necessarily mean that that load was carried during the system peak period. That load might have been carried on a power plant in the summertime, and the system peak load did occur in December.

Mr. Davis: I am going to let Mr. Fornili ask this question because I am not sure whether I understand.

By Mr. Fornili:

Q. Does the capacity of the various plants depend upon their ability to deliver that capacity at the time that the system peak generally occurs?

(Page 582):

A. Yes, that is generally true. It depends upon their ability to deliver that capacity on an uninterrupted basis.

Q. I see—continuously?

A. Continuously.

Q. And is that the function of this operating committee, to exercise a judgment as to the ability of these plants to deliver that capacity continuously?

A. Yes, sir, that would be the function, although the capacity of these plants was determined at the time this agreement was negotiated and there would be no reason

to change that except as some change occurred in the physical characteristics of a plant, either equipment being taken out of service or other equipment being put into service.

By Mr. Davis:

Q. Now, in this situation were you and Mr. Sanborn and the several other persons who are joint employees of the two companies, Dakota and Northwestern, respectively, serve, what would you say with respect to the general proposition as to whether or not you have any difficulty serving two masters? In other words, do not occasions arise when the loyalties might require some conflict of judgment or decision with respect to your duties?

A. That is true to a certain extent and on some occasions.

In the administration of the ordinary problems, however,

(Page 583):

of the companies, those occasions do not arise very often. There are certain duties that must be performed for each of the companies. There might be accounting duties, there might be engineering duties, billing, duties of the commercial manager or others in the organization, and it might be possible to neglect one company and the employees spend a greater amount of time on the other property. If that was done to any great extent, however, it would be reflected some place, either in the lack of development or increased expenses or loss of efficiency some place.

Ordinarily, there is not any incentive for either the officers or the employees to neglect one company and favor the other company. Certainly there is not any financial incentive and there is no pressure on the part of either group for such a program.

The Examiner: Well, take your own salary, Mr. Sandstedt, you are down here today testifying and have been for a week. Your salary is divided as to gross revenues, is it not?

The Witness: Yes, sir.

The Examiner: Between the two companies?

The Witness: Yes, sir.

The Examiner: Now, you might be down here 30 days out of a year testifying exclusively on various applications that Dakota might have with this Commission and never down here on Northwestern. Nevertheless, the allocation is as to gross

(Page 584):

revenues, rather than time, is it not?

The Witness: Yes, that is true. If you take a short period of time there might be some criticism for allocating my salary on the basis of gross revenues, but if you take it over a matter of time, a matter of years, the basis usually works out to be equitable.

For instance, I am spending some time here on Dakota and probably Northwestern is suffering. On the other hand, we had a bond refunding, that is, Northwestern Public Service Company had a bond refunding, and I spent considerable time on that matter. I think over a period of time an allocation on that basis works out equitably.

Outside of the officers, that problem does not arise very often. The accounting department staff and the billing department staff and most of the other employees have certain duties to perform, certain functions to perform, for each of the parties and they do their job, and I think the gross revenue basis is equitable.

The Examiner: Now, of course, when you come down here for Dakota your traveling expenses are paid entirely by Dakota?

The Witness: No, sir, they are allocated.

The Examiner: They are divided?

The Witness: Yes.

Now, I admit that there is some criticism if you take a short period of time in allocating salaries and expenses on

(Page 585):

that basis, but over a period of time I think it is fairly equitable.

The Examiner: Well, now, take an item like telegrams and telephone. Is that divided as to gross revenue, or is there any distribution made between the two companies?

The Witness: No, that is divided on the basis of gross revenues, and one of the reasons for dividing it on that basis is that we feel that the property [furthest] removed from the central office should not be penalized merely because the general office is located a considerable distance away from the center of operations. The same thing would be true of traveling expenses.

For example, in supervising our Huron Division, no traveling expenses are required. In supervising Bismarck and Dickinson, considerable traveling expenses are required. In spite of that, the Huron Division is on a revenue basis and stands a part of the traveling expenses, telephone, salaries, and all other expenses on the same basis that Bismarck and Dickinson do.

By Mr. Davis:

Q. You still [——] that you can sit on one side of the table as vice president of one company and face the president of your company who is acting for another company and arrive at a perfectly arm's length transaction?

Mr. Scheetz: He never testified to any such thing.

(Page 586):

Mr. Davis: Well, his name is on this thing—

Mr. Scheetz: That is right, but you said "do you still feel".

Mr. Davis: I think the substance of all his testimony has been that he can act in a dual capacity here.

Mr. Scheetz: But if you followed his direct testimony carefully, he then pointed out that he always had the question of deciding when his conflict of interest was such that the problem should be referred to other persons on the staff.

Mr. Davis: That is beside the point.

Mr. Scheetz: It is not beside the point at all. I am talking about his testimony.

Mr. Davis: His testimony, nevertheless, is and the exhibit in evidence is that he signs as a vice president of one company and the president of another company of which he is vice president signs the same document.

Mr. Scheetz: Well, Mr. Davis, he probably has the same difficulty you have in protecting the consumer and the investor at the same time.

Mr. Davis: We do not have any difficulty on that score.

Mr. Scheetz: That is the answer.

(Page 587):

The Witness: I have tried to explain that as far as the regular routine matters that come up, in administering the affairs of each company there is not any conflict. When matters of importance such as this interchange contract come up, I do not feel that we are in a position to pass final judgment. In those cases I think there possibly is a conflict that might affect my judgment or Mr. Sanborn's judgment, and we have always referred matters of that kind to the respective holding companies and they finally pass judgment on the matter.

By Mr. Davis:

Q. In other words, you sought authority from the officers of the holding company to direct you to enter into this contract? A. Yes, sir.

The [Eaminer]: That is not localized management, then, is it, if you seek the remote control of the holding companies?

The Witness: We probably could operate the property and enter into contracts, but personally as long as we do have this arrangement I would rather refer matters where a conflict might arise to someone else and as long as we have our present arrangement we can do that very easily and without any trouble or any embarrassment, as far as we are concerned.

Mr. Davis: That is all from Mr. Sandstedt.

(Page 588):

(Witness excused.)

Mr. Scheetz: Mr. Sanborn.

The Examiner: Has Mr. Sanborn been sworn?

Mr. Scheetz: Yes.

Thereupon—

A. B. SANBORN

was called as a witness for and on behalf of the respondents and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Scheetz:

Q. You are president of the Dakota Company, Knife River Company, and Northwestern Company? A. I am.

Q. How long have you been president?

A. Since July 1, 1938.

Q. And you are also a common director of those three companies? A. I am.

Q. Did you make application of the Federal Power Commission for permission to serve in those capacities on the two utility companies? A. I have.

Q. And have you approval of that Commission?

A. I have.

(Page 589):

Q. Now, you heard Mr. Sandstedt's testimony regarding the position that common officers and common directors are in. I suppose you are aware of the same problems as he is?

A. I am aware of the problems, and also aware of the responsibilities, chief among which, it seems to me, is the responsibility of determining where the conflict of interest occurs.

I also believe that the directors of the companies and the officers acting for the companies should have and do

have recourse to the owners, the common stockholders of the company.

In this case it is so, and wherever a conflict of interest occurs, which is seldom, we exercise that recourse to the owners of the company.

The Examiner: Well, Mr. Sanborn, in the event of a conflict between the two companies, as I understand your testimony, you submit it to the controlling common stockholders. Now, does not that ignore the rights of the bondholders and any preferred stockholders of the two companies, if you submit it entirely upstairs to the controlling stockholders?

Mr. Scheetz: Well, Mr. Examiner, the responsibility of the officers of the company is to the stockholders, that is, to the common stockholders.

The Examiner: And not to the preferred; is that your point?

Mr. Scheetz: Well, of course not.

(Page 590):

The Examiner: Or to the bondholders?

Mr. Scheetz: Of course, they have a responsibility to their creditors, but in an effort to see that independent judgment is brought to bear on a problem it is referred to the common stockholders, who is on top of the heap. I would say in seeking out the common stockholders they certainly sought independent judgment.

The Examiner: Well, I was merely trying to get the witness's attitude. As a matter of fact, that is what you do in the event of any conflict between the Northwestern and the Dakota; that is, you submit it to the common stockholders for their judgment?

The Witness: That is exactly so.

Of course, in the case of the Dakota Company, the common stockholders and the security holder are synonymous.

By Mr. Scheetz:

Q. Now, have you ever, to your knowledge, been asked by the United Public Utilities Corporation or by Middle

West Corporation to put your name to a contract that did not have the approval of your own judgment?

A. I never have.

Q. And have you ever put your name to a contract that did not have your approval? A. I have not.

Q. And, of course, your position as president is

(Page 591):

dependent on satisfying your owner, is it not?

A. That is exactly so. I would not be president five minutes if I did not satisfy the owners of both companies.

Q. Now, have you been in the hearing room during the time Mr. Sandstedt was on the witness stand? A. I have.

Q. And have you heard his entire testimony?

A. I have, and followed it carefully.

Mr. Scheetz: Now, I am not going to ask this witness the general question as to whether he corroborates all that testimony, but I am going to ask him whether there is anything he wishes to add to it.

The Witness: I think Mr. Sandstedt in his testimony covered the matter as fully as it can be covered, and I cannot think of anything at the present time that I could add either in clarification of it or in bringing out any points that he has missed.

Mr. Scheetz: Cross-examine—well, I will say more than cross-examine. I invite any questions that you care to ask.

Cross-Examination.

By Mr. Davis:

Q. What have you to say, Mr. Sanborn, in your capacity of president of the two companies, on this question of serving two masters?

A. Well, sir, I realize the possible ambiguity of the

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position.

On the other hand, my feeling is that the two companies do not compete. They are, on the other hand, helpful to each other, and my duties in relation to the two companies are so circumscribed by contracts that have been entered

into through the negotiation of the owners of the companies that the chances of a conflict of interest and the chances of my possibly carrying water on both shoulders are not nearly as great as you seem to think they might be.

On the other hand, I recognize that they might and do exist, and one of my first responsibilities is to attempt to recognize them when they do come up.

Does that answer your question, sir?

Q. Do you recall any occasions since you have been president of the two companies where you have had a conflict of loyalties, shall we call it, in so far as your duties to the companies were concerned?

A. Not of loyalties, no. There have been occasions when I found it necessary to refer to the owners to either establish a contract or a policy that I did not feel—

The Examiner: Will you tell us a little bit about the time that you have gone to the owners?

The Witness: Particularly in regard to the fundamental contract of interchange of capacity and interchange of energy.

The Examiner: Which is in evidence here.

(Page 593):

The Witness: It is in evidence before this Commission.

The Examiner: Have there been other instances where you have gone to the owners?

By Mr. Scheetz:

Q. Were you president when the joint office allocation agreement was entered into? A. I was not.

Q. Mr. Sandstedt would know about that? A. Yes.

My service with those companies has only been in the last four years. This one particular case, which seems to me to be fundamental and one of the utmost moment to both companies—

The Examiner: Well, as I understand Mr. Sandstedt's testimony, the two companies worked out what they thought was a fair working agreement. It was submitted to the owners and the owners made substantial changes. Will you tell us what the changes were?

The Witness: Well, as a matter of fact, the operating staff in Huron, which operate both companies, drew up an agreement in rough and sent the agreement to the owners of the property and those owners, by negotiation between themselves and by calling in such engineering advice as they thought was necessary, boiled the contract down not once but half a dozen times, and it was returned to us for our judgment as to the change.

It went back to Mr. White and the members of the owners of Northwestern for their further consideration, and the result of that is the contract which has been talked about here.

Now, to ask me to state in what form that started and just what the steps were through it would be something I am not capable of doing because it was changed as to phrases, as to wording, and legal advice was taken on it I suppose at least a half dozen times, and it was finally passed in its present form, I believe, by the board of the United Public Utilities Company.

Mr. Scheetz: That is correct.

The Witness: And it certainly was passed by the executive staff of the Middle West Corporation.

By Mr. Davis:

Q. Can you recall by which particular board you were asked to come and serve as president of the two companies?

A. I was asked to accept the job as president of the two companies by the representatives of the boards of both companies.

Q. Simultaneous offer?

A. No, not a simultaneous offer. The Dakota Company and the Northwestern Company both have service contracts with the Middle West Service Company and I believe that one part of that service contract is to provide executive officers for the subsidiaries or for the companies with whom they have

(Page 595):

the service contract, and acting in that capacity the president of the Middle West Service Company asked me to

come in and see him, which I did, and almost immediately I went up to call on Mr. White.

Q. Can you tell us something about your background and the different companies you were connected with before you came with these two companies?

A. Yes, I will do that.

I was born in Stevens Point, Wisconsin. I went to public school in Ashland, Wisconsin.

I graduated from the United States Naval Academy in 1912. I resigned my commission as a Lieutenant Commander in the Navy in 1920.

I immediately went to Canada to act as general manager of the East Cootenay Power Company, which was then a prospect. I was with that company for 18 years—

Q. By "prospect", you mean a mining company?

A. A power company. It was just then on paper. There was not anything there.

I was with that company 18 years, acting as general manager.

During that time the company built—

Q. Excuse me. Was that company in any way affiliated with any of the predecessors of the Middle West Utilities Company?

A. No, sir. That company is a Canadian company and is

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a subsidiary of the Power Corporation of Canada.

During the 18 years I was general manager, we built two hydro plants and one steam plant and brought our power production up to approximately 100,000,000 kilowatt hours a year.

In 1938 I resigned my position with the East Cootenay Power Company and came to Huron, South Dakota, to accept the position which I am now fulfilling.

Q. So during your entire professional career you have had no former affiliations with any of the predecessors of the present Middle West Company?

A. No. This is my first job with an American Company.

Mr. Scheetz: Mr. White, will you resume the stand, please?

The Examiner: He has been sworn?

Mr. Scheetz: Yes.

Thereupon—

SAMUEL W. WHITE

was called as a witness for and on behalf of the respondents and, having been previously duly sworn, was examined and testified as follows:

(Page 597):

Direct Examination.

By Mr. Scheetz:

Q. Mr. White, in your earlier testimony you testified at length about the negotiation of the present contract with the Middle West Service Company, which applies to the various subsidiaries other than Knife River Company.

Your testimony then was directed particularly to the Indiana-Ohio companies.

Now, Dakota Public Service Company is within the purview of that contract, and in view of the extent of the inquiry made about the Middle West Service Company in connection with Dakota, would you care to extend your remarks to the negotiation of that contract as it bears on Dakota Public Service Company?

A. Various discussions which I had with Mr. Daniel C. Green, the receiver of Middle West Utilities Company, were on the general subject of a management contract under which the services of the technical men on Mr. Green's staff would be available to the operating subsidiaries of the United Public Utilities Corporation, and those conversations were on the basis of a standard contract for all companies, and from my point of view the decision that I had to make for myself was whether I was going to provide the equivalent of those technical services either in an organization of my own or on a consulting basis or from some other service company, or whether I was going to get those services for our subsidiaries from Mr.

(Page 598):

Green's organization.

That discussion was on the basis of all of our subsidiaries, and according to Mr. Green's idea at that time was also to include Knife River Coal Mining Company. I took exception to the inclusion of Knife River Coal Mining Company on any fee basis because, as I pointed out to Mr. Green, his organization had nothing to offer us in the way of assisting a coal mine because they had no technical ability in their organization that could be of value to our coal mine operation.

Before those contracts were signed, I talked with our operating men about it and my agreement with Mr. Green then was that with the exception of our Indiana companies and of the coal mine, that our subsidiaries would receive services from the Middle West organization, and this present standard service company contract is an outgrowth of that original arrangement, which I made in the early days of the receivership.

Q. Now, there was a reference made to the engineering firm of Sargent & Lundy in connection with the construction of the Bismarck station. What had you to do with that?

A. Well, I was the first one to insist that there be an outside engineer employed to design that station. I had some question in my own mind as to whether we wanted to confine ourselves to the standard type of design that might obtain in Middle West properties, which would be the result if it were designed only by the Middle West Service Company.

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We had no argument on that point except, I believe, on the operating property, where the management did not want to spend the money for those consulting services. However, inasmuch as we were providing the money, our idea prevailed there as to the advisability of having outside advice on that construction.

I might say that the Middle West Service Company readily agreed to this suggestion.

Now, this gives me an opportunity to develop one

thought that was not brought out this morning.' After it had been agreed to have them design that plant, Sargent & Lundy engineers went out there on an inspection trip and I insisted that they make, especially for me, a report on the relative merits of each of the locations that were under consideration—

By Mr. Davis:

Q. As a construction site, you mean?

A. As the point at which the additional capacity should be located on our end of the system.

There had been a great deal of discussion on that point as to whether we should take advantage of the cheap fuel at the north end of the line or balance off the system by putting additional capacity at the south end of the line.

Sargent & Lundy reported on each of the locations that had been suggested, which included all of the reasonably conceivable locations, there being about three, as I recall it, and came

(Page 600):

back and recommended Bismarck. That recommendation was shared by the Middle West Service Company. It coincided with their own view, that is, the engineering staff of the Middle West Service Company, who had given us their report on it, and so we located it there.

We did have more than the location of a plant to decide at that time. Even if located at Bismarck, we had to decide whether we would expand the plant which we already had there or whether we would abandon that plant and start in an entirely new development over on the Missouri River, a short distance out of town, which would have been a splendid idea if we already did not have a plant in Bismarck, but we had to weigh the advantages of junking the power plant investment that we already had as part of a long time program, and that idea we finally abandoned.

By Mr. Scheetz:

Q. Now, Mr. White, I think you heard the Examiner's question to Mr. Sanborn as to whether the reference of contracts to the holding company was localized management.

Did you as the executive head of the owner of the securities of the Dakota Company consider that you had any interest in the interconnection and interchange agreement, and if so, what?

A. Well, I considered that I had a very substantial interest in that interconnection agreement and in this joint

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management arrangement.

I also feel that I carried the responsibility of continuing that arrangement. In fact, when I first came into this picture, in 1932, everyone of these subsidiaries—20 at that time; 19 today—of United Public Utilities Corporation were operated under a joint management arrangement with some other company that either belonged to or was affiliated with Middle West Utilities Company, and I have discontinued every joint management arrangement which I found at that time, with the exception of these three companies in the Dakotas.

In the case of this particular interconnection contract, I would have insisted on having some finger in the pie or being consulted on a long-term arrangement which involved our whole future operating policy as to any plans that we might have for the expansion of our generating system in that largest of our subsidiaries.

I also recognized that that joint management out there had a perfect right to pass on to me the responsibility of satisfying myself and the investors that I represent that their interests were being adequately protected under that contract, and the length of time that it took to negotiate that contract in is final form was primarily due to the difficulty that I had in making up my mind on its sufficiency and adequacy.

Mr. Scheetz: Cross-examine.

(Page 602):

Cross-Examination,

By Mr. Davis:

Q. Mr. White, have you ever had occasion to check the extent to which there is any common identity between the stockholders of United Public Utilities and Middle West?

Mr. Scheetz: Would you like to have it noted of record that the Middle West Corporation owns two-thirds of the Class B common stock of United Public Utilities Corporation, which stock has the voting right to elect one director?

The Examiner: Out of how many?

Mr. Scheetz: There are five at the present. There have been more in the past.

The Witness: It has run up to seven at one time.

May I amend your statement slightly? Out of our total common stock, 40 per cent is in the form of Class A common stock and the remaining 60 per cent is in the form of Class B common stock. The Class A stock was given to the bondholders in the reorganization and has full voting power, except for the voting power which Mr. Scheetz has just mentioned which attaches exclusively to the Class B common stock.

Of the total issue of Class B common stock, two-thirds, which means two-thirds of 60 per cent of our total common stock issue, is owned by United Public Service Corporation and slightly over 50 per cent of the capital stock of the United Public Service Corporation is owned by the Middle West Corporation.

(Page 603):

By Mr. Davis:

Q. How about the Class A common stock of United Public Utilities?

A. The Class A common stock of United Public Utilities, which is issued at the rate of 10 shares for each $1000 bond—

Mr. Scheetz: Mr. White, if I may interrupt.

By Mr. Scheetz:

Q. Do any of these companies in the Middle West system own any of your Class A common stock?

A. That question covers a lot of territory. It covers my whole list of Class A common stockholders. I will have

to answer the question in a roundabout way, not to be evasive but not to state something specifically that I do not know to be a fact.

Mr. Davis: Just a minute. Maybe I can help you.

Off the record.

(Discussion off the record.)

The Witness: To no appreciable extent does any company in the Middle West system own any of our Class A common stock.

The Middle West Corporation or some of its subsidiaries did hold some of the bonds of our predecessor company, and they received some Class A common stock in the reorganization. I happen to know that every share of that stock was sold.

By Mr. Scheetz:

Q. How about preferred stock which has voting rights at

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the present time?

A. The same statement would apply exactly the same.

Mr. Scheetz: Might I suggest that if the subject is of any further interest to you, I suppose it can be supplied.

Mr. Davis: Yes.

By Mr. Davis:

Q. To clear up one other point, am I correct in my understanding that there are four common directors on both boards of Northwestern Public Service Company and Dakota Public Service Company?

A. Four directors are common. That is shown on the exhibit that was introduced by the company.

Mr. Davis: I think that is all.

(Witness excused.)

Mr. Scheetz: Mr. Armbruster, take the stand, please.

The court received in evidence testimony offered by defendant from the Official Report of Proceedings before the Securities and Exchange Commission, Docket No. 43-185, entitled "In the Matter of North Dakota Power and Light Company et al.", being a record of evidence taken at Philadelphia, Pennsylvania, on May 8, 1939, before James G. Ewell, Trial Examiner, which testimony together with the page references to said Official Report are as follows:

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of 34,819, with 8,242 electric customers.

The Examiner: Which company is that?

The Witness: This is the North Dakota Power and Light Company.

The Examiner: With a total population of 34,000?

The Witness: 34,000 total population in 35 towns.

By Mr. Scheetz:

Q. Are the operations of the Dakota Company confined entirely to North Dakota?

A. Yes.

The Dakota Company has 472 miles of transmission line of over 6,600 volts; 9,960 kilowatts of generating capacity located in four plants, the largest of which is the Beulah station, containing 6,000 kilowatts, or approximately two-thirds of the total generating capacity. I will correct that figure. That 9,960 kilowatts is in steam capacity. In addition to that, we have 956 kilowatts of internal combustion capacity located in two plants.

The Examiner: Do you have any water power?

The Witness: We have no water power.

By Mr. Scheetz:

Q. Will you describe the Beulah plant?

A. The Beulah plant is located at Beulah, North Dakota,

at the mouth of a mine that is also owned by the United Public Utilities Corporation. The location of the plant

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makes very low generation cost.

Q. When you say a mine owned by United Public Utilities Corporation are you not mistaken? What corporation owns the coal mine? What is the name of the subsidiary corporation owning the coal mine?

A. The Knife River Coal Mining Company.

Q. How does the capacity, generating capacity, of the Beulah plant compare with the needs for the Dakota system?

A. There were 6,000 kilowatts of generating capacity in the Beulah plant and the total peak demand of the Dakota system was 7,638 kilowatts in 1938.

Q. What happens to the excess energy?

A. The output and the demands of the system vary considerably during hours of the day, and also during months of the year. The peak hours usually occur along about dusk, in the evening, and later on there is a sharp drop off in that peak. During the time of that drop off the energy is transmitted to the south end of the system, and during certain hours of the day this energy passes through the Northern system and into the Northwestern Public Service Company. At other hours during the day the flow of energy is northward from the Northwestern Public Service Company system to the Northern Power & Light Company system; and during emergencies, such as breakdown of the Beulah plant or during times when the lines might be out of service, it is

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possible for the Northwestern Public Service Company to supply energy to the Dakota Company.

Q. So that there is an exchange of power between the system comprised on the one hand of the Dakota Company and the Northern Company, and the Northwestern Public Service Company on the south, on the other hand.

A. There is a constant interchange of power.

The Examiner: Is this Northwestern Public Service Company either a subsidiary or an affiliate of the top holding company?

The Witness: No. There is no connection between the Northwestern Public Service Company and these two companies or between the Northwestern and the United Public Utilities Corporation.

By Mr. Scheetz:

Q. Does energy from the Northwestern source flow through to the Dakota system and is it used by the Dakota system?

A. During times of emergency, yes; ordinarily, no.

Q. In normal times that energy coming from the Northwestern would be used by the Northern Company? A. Yes.

Q. You were describing the terrain in which the Dakota Company operates. I think you gave the mileage of the transmission lines. What are the principal load centers in the Dakota Territory?

(Page 50):

A. Bismarck, Mandan and Dickinson.

Q. All in North Dakota? A. All in North Dakota.

Q. What is the distribution of population and area of the Northern Company's territory?

A. The Northern Company operates in both North and South Dakota, as is shown by the map. The transmission lines cross the state line at six different points. There are three points of interconnection between Northwestern Public Service Company's system and two points of interconnection with the Dakota System.

The Northern Company's territory is considerably more sparsely settled than that of the Dakota Company. The total population is 28,917, located in 56 towns, the largest town being Mobridge, South Dakota, which has a population of approximately 3,000. There is a total of 5,676 electric customers located in these 56 towns.

Q. What problems are created for these two companies by the weather conditions which prevail in the territory? First, describe the general conditions, briefly.

A. During the past seven or eight years we have had a period of extreme drouth. During those years there has been very little cash income produced in the territory. And we have also had sleet storms from time to time.

Q. What is the problem created in servicing your trans-

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mission lines during the winter in connection with the sleet?

A. That, of course, necessitates the location of our plants at points that will protect the service to the principal load centers of both companies.

Q. What problem does that make in zoning your district offices?

A. The problem of zoning our district offices is, of course, partly dictated by weather conditions, but on account of the number of miles covered by the territory, geographical location is also necessary. By that I mean we have to have offices located in some of the larger towns in order to adequately take care of the service of these towns and the smaller surrounding communities.

The Northern Company has seven district offices, in addition to the main office which is located at Mobridge. In each one of these offices is located a service man, usually a service man and an office girl, to take care of the customers' service; and in Mobridge we have a line crew which takes care of the service for the entire territory.

Q. If it were not for the fact that you have two different corporations here what changes would you make in the handling of your zoning of your district offices?

A. We would probably do some rezoning. For example, it is approximately 200 miles from our Mobridge office, which is our division office, to Steele, which is the farthest—

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district office, and there are no railroad connections, or very few rail connections north and south in either of the Dakotas, and in the movement of mail it is sometimes necessary in some of the towns for it to go into Minneapolis and come out again, and sometimes it takes two or three days to get mail service. The Steele District could be much more advantageously operated out of the Bismarck office, because they are both on the main line of the Union Pacific, and Steele is only about 50 miles from Bismarck.

Q. In other words, if you had a free hand now you would hitch the Steele area to the Bismarck office as the principal office of the Dakotas? A. Yes.

Q. At the present time how does your reserve capacity in the system for the two companies compare with present needs?

A. By referring to Exhibit K you will notice that we have very little reserve for the two companies. The system peak in 1938 was approximately 11,000 kilowatts, while the installed capacity for the two companies was approximately 12,800 kilowatts. This capacity is located in ten different plants, and it is not possible to utilize the rated capacity of these plants on account of their size and the difficulty of keeping them on the line, and from a practical standpoint we depend largely on the Beulah plant, together with the tying in with the Northwestern Public Service Company.

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Q. When it comes to placing additional reserve capacity for the system, if these two companies are merged am I correct in my understanding that that will give you a free hand to place your additional capacity in the most efficient places and where it is needed in the system as a whole?

A. Yes.

Q. Otherwise, you would have to pay your respects to the separate corporate identities and have regard for that in placing?

A. That is true. That would be particularly true if the present arrangement was discontinued, and we always have to keep that in mind, and always have had as long as there were separate corporations which may not be as closely associated as they are at the present time.

Q. In the interchange of power between the Northern Company and the Dakota Company there is a charge made between the two companies for energy furnished in either direction? A. Yes, sir.

Q. And as long as these two companies are separate you will always have the problem of determining the intercompany price? A. That is true.

Q. In this connection, am I correct in saying that the

Northwestern as a source of energy is in the nature of a standby to the Dakota Company?

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A. The three companies have pooled their power resources. The company with a deficit of generating capacity pays a rental charge to the company with an excess, and that deficit or excess is determined once a year. We also have an interchange power agreement that covers energy only. Under this agreement the Beulah plant, which is the most efficient plant of any in the three systems is operated at maximum capacity. During peak hours the movement of energy is south through the northern system, and during the graveyard period considerable quantities of this energy are transmitted to Northwestern Public Service Company. This energy rate is worked out on a basis to allocate the savings and the benefits to the three companies. Of course, if the Northern Company and the Dakota Company were merged there would be less of a problem in the matter of allocation of savings, as well as in the allocation of rental charges.

The Examiner: When you talk about pooling your capacities did you refer to pooling with the Northwestern Company to the south?

The Witness: Yes, sir.

By Scheetz:

Q. Have you made a computation of the number of reports which the two companies are making, in the aggregate, to various arms of the State and Federal Government, that is, both North Dakota, South Dakota, and the Federal Government?

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Q. What effect will this merger have, if any, upon the subjection of the operations of the two companies to state regulation? That is to say, will it all be brought under the North Dakota Railroad Commission?

A. It will have no effect whatever. South Dakota does

not have a regulatory body at the present time, and all of the property in North Dakota is now subjected to the regulation of the North Dakota Railroad Commission.

Q. So there will be no division of authority over one company's operations— A. No, sir.

Q. —tc the extent that South Dakota continues to have no regulatory body? A. Yes; that is right.

Q. Are these two companies, namely the North Dakota Company and the Northern Company, being operated now under a management or service contract?

A. Yes, they are being operated under a service contract with the Middle West Service Company.

Q. Are any other companies also being serviced under that contract or operated under it?

A. I believe all the companies in the Middle West System are under similar contracts.

The Examiner: Is that service company a subsidiary of the parent holding company?

(Page 70):

The Witness: No, it is not. It has no connection whatever with the parent holding company.

By Mr. Binford:

Q. Is this a management contract of which you are speaking? Isn't there a joint management contract with the four companies of which the North Dakota Company and the Northern Company are two?

A. Yes, there is a management contract between the four companies.

Q. Those four companies are what companies?

A. Northwestern Public Service Company; the Northern Company, the Dakota Company, and the Knife River Coal Mining Company.

Q. The Northwestern Public Service Company is a company of which you are also an officer. Is that true?

By Mr. Scheetz: (Interposing).

Q. Are you not wrong about the Knife River Coal Mining Company being under that agreement?

A. I was not speaking of the service agreement. I was speaking of our general office agreement. It is not in writing. We merely allocated the expenses between the four companies. Our general office expenses are allocated between the four companies. I was not speaking of the service agreement at this time with the Middle West Service Company.

By Mr. Binford:

(Page 71):

Q. Those are two separate agreements, one agreement being oral and the other in writing? A. Yes.

Q. The management agreement being oral? A. Yes.

Q. Are you an officer of Northwestern Public Service Company? A. Yes, sir.

Q. That company is a subsidiary of what utility system?

A. It is a subsidiary of Middle West Utilities Corporation.

Q. What is your position with that corporation?

A. Vice president, treasurer and director.

Q. Is this management agreement under which these companies are being operated proposed to be continued after this merger as before?

A. When you speak of the management agreement—

Q. I am speaking of the oral understanding of which you spoke? A. Yes.

Q. What about the service contract which is written?

A. That will continue.

Q. There will be no change in either one of those arrangements? A. No, sir.

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The Examiner: What will these companies' own officers do if the management is contracted out or farmed out? What offices will there be left for them to perform, or rather, what services?

The Witness: The only services that we now receive from the Service Company, are in the nature of expert advice along technical lines, and I can not imagine the management of the properties being released or farmed out off

the territory. I don't know whether that answers your question or not.

Mr. Scheetz: Maybe I can clear this up.

By Mr. Scheetz:

Q. When you speak of a management agreement, which is the oral agreement, as I understand it, that is an agreement whereby you pool your management expenses in a central office in Huron. Is that correct? A. Yes, sir.

Q. I do not understand by management agreement you mean that the officers are delegating their duties away to some other unit to manage the operating company?

A. No, sir. I did not want or intend to leave that impression. We merely take care of the same functions for the four different companies.

Q. All of those operations are centralized in an office in Huron. Is that correct?

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A. Yes, sir.

The Examiner: By my question I simply wanted to bring out or to find out the extent of this management contract.

By Mr. Binford:

Q. I show you Exhibit H-1 to the registration statement, supplement U-5-S, of United Public Utilities Corporation, entitled, "Agreement for Allocation of Joint Management Expenses." You stated that the management agreement, as you have identified it, was oral. As a matter of fact, isn't the agreement in written form?

A. I was mistaken in that. That was reduced to writing for the purpose of this filing.

Q. Then that agreement to which you have been testifying as a management agreement, is the same as the exhibit which I have just shown you?

A. Yes. That is identified here as agreement for allocation of joint management expenses.

Q. That agreement, in the form which you just identified is to be continued after this merger the same as before? A. Yes, sir.

The Examiner: Did I understand you correctly to say that you are an officer of this service company?

The Witness: No, sir. I am an officer of the four operating companies. I have no connection whatever with the Service Company.

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The Examiner: What are the companies with which you said you are connected? I understood one was a subsidiary of the Middle West Corporation.

The Witness: Northwestern Public Service Company is an operating company, and it is a subsidiary of the Middle West Corporation. I am an officer of that company.

The Examiner: That is an operating company?

The Witness: That is an operating company, yes, sir.

The Examiner: Where are they located?

The Witness: Their headquarters are in Huron, South Dakota. They operate in South Dakota and Nebraska.

The Examiner: Is that contiguous territory to this?

The Witness: Yes, sir.

By Mr. Binford:

Q. What do you consider the present prospects for future earnings of the North Dakota and Northern Companies, that is to say, do you expect increased earnings in the near future, or do you think the earnings will decline? Can you make any reasonable prophesy in that respect?

A. Of course, in our territory it is strictly agricultural, and a great deal will depend upon agriculture and weather conditions. We have gotten along extremely well, considering conditions under which we have operated in the past few years, and I do not anticipate any change for the worse, but if we get the rainfall that we hope to get we can probably anticipate

The court received in evidence testimony offered by defendant from the Official Reports of Proceedings before

the Securities and Exchange Commission, Docket No. 59-38, entitled "In the Matter of United Public Utilities Corporation, et al.", being a record of evidence taken at Philadelphia, Pennsylvania, on May 13, 1942, before William W. Swift, Trial Examiner, and Docket Nos. 54-97, 59-38, 59-73 and 70-1110, entitled "In the Matter of United Public Utilities Corporation, et al.", being a record of evidence taken at Philadelphia, Pennsylvania, on October 9, 1945 before Willis E. Monty, Trial Examiner, which testimony together with the page references to said Official Reports are as follows:

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Citizens Company.

Q. The reason I asked that question was, since these contracts were originally concluded, have you kept in close contact with their operations? A. Yes.

Q. Have you had any reason to change your mind over the course of time as to the merits or demerits of that servicing?

A. I would like to say that I have no particular illusions with respect to the value of mutual service company services to holding companies, and for our purposes I have scrutinized the value of those services rather carefully and rather continuously ever since the contracts have been in effect, and it is my judgment that an adequate substitute for those services cannot be provided at the cost that we are subjected to, and that if we did not have this particular arrangement with Middle West Service Company, we would have to make some sort of a substitute proposition for service and advisory services that would cost us probably more than we are now paying.

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Q. What do you base that statement on?

A. I base it on the range and diversity of experts that are available to our companies in the Middle West Service Company, and in building up the cost of providing a substitute I do not assume that the substitute would have as many different experts in it but rather that the advisory service would have to be provided by combination men. Even with combination men I cannot build a supervisory

organization for our group of operating subsidiaries for an overall cost of $35,000 a year.

By Mr. Davis:

Q. That is what you are paying Middle West now?
A. Correct.

By Mr. Scheetz:

Q. Well, of course, the amount of service required by these subsidiaries at any one time or even in any one year is not wholly predictable, is it?

A. Definitely not. The value of these advisory services is in their availability when needed, without paying a heavy overhead to keep them available.

We participate under a joint arrangement with a lot of other public utility companies which collectively provide a higher load factor for that service organization than would be attainable if the number of participating companies were smaller.

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Q. Would you care to comment on the advantages or disadvantages of continuity?

A. It of course has been distinctly to our advantage that the men who were furnishing advisory services to our subsidiaries have an intimate knowledge of the history and of the past developments in the areas that we serve, and it would of course require time and therefore effort and cost to establish that same historical knowledge with any new agency that might give us advisory services.

Q. But, again, that is a price consideration, is it not?

A. I fail to see where it enters into a price consideration.

Q. Well, I mean that if instead of this arrangement you were picking consultants and experts from time to time as you happened to need them, then there is always the question of the cost of educating new men, is that correct?

A. I missed your point when you asked the other question. In making comparative costs up to that time I had in mind only the cost of the Middle West service as service company facilities, as compared with the same type of service which might be furnished by some other comparable organization.

Q. Mr. White, one of the things I wanted to bring out was the history of this arrangement, because it might be

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suggested that the arrangement was purely the result of its history and not the result of a careful study of the situation, and I want to have any comments you are to make on that.

A. Well, I would like to say that as receiver I took particular pains that that should not be the case because I felt and still feel that it is incumbent on me as the head of this reorganized company to justify the retention of practices of the past just as much as it would be to justify a change in those practices.

By Mr. Davis:

Q. Mr. White, I gather from what you have told us in the last 10 or 15 minutes that you are intimately familiar with the staff of the Middle West Service Company.

A. I am reasonably familiar with the heads of departments in Middle West Service Company.

Mr. Scheetz: Mr. Davis, when you say familiar, are you meaning in a social sense or in a professional sense?

Mr. Davis: Professional sense, of course.

The Witness: I would like to say that my contacts with the staff on matters affecting our operation are less frequent than are the contacts of men like Mr. Lakin and other subsidiary heads who are concerned with the details of operation, although I do use those men myself for consultation on problems that come up to me from the

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subsidiary heads.

By Mr. Davis:

Q. Well, in fact, your office in Chicago is in the same office as Middle West Service Company, is it not?

A. No, sir.

Q. That is where I thought it was.

A. That just does not happen to be the fact.

Q. Will you straighten me out on that, please?

A. Well, it is not the fact.

Q. Well, you may not share the same office, but you are in the same building? A. Oh, yes.

Q. And in certain respects you share some of the same services with that company?

A. We have a connection through their switchboard.

Q. Yes.

A. Which saves us the expense of a telephone operator.

Q. Is your suite on the same floor? A. No.

Q. Well, do you use some of their office facilities in some respects? A. No, outside of the switchboard.

Q. The only thing you use is the switchboard?

A. That is right.

Q. None of their accounting facilities?

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A. None.

Q. Or so-called general office facilities? A. None.

Q. Just for the sake of clearing up the record so that I do not gain a false impression—

Mr. Scheetz: (Interposing) It strikes me the record is very clear, Mr. Davis.

By Mr. Davis:

Q. I know every time I try to get you on the telephone I have to reach you through the Middle West Service Company. I can never reach you in care of United Public Utilities Corporation. That is the reason I was led to the conclusion that you shared the same office with them.

A. You could reach me in my own name.

Q. In Chicago? A. Yes.

Q. Well, coming back to the question of your knowledge of the staff of Middle West Service Company, how many engineers have they got on the staff?

A. Of Middle West Service Company?

Q. Yes. A. I would say 12 to 15.

Q. And how many so-called financial, tax, or other corporate experts on the staff?

Mr. Scheetz: Mr. Davis, if you want to know what kind

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of a staff Middle West has, I suppose we could produce a Middle West witness.

If you are trying to ascertain Mr. White's knowledge of the staff of that company to see his ability as a negotiator—

Mr. Davis: (Interposing) No; I am just trying to find out what Mr. White's own knowledge is of the staff of the Middle West Service Company.

Mr. Scheetz: [Al] right. I just wanted to be sure.

Mr. Davis: There was one question that was left unanswered.

The Witness: Yes. I believe it referred to the staff of their tax department.

By Mr. Davis:

Q. Well, their tax, corporate or financial experts.

A. I do not know just how many people there are in their tax department. I have never talked with but one man, who is the head of their tax department, and I believe he has a staff under him. I do not happen to have been in his office, although he has been in mine.

Q. And how about the rest of it?

A. The corporate and financial department—I know those men. However, we do not use their services.

Q. Now, how much of a turnover has there been in that staff in the last 10 or 12 years, since it was formerly the

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staff of the old Middle West Utilities Company.

A. From the time that I first had occasion to observe it, in April, 1932, up until the present time there has been a very drastic revision of the personnel of that staff, and in the key positions I believe there are only one or two—I think offhand of only two—who—

Q. (Interposing) Still remain?

A. (Continuing) Were with the old Middle West organization.

In the minor jobs, there undoubtedly are a number.

Q. So that this historical familiarity which you described with the operating phases or features of the subsidiaries in your company now would not really add up to very much?

A. I so appraise it. I appraise it at considerable value in my own case, and mine only dates back to 1932.

Q. I am not sure that I understand that answer.

A. I set considerable store by my own historical knowledge of the affairs of these companies, and yet mine only goes back to 1932.

Q. But you have already stated that there has been a very substantial turnover in the key men in the Middle West Service Company. A. That is right.

Q. So that except for the fact that a compilation of

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the historical records are in the same office, the familiarity of the key men really does not amount to very much?

A. That statement of yours does not stand up, Mr. Davis, because—

Q. (Interposing) I am just asking the question. I do not know. A. Well, you made it as a statement.

Q. No. I am asking the question. If I said "Does it" you would have the complete question.

A. Yes, that would be a question.

Q. All right.

A. If there should be a complete revision of the Middle West staff in a period of a few weeks or six months' time, the carryover to the new organization from the old organization would be virtually nil, but where that staff is revised in stages over a period of years the continuity of the knowledge of the affairs of subsidiaries within that service organization is not materially impaired even though the organization itself is in a mild state of flux.

Q. Would you concede that in the face of the almost complete turnover? I believe you said there were only one or two men left from the original organization.

A. No, I did not quite say that.

Q. Key men, I mean.

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A. I said in the key positions, that of the men that were in the old Middle West Utilities Company I recall only

two who are members of the staff there today but that I thought that in the minor capacities there were a number of employees who had been retained right through.

Q. Well, would you concede that to a certain extent at least, which might be open to question as far as a scientific gauging of the extent is concerned, the historical association of the old Middle West Service men is of a substantial lesser importance today than it was at some time in the past? A. No, I would not be willing to concede that.

Mr. Davis: All right.

Mr. Scheetz: Before you leave that, Mr. Davis, let us understand this.

By Mr. Scheetz:

Q. Mr. White, Mr. Davis asked you about a turnover in the key men, which you commented on, and then you made a comment on the minor men.

Coming down to the men who have been used on these properties, if you know, what has been the rate of turnover as to them? If you do not know, I will ask the operating men to tell me.

A. Just a moment. I will be very glad to answer that. Of course, your question has just refreshed my memory on a

(Page 249):

third man who is a holdover from the old organization and has been with Middle West for many years and happens to be a man in a key position that we use very frequently indeed, and that is Mr. Buell, the chief electrical engineer, which is a flagrant omission on my part in view of the frequency with which we use his services, and I daresay there might be another just as good that does not occur to me at the moment.

The turnover in that organization has not impaired the value of their services to our operating companies, according to my best judgment.

I would like to repeat, Mr. Scheetz, if it is appropriate, that I have no inclination whatever to sell Middle West Service Company. To me, they mean a benefit to our operating companies and that is all they mean, and my inter-

est in them consists only of a desire to conduct these utility businesses just as efficiently and as profitably as we can. I have no further interest.

By Mr. Davis:

Q. You testified that when Mr. Lakin became president of all these companies you instructed him to build up a new staff to take over these various functions and duties which were formerly performed by the staff of one of these

(Page 35):

Dakota and UPU or the Dakota Public Service and Knife River? A. No.

Q. Is there anything in this picture that has come to your attention at any time since the conversations and negotiations with the representatives of Montana-Dakota were commenced, which would indicate to your mind an absence of arm's-length bargaining? A. No.

Mr. Scheetz: Cross-examine.

(Witness excused.)

Mr. Scheetz: Mr. Examiner, before Mr. Oakley begins his testimony I would like to incorporate by reference in the notes of this proceeding the testimony appearing in other files of the Commission, namely, File No. 43-185, hearing May 8th, 1939, Notes pages 1 to 113 inclusive and 142 to 145 inclusive. File No. 59-38, hearings on May 15, and 16, 1942, notes pages 388 to 604, inclusive, File No. 54-121, hearing April 23, 1945; notes, pages 31 to 35 inclusive, 37 to 38, 42 to 53 inclusive.

(Page 36):

These references include a description of the systems, properties of the Dakota Service Company and the Knife River Coal Mining Company, the data on original cost findings of the two companies, depreciation studies, questions of management, an elaborate description of the interchange capacity arrangement with Northwestern and of the joint management agreement between the Dakota-Public Serv-

ice Company, Knife River and Northwestern. Those are only some of the items included there. Also, Mr. White in his testimony referred to testimony taken in proceedings docketed as numbers 54-97, 59-73, 59-38, notes of testimony of August 8, 1944, at pages 1172-3, 1176-8 and UPU P-9. I ask that that testimony and exhibits be incorporated by reference.

Mr. Sweetwood: No objection.

The Examiner: Then the record may show that the testimony which has been identified and referred to by counsel for the applicant may be incorporated by reference in these proceedings, there being no objection to such incorporation.

(The incorporation by reference is noted.)

Whereupon:

KENNETH E. OAKLEY,

a witness produced by and on behalf of the Applicant, and having been first duly sworn, was examined and testified as follows:

(Page 94):

Q. I call your attention to the Day & Zimmermann report in evidence as Montana-Dakota Utilities Company Exhibit No. 15 and ask you if you would care to comment on the portion thereof commencing on page 8, entitled "Economies of Combined Operations"?

A. Montana-Dakota Utilities Company employed the services of Day & Zimmermann, for the purpose of making a physical survey of the operating plant and facilities of Dakota Public Service Company with a view to determining possible economies to be effected in the proposed acquisition.

In the report of Day & Zimmermann, beginning on page 8, there is set forth the economies to be expected. One is power supply. The Day & Zimmermann report speaks for itself, but in general concludes that very substantial economies will be effected as the result of the interconnection of the two properties and the rearrangement of certain

power requirements now in effect on the properties of Dakota Public Service Company.

The report on page 10 sets forth advantages to be gained by the elimination of an interchange power contract between Dakota Public Service Company and Northwestern Public Service Company. On page 10 of the Day & Zimmermann report there is set forth the opportunity for the elimination of transmission line charges now being charged Northwestern Public Service Company by Dakota Public Service Company.

(Page 95):

On page 11 of the Day & Zimmermann report it is pointed out—is pointed out the considerable advantage to be gained in the elimination of reserve capacity charges now made necessary by reason of the power facilities of Dakota Public Service Company which will be considerably altered upon interconnection with the properties of Montana-Dakota Utilities Company.

There is also set forth on page 11 certain charges resulting from so-called interchange of power, the paragraph being identified as "Energy charge."

On page 13, under "Transmission system improvements" there is set forth certain advantages to be gained in improvement of the transmission systems.

On page 14 there is set forth savings to be effected by the elimination of duplicate office expenses.

The total of these savings set forth in the report is considerable.

On page 16 of the report there is set forth savings to be made by the elimination of a management service contract with the Middle West Service Company of Chicago.

Q. Mr. Gamble, it is understood from the report that Dakota Public Service Company has a management service contract with Middle West Service Company. Would you intend to continue or cancel that contract?

A. We would cancel that contract.

(Page 96):

Q. It is also understood that Dakota Public Service Company has a joint management contract with Northwestern Public Service Company providing for mainte-

nance of a joint office at Huron. Would you continue or terminate that arrangement?

A. That arrangement would be terminated as rapidly as the office and other parts of the company carried at Huron could be transferred and consolidated with the present operations of Montana-Dakota Utilities, I might conclude by referring to page 23 of the Day & Zimmermann report wherein is summarized the annual savings to be made by the various recommendations contained in the Day & Zimmermann report as set forth on page 23. As set forth on page 23, the annual savings would amount to approximately $164,000.

Q. I call your attention to page 21 of the Day & Zimmermann report with respect to rates showing that there is a considerable difference between new Montana-Dakota Utilities Company rates now in effect and present Dakota Public Service Company rates. For example, the customer's bill consuming 181 kilowatt hours per month in the largest communities served by Montana-Dakota Utilities Company is charged $5.10, whereas the same customers in the Dakota Public Service Company communities are charged $6.45.

Will you make a statement as to what your rate policy will be when you acquire—in the event you acquire ownership of Dakota Public Service properties?

(Page 97):

A. The present plan of Montana—it is the present plan of Montana-Dakota Public Utilities Company to reflect immediately in rate reduction all possible savings as the result of this merger of the properties. It is the further plan of the company to make further reductions as fast and as rapidly as the development of business will warrant and as further savings can be effected.

I might point out at this time that the policy of Montana-Dakota Utilities Company in the matter of rates has been for many years a standardization of rates throughout the territory on a uniform basis to as nearly a single rate as is possible. At the present time there is a difference in the rates as between the largest communities served by Montana-Dakota Utilities Company and the smaller communities served for residential service of not

to exceed 50 cents on any amounts of electricity consumed by the customer.

Q. That is 50 cents per month?

A. 50 cents per month. It will be the policy of Montana-Dakota to work toward a uniform rate in the territory of the proposed acquisition as rapidly as possible so that within such times as earnings and economic conditions present, the entire service area of Montana-Dakota including the service area to be acquired will have substantially uniform rates.

(Page 98):

Q. Are you able to state what action Montana-Dakota Utilities Company will take with respect to the present interchange contract with Northwestern Public Service Company?

A. It will be necessary to continue the present interchange contracts until such time as Montana-Dakota can build its interconnections and determine the exact power requirements and the power available in the territory. It will be our endeavor, however, to as rapidly as possible reach a satisfactory basis of interchange with Northwestern Public Service Company.

Mr. Christopherson: Mr. Examiner, I ask leave to reserve as Montana-Dakota Utilities Exhibit No. 17 a number for the order to be issued by the Federal Power Commission in Docket No. IT-5958 in the event an order is issued by this Commission.

Mr. Sweetwood: No objection to that.

Defendant's Exhibit 296 was received in evidence. It consists of a letter from Leon M. Fuquay, Secretary of the Federal Power Commission, to John C. Benson dated October 22, 1946, re: Docket No. IT-6004 Montana-Dakota Utilities. It states in part as follows:

This is to acknowledge your letter of October 11, 1946 relative to reception by the Montana-Dakota Utilities Company of communications from the Commission authorizing Mr. Clarence M. Alliman to make certain field investigations and calling the Montana-Dakota Company's

attention to the fact that that Company failed to file a notice of succession as required by the Commission's rules and in which you state that it "would seem inadvisable for Montana-Dakota Utilities Company to file a notice of succession" at this time.

The Company has been in default and has violated the Commission's rules since thirty days after the purchase of the Dakota Public Service Company assets. A notice of succession should be filed immediately referring back to the original date of succession. However, the filing of the notice of succession will not jeopardize Montana-Dakota's rights in the present complaint before the Commission in Docket IT-6004.

Defendant's Exhibit 297 was received in evidence. It reads as follows:

J B FAEGRE
JOHN C BENSON
RAYMOND A SCALLEN
GLENN S STILES
PAUL J McGOUGH
JOHN J GLEASON
LORING M STAPLES
PAUL CHRISTOPHERSON
ALEX M KITTS
WENDELL G ROGERS
GEO D McCLINTOCK
HAYMER N LARSON
LEONARD O LANGER
EVERETT A DRAKE
ARMIN H JOHNSON
ROBERT J CHRISTIANSON
DONALD L ROBERTSON
WRIGHT W BROOKS
JOHN B FAEGRE JR
JOHN S PILLSBURY JR
JOHN A McEACHRON JR
RODGER L NORDBYE

FAEGRE & BENSON

1200 NORTHWESTERN BANK BUILDING

MINNEAPOLIS 2

October 11, 1946.

Leon M. Fuquay, Esq.,
Secretary
Federal Power Commission,
Washington, D. C.

FED. P. C. ..OCT.14 1946.

Dear Mr. Fuquay:

100-2 CORRES

In re: Docket No. IT-6004
Montana-Dakota Utilities Co.

We have received from Montana-Dakota Utilities Co. copies of your undated communications to that Company advising of the authorization to Mr. Clarence M. Alliman to make certain field investigations and calling that Company's attention to Sections 35.6 and 200.51 of the Rules of Practice and Regulations of your Commission and the fact that that Company has filed no notice of succession to Dakota Public Service Company Rate Schedule F.P.C.No.4 or Supplement No.1 to Rate Schedule F.P.C.No.4.

We have examined the order of the Commission with reference to the acquisition of the Dakota Public Service Company properties by Montana-Dakota Utilities Co. and we have examined Sections 35.6 and 200.51. Passing for the time being the question of the applicability of the aforementioned sections to the purchaser of the assets of Dakota Public Service Company, we find ourselves faced with a very practical problem. Section 200.51 contains language to the effect that the utility filing the notice of succession provided for in said section "adopts, ratifies and makes * * its own, in every respect" the rate schedules listed in the notice. There is pending before your Commission at the present time a complaint objecting to the rate schedules referred to in your letter on various grounds. Under the circumstances, it would seem inadvisable for Montana-Dakota Utilities Co. to file a notice of succession.

We shall be pleased to discuss this matter further with you or with the Commission in the event that it is the opinion of the Commission that some form of notice of succession should be placed in your files, although it seems to us that your record is complete at the present time.

Very truly yours,
FAEGRE & BENSON,
By Benson

JCB:FH.

Defendant's Exhibit 297.

Defendant's Exhibit 298 was received in evidence. It consists of certain correspondence, including:

Letter from Fuquay to plaintiff dated October 4, 1946, re Docket No. IT-6004 with reference to the complaint filed by plaintiff against defendant with the FPC. It advised that Mr. Clarence L. Alliman, who was at that time a member of the staff of the Commission, had been authorized by the Commission "to make certain field investigations, including an inspection of your properties and to collect data pertaining to the utilization of the interconnection facilities". It further requested that data relating, among other things, to production and fuel costs at the generating stations of Beulah and Bismarck, to estimate of losses in transmission of blocks of 1,000 to 5,000 KW from Beulah to defendant, and to loads for 1946 and 1947 in the area formerly served by Dakota Public Service Company be made available to Alliman.

A similar letter by Fuquay to defendant under the same date, requesting that there be made available to Alliman by defendant, among other things, data relating to production and fuel costs by generating stations, to interconnection facilities including the investment therein and annual operating costs, receipts and deliveries of energy over the same from 1930 to 1946, and log sheet records of loads from 1930 to 1947, and also records of Operating Committee meetings.

Defendant's Exhibit 299 was received in evidence. It reads as follows:

100-2 FORMAL

Northwestern Public Service Co.

Montana-Dakota Utilities Co., 831 Second Avenue South, Minneapolis, Minnesota, on this 5th day of November, 1946, hereby ratifies, adopts and makes its own in every respect all applicable Rate Schedules and Supplements thereto listed below, heretofore filed with the Federal Power Commission by Dakota Public Service Company, effective October 19, 1945, to-wit:

Dakota Public Service Company
Rate Schedule FPC No. 4

Supplement No. 1 to
Rate Schedule FPC No. 4;

subject, however, to all exceptions, objections and complaints heretofore filed with the Federal Power Commission in Docket IT-6004.

MONTANA-DAKOTA UTILITIES CO.,

By Odell W. Smith
Vice-President

FEDERAL POWER COMMISSION
DOCKETED
NOV 12 1946

FEDERAL POWER COMMISSION
NOV 12 1946
RECEIVED

47 (1) D

1581

Defendant's Exhibit 299.

Defendant's Exhibit 300 was received in evidence. It consists of a certification by Fuquay dated December 12, 1947 that in the files of FPC there is no record of any notice given by plaintiff of the termination of defendant's rate schedule FPC No. 6 and supplement No. 1 thereto.

Defendant's Exhibit 313 was received in evidence. It consists, among other documents, of the following:

Excerpts from the minutes of a meeting of the Federal Power Commission held January 14, 1936, showing, among other things, that the time within which North Dakota Power & Light Company, Northern Power and Light Company and defendant should file rate schedules under FPC Order No. 36 had been extended to January 31, 1936.

Letter from Francis H. Scheetz to the Federal Power Commission dated November 22, 1939, in which he advised the Commission concerning the merger of North Dakota Power and Light Company and Northern Power & Light Company into Dakota Public Service Company, and which reads in part as follows:

> "Entirely through my oversight as counsel, the officers of Dakota Public Service Company were not advised to file Notice of Succession as prescribed by Section 200.51 of the Regulations of your Commission."

Letter from Federal Power Commission to said Scheetz dated December 7, 1939, replying to the aforesaid letter of Scheetz, in which the Commission, among other things, requested that Certificates of Concurrence in defendant's rate schedules FPC Nos. 3 and 4 be filed by Dakota Public Service Company.

Letter from said Scheetz to the said Commission dated December 8, 1939 advising that its letter of December 7, 1939 had been referred to "our correspondent, Karl Goldsmith, Esq., of Pierre, South Dakota, who is local counsel for the Company" and that Scheetz had asked him to have the requested documents executed and forwarded directly to the Commission.

Letter from Karl Goldsmith, of Martens & Goldsmith, to the Commission dated December 26, 1939 enclosing the above requested Certificates of Concurrence and asking that the Commission enter an order making said certificates effective as of July 1, 1939.

Letter from the Commission to Martens & Goldsmith dated January 6, 1940 acknowledging receipt of the aforesaid Certificates of Concurrence and applications for retroactive effective dates thereof and advising, among other things:

> "It will not be necessary for the Commission to issue orders allowing the Certificates of Concurrence to become effective on July 1, 1939."

Defendant's Exhibit 316 was received in evidence. It reads as follows:

Defendant's Exhibit 316.

United States of America
Federal Power Commission

Commissioners { Claude L. Draper, Acting Chairman, Basil Manly, John W. Scott and Clyde L. Seavey. Leland Olds not participating.

September 30, 1941

In the Matter of
Montana-Dakota Utilities Company }

Order Allowing Supplemental Rate Schedule to Take Effect.

It appearing to the Commission that an application has been filed by the Montana-Dakota Utilities Company, requesting that Montana-Dakota Utilities Company Supplement No. 1 to Rate Schedule FPC No. 1, providing for the sale of electric energy to Mountain States Power Company,

be allowed to take effect as of January 1, 1941; and the Commission having considered the same;

It is ordered that:

(A) The aforesaid supplemental rate schedule be and it is hereby allowed to take effect as of January 1, 1941;

(B) The aforesaid supplemental rate schedule shall be deemed to have been filed and published in compliance with the Federal Power Act;

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein;

(D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, against the applicant.

By the Commission.

LEON M. FUQUAY,
Secretary.

(Seal)

Defendant's Exhibit 317 was received in evidence subject to the objection of plaintiff that the exhibit referred to the plaintiff and Mountain States Power Co., a matter not in any way involved in the instant controversy. It consists of a letter dated September 9, 1941 from plaintiff to FPC, which was marked as received by FPC on September 11, 1941. It contains information regarding plaintiff's Supplement No. 1 to its Rate Schedule FPC No. 1, and includes among others the following statement: "It is proposed to make the amended rate effective as of January 1, 1941."

The following testimony offered by defendant was received in evidence:

(Read from deposition of LEON M. FUQUAY:)

Q. Can you state, Mr. Fuquay, whether that folder contains all the communications and all the information which was before the Federal Power Commission when it entered the order to which I have directed your attention?

A. No, sir, I cannot.

Q. Is that folder the only folder containing relevant matters as to the application and orders to which I have been referring, and about which I have been inquiring?

A. I do not know whether even this folder contains rele-

vant matter. I am not in a position to pass upon that.

Q. Have you ever been a member of the Federal Power Commission? A. No, sir, I have not.

Q. If the testimony you gave yesterday or today in reply to any inquiry by Mr. Benson, reads to the effect that you are stating that the information or material on which the Federal Power Commission acted in a given or particular matter, would you care to add anything to that testimony?

A. I do not recall the testimony given, but when I attempt to say that I have had a search made of the files of the Commission, I meant those files relating to the particular subject matter which we were able to locate which were in the possession of the commission.

I do not think that I stated what constitute the whole records before the Commission, but merely that we had made a search of the records which are official public records, and that I brought down with me all such records we could find, that were in the Commission's possession, not before the Commission or considered by the Commission: I do not know what the Commission considered when it took its action; the action speaks for itself.

Q. And this is the only folder under the caption contained on the face thereof, which the files of the Federal Power Commission contain under that caption?

A. I do not think this is the only folder before the Federal Power Commission with this caption.

Q. Well, may I have the other folders made available, then?

Mr. Fuquay, by "any other folders" I meant any other folders available to the public.

A. I have had a check made, and am advised that this is the only folder containing the formal official public records in this docket.

Q. Well, Mr. Fuquay, Mr. Benson inquired of you as to Northwestern Rate Schedules FPC Nos. 3, 4 and 6, and asked you in substance, I think, whether you had produced all the evidence, testimony and records which were before the Commission in the entry of orders relating to those rate schedules. Does your answer to my last question stand? A. It does.

Q. As to the orders covering Northwestern Rate Schedule FPC No. 3, 4 and 6?

A. I do not recall the testimony, if any, which I gave in response to the question by Mr. Benson, but you see, even

if there were such testimony, it related to my efforts to find among the official public records of the Commission all documents which were in the possession of the Commission and filed in the proceeding involved, which were received, according to the [Commiss's] "Received" stamp prior to a certain date. At no time have I stated, as I recall, that the documents which I produced here were all the documents before the Commission. I stated that I had a diligent search made of the public records of the Commission, and those were the only documents that I could find in the Commission's possession on the particular subject matter.

Q. Do you know of your own knowledge all of the evidence, testimony and records received by the Commission before acting upon that application of any rate schedule?

A. No, sir, I do not.

Defendant's Exhibits 318 and 319 were received in evidence. They are, respectively, copies of the complaint and of the amendment and supplement to complaint filed by plaintiff with the Federal Power Commission and are the same, respectively, as Defendant's Exhibits 4 and 5 to its answer herein (R. pp. 149 and 163, supra).

(Read from deposition)

Q. Now, Mr. Fuquay, in accordance with my request, have you caused a search to be made of the official files of the Federal Power Commission to ascertain whether or not any [application] have ever been filed by R. M. Heskett, F. R. Gamble, Cecil W. Smith, or H. N. Elvig, to hold interlocking positions as directors or officers pursuant to the provisions of the Federal Power Act?

A. Yes, I have had a check made of that.

Q. And did you find any applications to hold such positions? A. No, I was not able to find any.

Q. Now, Mr. Fuquay, in accordance with my request, did you cause a search to be made of the official public files and records of the Federal Power Commission to ascertain whether the Commission has ever instituted any complaints on its own motion against Northwestern Public Service

Company, Northern Power and Light Company, North Dakota Power and Light Company, or Dakota Public Service Company?

A. I have caused such a search to be made, yes.

Q. And did you discover in the files, official files and records of the Commission any such complaint instituted by the Commission against any one of those four companies? A. No, I did not.

Q. And in accordance with my request, did you also cause a search to be made of the official public files and records of the Commission to ascertain whether or not a complaint had been filed, a formal complaint has been filed by anyone against Northwestern Public Service Company, Northern Power and Light Company, North Dakota Power and Light Company or Dakota Public Service Company prior to the filing of the formal complaint by Montana-Dakota Utilities Company in August of [illegible]?

A. I have had such a search made, yes.

Q. And did your search reveal any such complaint, disclose any such complaint having been filed?

A. No, it did not.

By Mr. Benson:

Q. What I am trying to find out is, in my examination before, I asked you for the communications concerning the application to make Northwestern Public Service Company's Rate Schedule FPC No. 3 effective retroactively, and I want to ask you now whether, if I asked you for all of the rate correspondence file with Northwestern Public Service Company concerning the application to make Northwestern Public Service Company's Rate Schedule FPC No. 4 effective retroactively, you would produce this same file No. 100-2 entitled Northwestern Public Service Company Rate Correspondence, Part I?

A. Yes, I would produce this same file folder, but without any representation whatever that I know of my own knowledge that these are the only documents or correspondence between Federal Power Commission and Northwestern Public Service Company.

Defendant's Exhibits 320, 322 and 324 were received in evidence. They consist of certified copies of applications

to the Federal Power Commission for authority to hold interlocking positions in plaintiff and other companies by C. C. Yawkey, Ben Alexander, and Aytch P. Woodson, respectively, giving in general the same kind of information as that set forth in Plaintiff's Exhibit 38 (R. p. 324, supra).

Defendant's Exhibits 321, 323 and 325 were received in evidence. They are certified copies of orders of the Federal Power Commission authorizing the aforesaid applicants to hold the interlocking positions for which authorization had been sought, respectively, and are identical with Plaintiff's Exhibit 204 except for the different names and docket numbers of the applicants.

There were offered by defendant and received in evidence portions from the deposition of FREDERICK R. GAMBLE on adverse examination which are as follows:

The witness testified that his name was Frederick R. Gamble, residing in Minneapolis, Minnesota; that he was Treasurer, Assistant Secretary and Director of plaintiff; that he had been a Director for 7 or 8 years, Treasurer continuously since 1931 or 1932 and Assistant Secretary since 1925; that he was a stockholder of plaintiff holding approximately 3,200 shares of common stock, which was substantially the same amount as he held during 1945.

Q. When is the first time, Mr. Gamble, that you recall that the Montana-Dakota Utilities Co. became interested in acquiring the properties of Dakota Public Service Company?

A. Well, I am not sure but my best recollection would be some time in 1944.

Q. And that price was agreed upon prior to the investigations made by Montana-Dakota of the properties and the physical properties and the records and so forth of the Dakota Public Service Company?

A. Well, I can't say it with a certainty, but that's my recollection.

Q. I say that's your best recollection? A. Yes.

Q. In any event that's the one that was put in the contract? A. That's correct.

Q. What, if anything, did you have to do with those investigations. First let us find out whether Mr. Heskett did give you any instructions on that?. A. He did.

Q. Did Montana-Dakota Utilities Co. at that time want to buy Dakota Public Service Company and the Knife River properties without regard to the result of your investigations?

A. No, I would say if there was any alarming difference between the representations of Mr. White and the actual conditions as we found them, it would be a matter to consider at that time.

Q. It would be a fair statement to say that the investigations, at least in part, were made to satisfy yourself that the things which he had told you were true and correct?

A. Yes.

Q. Do you know how long these investigations continued, approximately? A. Several months.

Q. They were not a perfunctory thing? A. No.

Q. Now, was there any examination made by engineers in connection with this investigation and examination of the properties and records of the Dakota Public Service Co.? A. Yes.

Q. That was handled, was it, by someone on the outside, some engineering firm? A. Yes.

Q. Was that Day & Zimmerman, Incorporated? A. Yes.

Q. Who engaged Day & Zimmerman [Incorporation] for that purpose? A. I did.

Q. When did you engage them, approximately?

A. In the spring of 1945.

Q. Did you have any prior experience with Day & Zimmerman in connection with engineering studies, Montana-Dakota? A. Yes.

Q. How long had they rendered service to you in an engineering capacity? A. Oh, fifteen or eighteen years.

Q. What was the occasion for rendering that service?

A. Oh, there were a number of occasions, purchase of property, the issuance of bonds.

Q. You mentioned the purchase of properties. Is that electric utility properties?

A. No, I believe the purchases I had in mind were gas properties.

Q. Gas properties, but utilities? A. Yes.

Q. Now, was Day & Zimmerman [Incorporation] to render any report? A. Yes.

Q. Did they render a report? A. Yes.

Defendant's Exhibit 326, which is also referred to as Defendant's (Minneapolis) Exhibit 4, was received in evidence. It consists of a 26 page report by Day & Zimmerman, Inc., dated October 8, 1945, received by plaintiff on or about the date thereof. It states, among other things: "In accordance with your request, we have made a study of the advantages to be expected as a result of combined operation of the properties and business or Montana-Dakota Utilities Co. and Dakota Public Service Company. * * * Our investigation and study is based on first-hand contact with and observation of the developments and accomplishments" of plaintiff "over the past twenty years, and field and office studies of the property and business of Dakota Public Service Company in May and June of this year [1945]. It is our opinion that the physical integration of these properties is both possible and desirable and that combined operation of the property and business offers immediate advantages to both companies and tangible benefits in the near future to the general public in the territory now served by Dakota Public Service Company." It sets forth the total net effective plant capacity, expressed in KW, for each of the generating plants of Dakota Public Service Company. The aggregate effective plant capacity for the four principal plants was stated to be 12,950 K. W. and for the six small standby stations, 1,005 K. W. The report sets forth the maximum demand of Dakota Public Service Company's system in 1944 at 13,230 KW. The report sets forth production statistics of the 4 principal generating stations of Dakota Public Service Company and also the following tabulation in reference to the six standby stations:

	Stand-By Generating Stations						
	Dickinson	Mandan	Ellendale	Gettysburg	Lemmon	Mott	Total
Peak Demand—kw.....	300	.....	150	110	225	200	985
Net kwhr Generated....	12,900	65,944	45,080	2,240	9,237	3,996	82,651
Total Production Cost..	$11,139	$ 9,991	$11,488	$ 1,461	$ 2,424	$ 2,040	$38,543
Cost per kwhr.....	.8634	....	....	.6522	.2635	.5105	....
Kind of Fuel.....	Coal	Coal	Coal	Oil	Oil	Oil	
Unit	Ton	Ton	Ton	Gal.	Gal.	Gal.	
Quantity	5,260	7,407	2,342	561	2,053	605	
Avg. Fuel Cost per Unit	$2.74	$2.22	$3.25	$.0990	$.0940	$.0870	
Avg. Fuel Cost per kwhr	$1.1172	....	....	$.2479	$.2089	$.1316	

The report also states as follows:

> "The elimination of the net interchange sale of 10,000,000 kwhr to Northwestern Public Service Company from the estimates for Dakota Public Service Company can only be considered feasible because of the possibility of physical interconnection with Montana-Dakota Utilities Co. and the resultant availability of Fort Peck power. In order for Dakota Public Service Company to terminate the interchange power agreement independently of integration, it would be necessary for that Company to secure additional generating capacity, probably to the extent of 5,000 kw."

The report also reviews separately the transmission line charges ($1,666.66 per month), the reserve capacity charge ($13.20 per year per kw) and the energy charge (5 mills per kwh).

The report concludes:

> "We believe that all the foregoing factors indicate the possibility for advantages, as a result of integration, in the form of savings in operating cost to the company and improved electric service at decreased cost to the consumers."

Q. You mentioned conferences with various personnel of Day & Zimmerman, Inc., during the course of this study; at any time during any of those conferences did anyone

from that organization complain to you or report to you that they were denied access to any record or property or facility on the part of the Dakota Public Service Company which they desired to examine?

A. No, I can't recall any complaints.

Q. So far as you know they were afforded complete access to whatever information they desired?

A. As far as I know.

Q. Now, diverting for a minute to another line of inquiry. You testified, did you not, before the Securities & Exchange Commission on October 9, 1945? A. Yes, I did.

Q. And in proceedings entitled, "The matter of United Public Utilities Corporation, et al., Docket No. 54-97, 59-38, 59-73, and 70-1110? A. Yes.

Q. All right, you were sworn before you testified before the S. E. C. on October 9, 1945? A. Yes.

Q. Your testimony as given on that date appears in the transcript beginning at Page 71, does it? A. Yes.

Q. Now, I want to refer for just a few minutes to that Day & Zimmerman report of October 8, 1945.

A. Is that the certificate of value or the integration report?

Q. The integration report number 4357. Have you been over this report recently? A. Not recently.

Q. Does that refresh your recollection with reference to any recommendation that the Day & Zimmerman people made with reference to terminating the 1941 interchange contract? A. Yes.

Q. Did they recommend termination of it?

A. I believe they did.

Q. Well, do you recall testifying about this report before the S. E. C. on October 9, 1945? A. Yes.

Q. Now, Mr. Gamble, you have heard what I have just read into the record. You did refer to the Day & Zimmerman report at that time before the S. E. C., did you?

A. Yes.

Q. And you were at that time aware of the recommendations contained in that report, Defendant's (Minneapolis) Exhibit 4? A. Yes.

Q. I believe you mentioned that you retained outside help to make some of those examinations. Did you retain Arthur Young & Company to make any investigation or

examination of the books, records and properties of the Dakota Public Service Company? A. Yes.

Q. When did you retain that firm to do that work?

A. I am not certain of the date.

Q. Approximately? A. Approximately May of 1945.

Q. Sometime during May of 1945? A. Yes.

Q. What was the purpose of their retainer?

A. To make an examination of the books and accounts of the Dakota Public Service Company, with a view to preparing such information in their official form for use with our application to Federal Power Commission and to the Securities & Exchange Commission.

Q. Were they to make a report to you, to Montana-Dakota? A. To Montana-Dakota, yes.

Q. Did they make such a report? A. Yes.

Q. Anybody from Arthur Young & Company ever state to you that they were refused examination of any document, records [of] book which they requested? A. No.

Q. Never made any complaint on that score? A. No.

Q. As far as you know they did have complete access to the books and records that they desired to examine?

A. Yes.

Q. Had you had occasion to retain or employ Arthur Young & Company for Montana-Dakota Utilities Co. on prior occasion? A. Yes.

Q. Were they your regular auditors? A. Yes.

Q. How long were they the regular auditors of the Montana-Dakota prior to May of 1945?

A. I believe I first employed Arthur Young in 1925 or early 1926.

Q. And were they the regular auditors of Montana-Dakota through all of the intervening years after 1925?

A. Yes.

Q. And are they the auditors of that company at the present time? A. Yes sir.

Q. During the course of their examination did Arthur Young & Company also review information in Mr. White's office in Chicago? A. Yes, I believe they did.

Q. As a matter of fact, didn't you request Mr. White to make certain information available to them in connection with that examination? A. Yes.

Q. And did Mr. White comply with your request?

A. Yes.

Q. And there was never, I take it, any occasion in which you requested any such information that it was not forthcoming to Arthur Young & Company? A. That is correct.

Defendant's Exhibit 327, which is also referred to as Defendant's (Minneapolis) Exhibit 45, was received in evidence. It consists of the report by Day & Zimmerman, Inc., dated October 23, 1945, concerning the fair value to plaintiff of the electricity utility system of Dakota Public Service Company in connection with the acquisition thereof by plaintiff. It was received by plaintiff on or about the date thereof. It reads in part as follows:

> "Based upon our investigation of the gross electric utility property additions so acquired from Dakota Public Service Company, consisting of electric utility system formerly owned by that Company, we are of the opinion that the fair value of those properties to Montana-Dakota Utilities Co. as of April 30, 1945, as of August 31, 1945, and as of the present date, is substantially more than the amount of $5,208,818.14, which was the depreciated original cost thereof at August 31, 1945, and is not less than $6,600,000."

Q. I asked you yesterday afternoon, Mr. Gamble, about the work done by Arthur Young & Company and the reports rendered by them, and also with reference to the work done by Day & Zimmerman, Inc., in the two reports which were rendered by them, being Defendant's Exhibit 4 and Defendant's Exhibit 45, which is their certificate of valuation, and I will ask you now whether you were familiar with both of those reports? A. Yes.

Q. Did you read that at about the time they were rendered? A. At about the time we received them.

Q. That's both Arthur Young & Company and the Day & Zimmerman reports? A. That is correct.

to be paid to Northwestern Public Service Company by Northern Power & Light Company, and my oral report on that was that in my opinion the $20,000 charge was very reasonable from the standpoint of Northern Power & Light Company.

Q. Did you make any recommendations at that conversation with Mr. White in connection with your report as to what would be necessary, in your judgment, to put on the properties of the Dakota subsidiaries of United Public Utilities Corporation, if the interconnection facilities were not in existence or were discontinued? Did you do that?

A. Yes, sir.

Q. Will you please tell us what you said, in substance?

A. I reported that it would take additional firm capacity on the properties of Northern Power & Light Company in the southern and southeastern portion of the interconnected Dakota system of Northern Power & Light Company and North Dakota Power & Light Company; that it would require a minimum of 1,000 k. w. in the Ellendale section, 1,000 k. w. in the Mobridge section, and 500 k. w. at Gettysburg.

Q. By kilowatts you mean additional generating capacity? A. Yes.

Q. Did you have in mind or recommend to Mr. White any particular type of generating capacity?

A. I had suggested it would probably be most practical for the installation of Diesel generating units at those points, and, in addition, the construction of an interconnecting line from Ipswich to Barnard.

Q. And did you have any opinion as to the approximate cost at that time of those units and transmission line, which you talked about and recommended to Mr. White?

A. Approximately $480,000 for the additional generating units and the transmission tie line from Ipswich to Barnard.

Q. And did you report that to Mr. White, that that was your estimate of the cost? A. Yes sir.

Q. Well, while you were making your report to Mr. White, did you have any discussion with him as to any particular advantages or benefits which you deemed to flow to Northern Power & Light by reason of the interconnections? A. Yes sir.

Q. Will you please tell us what that discussion was, in substance?

A. I reported to Mr. White that the interconnection facilities with Northwestern Public Service Company in fact provided firm power in the eastern and southern section of the interconnected transmission system of Dakota. That this interconnection regulated the voltage in the eastern and southern section of the transmission system. It provided ample power for the operation of oil switches for isolating sections of the line which might be in fault.

Q. What do you mean by regulated the voltage?

A. The power supply coming from the northern part of the interconnected transmission system of Dakota into the southern portion of the transmission system would have a very wide voltage regulation during a large part of the time, a voltage regulation which was too wide for practical operating purposes.

Q. When you say "regulate the voltage", is that synonymous with the term "stabilize the voltage"? A. Yes.

Q. Did you have any discussion in that report as to whether or not the interconnection facilities gave any standby capacity for the Dakota properties or their system?

A. Yes, at that time the peak load of the interconnected Dakota system was—oh, would have been about 2,000 kilowatt low with a 3500 kilowatt unit out of service at the [Buelah] plant.

Q. By the Dakota system, do you mean the North Dakota Power & Light Company and Northern Power & Light Company combine? A. That is what I intended, yes.

Q. How about duplicate service? Was there any discussion about that?

A. Yes, I reported to Mr. White that the interconnection at Gettysburg provided duplicate service for that town as well as many of the other towns through the eastern and southern part of the system.

Q. Now, if I remember correctly, you testified that when you were out there Mr. White asked you to look into, generally, the question of this five mill energy interchange rate. Did you make any report to Mr. White during this conversation you are just testifying about with reference to that question? A. Yes sir.

Q. Will you please tell us what you said touching on that point?

A. The information which I secured on the property indicated that Northern Power & Light Company sales of power to Northwestern Public Service Company as dump power provided a margin of profit to North Dakota Power & Light Company and Northern Power & Light Company.

Q. That rate to Northwestern at that time was five mills per k. w. h.? A. Yes.

Q. Were you satisfied, Mr. Lakin, from your investigation and the matters which you learned during the course thereof, that the five mill rate was fair insofar as Northern Power & Light and North Dakota Power & Light Company were concerned? A. Yes sir.

Q. Did you tell Mr. White that you considered it fair? A. Yes sir.

Q. Does that pretty well cover the report you made to Mr. White, or is there anything you care to add?

A. I believe that covers everything.

Q. Mr. Lakin, did you attend a meeting of the board of directors of United Public Utilities Corporation on or about June 30, 1936, in Philadelphia, Pennsylvania?

A. Yes sir.

Q. You were not a director of that corporation at that time, were you? A. No sir.

Q. Who invited you to attend that meeting, if anyone?

A. Mr. White.

Q. Was Mr. Scheetz also present? A. Yes sir.

Q. Who is he?

A. He is general counsel for United Public Utilities Corporation.

Q. Was he general counsel at that time? A. Yes sir.

Q. At that meeting did you make a report to the directors of United Public Utilities Corporation? A. Yes sir.

Q. What was the subject matter of your report?

A. The subject matter was the interconnection agreement between Northern Power & Light Company and Northwestern Public Service Company.

Q. Do you recall in substance what you reported to the board? A. Yes.

Q. Was that report oral or written?

A. The report was oral.

Defendant's Exhibit 328 was received in evidence subject to plaintiff's objection that it was immaterial. It reads as follows:

Defendant's Exhibit 328.

At your request we have made an examination of Knife River Coal Mining Company for the purpose of determining the fair value to you of the outstanding securities of that company consisting of 673 shares of common stock and $205,746.17 of notes to be purchased by you for a base price of $547,461.57, being the net book value at April 30, 1945 of the securities to be purchased, such securities to be purchased from the United Public Utilities Corporation simultaneously with your purchase of the outstanding securities of Dakota Public Service Company.

We are of the opinion that the outstanding securities of Knife River Coal Mining Company had a value to you at April 30, 1945 of approximately their net book value.

In arriving at our judgment in this matter we have examined and accepted as correct the various data in the Company's possession dealing with the description of the property, ownership, leases, contracts and the extent of recoverable coal reserve. We have also examined and accepted as correct the financial report of the Company dated April, 1945, containing the balance sheet and comparative income schedules; a detailed schedule of operating revenues, expenses and income for the five years 1940 to 1944, inclusive, and the four months ended April 30, 1945; and the record of dividend payments for the past five years and various other pertinent data.

This Coal Company was developed primarily to furnish coal to the Beulah generating plant which is immediately adjacent to the mine. At the present time coal is supplied by the Coal Company to other generating plants of Dakota Public Service Company, in addition to the Beulah plant, and also to generating plants of Northwestern Public Service Company, whose electric property is interconnected with the Dakota Public Service Company system. The Coal Company also sells coal to the general public. For the past five years, 1940 to 1944 inclusive, the annual sales to the

Q. Give us the substance of that report?

A. The report was substantially the same as the report which I had given to Mr. White on June 19, 1936.

Q. Which you have just previously described to us in your testimony this morning? A. Yes sir.

Q. And did it cover the $20,000 rate charge? A. Yes sir.

Q. Did it cover also your recommendation if interconnection facilities were discontinued? A. Yes sir.

Q. And also covered the advantages as you saw them to Northern Power & Light Company, which you described?

A. Yes sir.

Q. And also covered the five mill rate for the interchange of energy? A. Yes sir.

Q. And in substance your testimony is that you told the directors substantially what you told Mr. White, as testified here this morning? A. Yes sir.

Q. That is your recollection? A. Yes sir.

Q. Specifically, Mr. Lakin, do you recall whether Mr. White reported to the board of directors at that meeting that the use of the interconnection facilities with Northwestern Public Service Company, at an annual charge of $20,000 a year, under a five year contract, effective from January 1, 1936, terminable on 19 months' notice by either party, would be advantageous to Northern Power & Light, even without firm power?

A. He did recommend to the board of directors such a contract be executed.

Q. Did you concur in that recommendation?

A. Well, I merely made my report, and how they interpreted my report I have no way of knowing, except that I did know that they did vote or agree that such contract should be signed.

Q. Do you recall whether at that meeting there was any discussion of a survey which you had made of the Dakota subsidiary property and discussion whether or not there was any shortage of reserve generating capacity on those properties?

A. The subject was quite fully discussed on all of the items I reported.

Q. You reported on that as well? A. Yes sir.

Q. Did you feel at that time that the Dakota properties might be seriously embarrassed by failure of any one of those generators? A. Yes sir.

power companies have averaged around 186,500 tons and the annual sales to the general trade have averaged around 157,000 tons. The average price received by the Coal Company was $1.06 and $1.45 per ton respectively. During the total five year period the sales of coal and revenue received have been distributed approximately as follows:

	Sales in Tons	Revenue
Power Companies	54%	47%
General Trade	46	53
Total	100%	100%

If the Knife River Coal Mining Company was to be acquired and operated by an owner entirely independent of power company affiliations, its value from an earnings standpoint might be somewhat higher than its value to your Company, assuming, of course, that the reserve of recoverable coal has been correctly estimated and that the present contracts and markets for sale of coal will continue. An independent owner might also have the opportunity to increase earnings by means of an increase in the price of coal to the power companies.

In acquiring the stock of Knife River Coal Mining Company, as a part of the possible acquisition of Dakota Public Service Company, however, Montana-Dakota Utilities Co. would no doubt continue to operate the coal company on much the same basis as it is presently being operated and the price of coal for use in generating plants, which is practically at cost, would probably not be substantially increased.

In view of all of the foregoing facts and as a result of our analysis of all the data examined by us, we are of the opinion that the outstanding securities of Knife River Coal Mining Company had a fair value for purchase by your Company of approximately their net book value of $547,461.57 as of April 30, 1945.

(Read from deposition.)

Q. Well, now, let's go back to July 2, 1945—that is the date of your contract with United Public Utilities Corporation—did you have any discussion with Mr. Heskett or others at that time in which there was included the subject of a claim against Northwestern Public Service Company?

A. When you limit it to a claim I am unable to answer you. We realize that there has been a number of transactions between Northwestern and Dakota. We have knowledge of contracts between the company, but the matter hadn't crystallized at that time into the form of a possible claim.

Q. I am just talking about discussion—whether the matter was discussed?

A. Well, the matter of charges had been discussed, and, from the meager information we then had, it appeared that there were excessive charges by Northwestern to the company.

Q. On July 2, 1945? A. Yes.

Q. You referred, I believe, to discussions about the charges between the two companies under contract and I believe you used the word "Excessive"?

A. Yes, appeared to be excessive.

Q. Did you have in those discussions anything, in consideration of those charges, as to whether they were unjust? A. They appeared to be excessive to us, yes.

Q. What do you mean by excessive?

A. More than reasonable.

Q. High? A. High.

Q. Did you have any discussion at that time as to whether they were unfair? A. Yes.

Q. Did you have a discussion at the time as to whether they were fraudulent? A. Yes.

Q. You did. Now, can you tell me what the subject of those discussions was—I am referring again back to the July 2nd date, or in that period?

A. We had realized that the properties of Dakota and Knife River had been under the management of Northwestern and Middle West, extending back over a considerable period of time, and I personally was intimately ac-

Q. Did you so report that to the board of directors?
A. Yes sir.
Q. Do you recall making any statement to the board as to whether such embarrassment might well develop, in the reasonably near future, through increasing the load of the Dakota property system? A. Yes, I believe I did.
Q. You made such statement in your report to the board?
A. Yes sir.
Q. Mr. Lakin, are you a director now of United Public Utilities Corporation? A. Yes sir.
Q. When did you go on the board? A. January 30, 1940.
Q. Did you succeed any particular prior director?
A. Mr. Arhard.
Q. Were you present, Mr. Lakin, at a meeting of the board of directors United Public Utilities Corporation, held at Jersey City, New Jersey, on April 30, 1941, which was an organization meeting of that board of directors?
A. Yes sir.
Q. At that meeting, Mr. Lakin, do you recall whether or not there was any discussion of a proposed ten year contract between the Dakota Public Service Company and Northwestern Public Service Company? A. Yes sir.
Q. Do you recall whether any action was taken at that time?
A. I do not remember whether the action was taken at that meeting or a later meeting.
Q. Do you recall whether any action was taken with regard to that proposed contract? A. Yes sir.
Q. What was the action taken by the board?
A. The action taken by the board was that the president be authorized to advise the officers of Dakota Public Service Company to sign the contract.
Q. Did you vote in favor of that recommendation?
A. I did.
Q. Mr. Lakin, were you present at the regular meeting of the directors of United Public Utilities Corporation in Philadelphia on February 3, 1943? Would you care to refresh your recollection by looking at the minutes? Let the record show I am showing the witness the original minutes which have been previously identified. A. Yes sir.
Q. And you were present? A. Yes sir.
Q. Do you recall whether at that meeting the president

of the company, Mr. Samuel W. White, read to the directors a proposed supplemental agreement to amend the then existing 1941 agreement between Dakota Public Service Company and Northwestern Public Service Company?

A. Yes sir.

Q. Do you recall whether or not the president explained that contract to the directors? A. Yes, he did.

Q. Do you recall the basis on which that proposed amendment to the 1941 contract was founded?

A. Well, it was generally because of the fact that Northwestern Public Service Company could not carry through with provisions of the 1941 contract, because of restrictions of the War Production Board.

Q. Do you recall whether or not the president stated at that meeting anything with reference to the manner in which officers of Northwestern Public Service Company and Middle West Corporation regarded that proposal?

A. It was satisfactory to both companies.

Q. Do you recall, Mr. Lakin, whether or not any resolution was adopted at that meeting with reference to that proposed amendment to the 1941 contract?

A. Yes, there was a resolution passed.

Q. Do you recall what the resolution authorized?

A. It authorized the president of U. P. U. to recommend to the officers of Dakota Public Service Company that the supplemental contract should be signed.

Plaintiff offered the following testimony from the deposition of Lakin, which was received:

Examination, by Mr. Benson.

Q. You made some statements about the interest of yourself, your wife, or your family, in various securities of various companies. Did you or your wife or any member of your immediate family own any securities of any Middle West subsidiaries?

The Witness: Will you be more specific on the time, please?

Mr. Benson: In 1936, from January 1st to December 31st.

quainted with all of the personnel of Dakota Public Service, all the property, and also with the operating personnel of Northwestern, and realized then that management decisions were being made by the Northwestern employees, because I know that on the properties there were no top level management employees of Dakota.

Q Was that the extent of your information at that time?

A. No, it wasn't

Q. Did you have other?

A. Yes, I knew that Middlewest had acquired the control of the U. P. U. Company from the Thompson-Ross interests.

Q. When?

A. In the early thirties, as I recall. It was about the time of the crash. They got into financial difficulty.

Q. All right.

A. And I knew that that arrangement had continued on through and it—

Q. Down to 1945 when we are talking—

A. I realized that the U. P. U. had gotten into financial difficulties in '31 or '32, and that there was some question as to the status of Middlewest at that time, but from all the knowledge I had, the property continued to be managed by employees of subsidiaries of Middlewest Utilities.

Q. If I understood you correctly—and if I misstate you, you correct me—that Middlewest was in a position at that time in 1945 of controlling of Northwestern and, in turn, through them, controlling Dakota Public Service?

A. No, I didn't say that.

Q. Well, that's what I want to know. I understood you to say that Northwestern was running Dakota Public Service and Middlewest was running Northwestern.

A. That is correct.

Q. Well, now, what did you deduce from that—that Middlewest was running Dakota Public Service Company?

A. I knew that Middlewest employees were furnishing services to Dakota through Northwestern and probably directing.

Q. Employees of the Middlewest Corporation? A. Yes.

Q. Or employees of Middlewest Service Corporation?

A. I believe the Service Corporation, and the corporation, both.

Q. Both of them. You knew that as a fact? A. Yes.

Q. In July, 1945? A. Yes.

Q. All right, you mentioned awhile back the relations between the company. What do you mean by relations—the contract relations or what you just referred to about the fellows out in the field—the men at Huron and the operating management, and so forth?

A. I mean the contractual relations and the management relations.

Q. Management. Did you know who was on the board of Dakota Public Service at that time?

A. Yes, I believe I did.

Q. Do you know who was on the board at Northwestern Public Service? A. Yes.

Q. This was in July of 1945? A. Yes.

Q. You have related in some detail, Mr. Gamble, about your own knowledge about the affairs of Dakota Public Service Company and Northwestern Public Service Company, Middle West Corporation, Middle West Service Company, and your view on that. Now, can I ask you at this time whether any of your co-officers or co-directors in Montana-Dakota Utilities Co. shared the same views at that time? A. I think they did, yes.

Q. Did they have the same knowledge that you have or was that after discussion with you?

A. Well, they had some knowledge. I don't believe any of them had as complete a knowledge of the relationship as I had.

Q. This letter here, Defendant's Exhibit 26, is February 27, 1946, which is included in Plaintiff's Exhibit 22 (R. p. 263, supra). Defendant's Exhibit 28 is July 8, 1946. Can you fix a time when you came to that determination of the position charged in the Federal Power Commission complaint in that period?

A. Well, I might explain part of the reasons, at least, why it is difficult to fix an exact time. We were dissatisfied with the contract for a considerable period of time before those letters were written, but because of the—

Q. Now, you mean the February 27 letters?

A. Both the February and the July letters, but, because of the physical problems involved in the operation of the Dakota properties until we could establish our-

The Witness: A. No, sir.

Mr. Benson: Q. Did you subsequent to December 31, 1936? A. No, sir.

Q. How long prior to January 1st, 1936, had you held Middle West securities?

A. I held no Middle West securities.

Q. Or securities of subsidiaries that your were thinking about when you asked me as to the time?

A. 1932 or '33, I believe.

Q. What became of these properties which you worked on, which were Albert Emanuel's properties? [There] did they finally wind up in these various holding company settlements?

A. They finally wound up in the National Electric Power when it was formed.

Q. What became of National Electric Power Company?

A. It went into receivership.

Q. Well, who acquired control? Did the Insull interests acquire any control of National Electric Power Company?

A. The Middle West Utilities Company acquired control of National Electric Power Company, in, I believe, it was 1928.

Q. You stated you worked for National Electric Power Company and I think Kansas Electric Power Company. Correct? A. Yes, sir.

Q. And who controlled that?

A. National Electric Power Company.

Mr. Benson: Q. What I am trying to ascertain from you is whether your employment, up to the time that you went to work for U. P. U., was always with subsidiaries of National Electric Power Company?

A. Always subsidiaries of National Electric Power Company or their predecessors.

Q. Well, for the ten years prior to the time that you went with the United Public Utilities Company, which I think was the company you first went to— A. Yes.

Q. Had you been continuously with National Electric Power Company subsidiaries? A. Yes.

Q. So that is from 1922 on up until 1932? A. Yes.

Q. Now, in order to be sure that I didn't misunderstand this work you said you did on transmission lines of North-

western Public Service Company, that was not on any of these lines that are known as the interconnection facilities and described in the contracts between Northwestern Public Service Company and Northern Power & Light Company? A. No. I did no work on those whatever.

Q. Now, in order that we can be sure as to what you are saying—when you said you did some work on lines of Northwestern Public Service Company you were not talking about work on a 22/38 kilovolt transmission line from Aberdeen to Barnard? A. No, sir.

Q. Nor from Barnard to Ipswich? A. No, sir.

Q. And you were not talking about and you did not do any work on a 33 kilovolt transmission line from Highmore to Gettysburg? A. No, sir.

Q. Did you do any work on a transmission line from Ree Heights to Highmore, or don't you remember?

A. Yes, I did do some work, I am quite sure on that short section.

Q. When was that done? A. 1926. 1927.

Q. And when you talk about working on the lines of Northwestern Public Service Company during the period you have referred and the period you referred to in your examination in chief, did you mean to imply that you did any work on the portion of Aberdeen's interconnection substation and control equipment used for interconnection with Northern Power & Light Company?

A. I did not do any work on that.

Q. And you did not do any work on the Gettysburg substation used for interconnection with Northern Power & Light Company? A. I did not.

Q. Or the substation portion serving Gettysburg?

A. I did not.

Q. You used the term "Sponsor" with reference to the Ohio Electric Company and the Michigan Public Service Company. Did you say that those properties, Michigan Public Service Company, were sponsored by Ohio Public Service Company? A. No, sir.

Q. What did you say?

A. I said I acted generally as sponsor for the three companies mentioned.

Q. What does that mean, "sponsor" for them?

A. It was general supervision of all operation and construction items.

selves in a manner to take care of the business of those properties, we had to continue whatever arrangements then existed, whether we liked it or not. Now, we may have an earnest desire to cancel those agreements some time prior to the date of the cancellation, but because of the practical problems involved the company's operation, we could very well have delayed writing the letters until we had at least some assurance that upon the termination of the agreements we would be in a position to render service.

The following testimony by deposition of C. E. LAKIN offered by defendant was received in evidence. It is as follows:

Q. Will you state your name and address, please?

A. C. E. Lakin, Greenville, Ohio.

Q. What is your present business and occupation?

A. President and general manager of the Indiana-Ohio subsidiaries of the U. P. U.

Q. What kind of business are the Indiana-Ohio subsidiaries of the U. P. U. in?

A. Electric utility business, gas utility business, and water utility.

Q. How long have you had experience in the electric utility business? A. 34 years.

Q. Calculation makes that commence in about 1913?

A. Yes sir.

Q. Will you please tell as briefly as possible what your connections have been and your experience from 1913 down to the present time?

A. I started with the Union City Electric Company in Union City, Ohio, as a meter and distribution engineer and later transferred to the Sidney office of the Albert Emanuel Company, which was then a holding company, where I had charge of meters and distribution engineering work for some of the companies. Then spent a little over a year in the U. S. Army, Department of Military Aeronautics, and, after returning from the army I was located in Kansas City, Missouri, which was then the operating office of the Albert Emanuel operating proper-

ties, which later became the National Electric Power Company.

Q. What services did you perform there, generally?

A. In general, meter and distribution engineer and with general inspection of various other things other than meter and distribution work.

Q. What time does that bring us to?

A. That brings us down to 1921.

Q. All right, will you continue?

A. At that time the Kansas Electric Power Company was formed by merging a group of several properties in the state of Kansas, and I was general superintendent of the Kansas Electric Power Company.

Q. Was that a fairly large company or a small company?

A. It was a relatively small company having about 40,000 customers.

Q. What were your duties there, just generally?

A. Everything relating to operations and construction.

Q. Does that include power plants? A. Yes sir.

Q. All right, sir, how long were you at Kansas Electric Power Company?

A. Until the early part of 1926.

Q. Where did you go then, sir?

A. I went to the New York office of the National Electric Power Company, which is a holding company for properties over about thirteen states.

Q. And how long were you with National Electric Power Company in the New York office? A. About six years.

Q. Until about 1932? A. Yes sir.

Q. During that period of time, Mr. Lakin, did you have occasion to go over the properties of the Northwestern Public Service Company? A. Yes sir.

Q. Will you tell us briefly the circumstances about that?

A. My first occasion to visit the Northwestern Public Service Company was in 1925, while I was still located with the Kansas Electric Power Company, and that continued on through until the latter part of 1927 or early part of '28. I did general engineering work on the Northwestern Public Service Company and did engineering work particularly on transmission lines which connected the various districts of the Northwestern Public Service Company which were not then connected.

Q. You mean that was the term that was used in the organization set-up of National Electric Power Company to designate the type of service that one of the officers or employees rendered?

A. We never used such a term at National Electric Power Company.

Q. Well, did you just employ it this morning for the first time?

A. No. It is a term generally used by large holding companies that had sponsors for certain groups of companies, certain geographical groups.

Q. That designated certain executive and administrative and supervisory effort over those groups, is that what it means?

A. Yes, and our company never had sponsors as such. We were, some of us, spending a great deal of our time on certain companies, carrying through on the operation and construction.

Q. Do you mean the term "sponsor" was improperly applied to the work you were doing, then? A. No, sir.

Mr. Benson: I still don't follow, because I am not familiar with the terminology. Why did you use the term this morning when you say you sponsored?

A. Well, it is a term that is generally used for that kind of work.

Mr. Benson: Oh. But you mean, in your National Electric Power Company, which you were working for at that time, I take it— A. Yes.

Q. They did not use the term "sponsor"? A. No, sir.

Q. But you used it this morning? A. Yes, sir.

Mr. Benson: I see.

Q. Now you say you handled some negotiations for the sale of firm power, in response to a question counsel asked you. Were you talking about firm power to customers who utilized that power in other than utility business or customers who were in themselves utilities and bought firm power?

A. That included both. Large blocks of power to individual non-utility corporations, usually worked on—

Q. The non-utilities? A. As well as utility sales.

Q. I take it, then, you went over the properties several times during this period of 1925 to late 1927 or early 1928? A. Yes sir.

Q. At whose direction did you go over the properties? Was it in the line of your employment with Kansas Electric Power Company, before 1926, and with National Electric Power Company thereafter?

A. Generally, that is correct.

Q. Do you know who owned or controlled Northwestern Public Service Company at that time?

A. National Electric Power Company.

Q. Do you happen to know, Mr. Lakin, how long National Electric Power Company continued to own or control Northwestern Public Service Company?

A. It was either the last part of 1927 or the first part of 1928.

Q. Then what did they do? Divest themselves of their ownership?

A. That was sold to Northwest Utilities Company.

Q. Now, Mr. Lakin, you told us you were with National Electric Power Company, in New York, between 1926 and 1932, that during part of that time at least you had occasion to go over the Northwestern Public Service Company property. Can you tell us, in a general way, what your duties or other activities during that period were for National Electric Power Company?

A. My title was Electrical Engineer and I had supervision of all electrical operation and construction on all the subsidiary companies of National Electric Power. In addition to that I acted more or less as sponsor for the Ohio Electric Power Company and Michigan Electric Power Company and Michigan Public Service Company.

Q. Did your duties include any work or activities in connection with interconnection or power contracts?

A. Yes.

Q. Can you describe briefly for us what those activities consisted of or what contracts you worked on, and about how many of them?

A. The activities were negotiating for sales of firm power or purchase of firm power and for interconnection agreements where the flow of power was from one company to the other. There were a large number of those and

Q. Did you make any investigation of charges for firm power in North and South Dakota in the year 1936?

A. There were no such charges, to my knowledge.

Q. And is that same period the period you were talking about with reference to firm power that Ottertail dealt in with other utilities? A. Yes, that is correct.

Q. So, since 1926 or '27, you knew nothing about the prices of firm power in North and South Dakota?

A. That is correct.

Q. Now, you made a statement or used a term in each of your answers to counsel, where you said you made a general inspection or you inspected generally, always using the word "generally". What did you mean by that?

A. I meant by that that I did not inspect every bit of property owned by the companies referred to.

Q. Well, how many trips have you made to the Northwestern Public Service Company property since 1925 or '26, the first trip you mentioned? A. Two.

Q. When was the first one after 1925 or '26?

A. In—I will refresh my memory—in June of 1936 and May of 1941.

Q. Those are the only trips you made? A. Yes.

Q. Now, in June of 1936 you say you were in the City of Minneapolis? A. Yes, sir.

Q. Were you attending a meeting or were these Northwestern Public Service Company managers attending a meeting of the North Central Electrical Association?

A. Well, it included the managers of Northwestern Public Service Company, of Northern Power & Light Company, and was, I believe, referred to as a managers' meeting of only those companies.

Q. Only those companies. And who went to the meeting? I mean, classifying the employees, who went to that meeting?

The Witness.: I cannot answer that.

Mr. Benson: No, I don't mean by names, I mean classification of employment.

The Witness: Well, I—

Mr. Benson: Q. You have used the term "managers." Now who else?

there were about 16 or 18 that were finally completed into a contract.

Q. Well, will you tell us something about these interconnection and power contracts, as to their size?

A. These vary in size, a few hundred kilowatts of power sales to relatively large interchange power. One of the last ones which I worked upon was with the Jersey Central Power & Light Company, who built an interconnection with the Public Service Gas & Electric Company, which was for a 20,000 k. w. interchange agreement.

Q. Was Jersey Central Power & Light a subsidiary of National Electric Company? A. Yes.

Q. Did you conduct negotiations in connection with that contract? A. Yes sir.

Q. All right, Mr. Lakin, you say you were with National Electric until 1932. What did you do then?

A. I then went to the management of the Indiana-Ohio properties of U. P. U.

Q. That was in 1932? A. Yes sir.

Q. By U. P. U., you mean United Public Utilities Company? A. Corporation.

Q. In 1932? A. Company is right.

Q. In what capacity did you go with those Indiana-Ohio subsidiaries? A. As president and general manager.

Q. How many subsidiaries were in Ohio? A. Seven.

Q. How many in Indiana? A. Four.

Q. Did you make any changes after that or are you still in that capacity? A. Still in that capacity.

Q. With the same subsidiaries? A. Yes, sir.

Q. But they are now subsidiaries of United Public Utilities Corporation? A. That is correct.

Q. Mr. Lakin, do you now have or have you ever had any connection with Northwestern Public Service Company except as you have testified, of going on its properties during the time you were with the National Electric Power Company and Kansas Electric Power Company? A. No, sir.

Q. Never been employed by that company? A. No, sir.

Q. Did you ever own any stock, any securities, in that company? A. No.

Q. Any members of your immediate family own any stock or securities in that company? A. No, sir.

A. District managers.

Q. So far as you know nobody else but district managers? A. Commercial managers.

Q. Commercial managers.

A. And engineers from the general office. Also the officers of the general office at Huron and department heads at Huron, I would say composed at least the majority of the attendance at that meeting.

Q. The first point at which you touched the properties of North Dakota Power & Light Company, Northern Power & Light or Northwestern Public Service Company, after you left this managers' meeting in 1936, was where?

A. Ipswich, South Dakota.

Q. How did you get out there from Minneapolis?

A. By train to Aberdeen.

Q. To Aberdeen?

A. And by automobile from Aberdeen to Ipswich.

Q. What time did you arrive in Aberdeen?

A. I don't know. It was quite early in the morning.

Q. Did you immediately leave for Ipswich after breakfast? A. Yes, sir.

Q. You did not inspect any property at Aberdeen at that time? A. No sir.

Q. Who went with you from Aberdeen to Ipswich?

A. Mr. Strike, Mr. Kruesi and Mr. White.

Q. Did you inspect any property on the way from Aberdeen to Ipswich? A. Yes, sir.

Q. What property?

A. Transmission line from Aberdeen to Ipswich.

Q. When did you arrive at Ipswich? A. I don't know.

Q. Well, was it before luncheon? A. It was after lunch.

Q. Where did you have lunch?

A. I don't remember. I believe it was in Mobridge.

Q. What day did you complete your inspection trips?

A. I can't answer that definitely.

Q. Have you a memorandum book before you, where you made notes concerning this trip?

A. I have a memorandum book containing part of the information.

Q. What day did you arrive at Aberdeen on this trip?

A. The morning of the 13th or 14th of June, 1936.

Q. Now, when did you get to Huron?

Q. Have you ever been connected with or employed by or in any capacity with Middle West Utilities Company?

A. No, sir.

Q. Or the Middle West Corporation? A. No, sir.

Q. Middle West Service Company? A. No, sir.

Q. Have you ever owned any stock or other securities of any of those corporations? A. No, sir.

Q. Have any members of your immediate family owned any stock or other securities of any of those corporations?

A. No, sir.

Q. That includes down to the present time? A. Yes, sir.

Q. Mr. Lakin, are you familiar with the company known as Insull Utilities Company?

A. I was when it was in existence.

Q. That was a different company from any of the ones I have just interrogated you about? A. Yes, sir.

Q. Are you a member of any engineering professional association or institute?

A. I am a member of the American Institute of Electrical Engineers, with the grade of Fellow.

Q. Have you ever had occasion to make any trips over the properties of the Dakota electric utility subsidiaries of United Public Utilities Corporation, namely, North Dakota Power & Light and Northern Power & Light Company? A. Yes, sir.

Q. Have you made any such trips? A. Yes, sir.

Q. When was the first of those trips, Mr. Lakin, if you recall?

A. In the spring of 1936.

Q. At whose request, if anyone's, did you make that trip? A. Mr. Samuel W. White.

Q. That was in May of 1936? A. Yes, sir.

Q. Mr. White, at that time, was president of United Public Utilities Corporation? A. Yes, sir.

Q. And I believe you testified at that time you were president of the Indiana-Ohio subsidiaries of that company? A. Yes, sir.

Q. Will you please explain to us the circumstances under which Mr. White asked you to go out to those properties to make that inspection?

A. He had told me that they were considering a contract between Northwestern Public Service Company and Northern Power & Light; that he would like for me to

A. I believe I arrived in there on the morning of the—or the afternoon of the 17th day of June, 1936, I believe.

Q. And after you got to Huron, you did not make any further trips out over the property, did you? A. No, sir.

Q. Your time was then spent in the office at Huron?

A. Yes, sir.

Q. When did you leave Huron?

A. On the night of, I believe it was on the night of June 18th.

Q. You went from Aberdeen to Ipswich and where did you finish your first day's trip?

A. At, I believe that was at Dickinson.

Q. So on the evening of the 13th, you were in Dickinson, North Dakota, correct?

A. I would say that is approximately correct.

Q. All right. Now, let's take the 14th. Do you want to look at this map? A. Yes.

Q. So on the 14th did you have any meetings in Dickinson? A. No particular meetings.

Q. I see. What did you do in Dickinson?

A. We inspected the substations and power plant.

Q. When did you leave Dickinson?

A. I believe we left Dickinson early the next morning.

Q. That is the morning of June 15, 1936?

A. Yes, or about then. I can't say as to the exact date.

Q. You cannot say as to the hour or the date? A. No.

Q. Well, you say you went to Dickinson and arrived there on the evening of the 13th day of June, 1936?

A. I believe that is correct.

Q. You don't know whether you spent more than the 14th in Dickinson?

A. No. It was relatively late when we got into Dickinson, at the power plant, it was dark when we were there. I don't know what time.

Q. You got into Dickinson late on the 14th and it was dark when you got to the power plant?

A. Yes. The 13th.

Q. It was dark when you got to the power plant?

A. Yes.

Q. Then on the 14th, what did you do, the 14th of June, 1936?

A. We proceeded from Dickinson along the transmission lines to the east, over as far as Glen Ullen, went north over the transmission line into Beulah, and from Beulah—

go over the interconnection facilities to determine, in my own mind, what value they were to Northern Power & Light, and to also make a general inspection of the facilities on both Northern Power & Light and North Dakota Power & Light.

Q. Did he at that time say anything to you concerning the rates at which those companies were interchanging electric power, electric energy? A. Yes, sir.

Q. Did he ask you to do anything in regard to that?

A. Make a general check to determine if that cost was reasonable.

Q. Reasonable from what standpoint?

A. Reasonable from the standpoint of Northern Power & Light.

Q. Did you make such inspection trip? A. Yes, sir.

Q. Do you recall approximately when you made it?

A. It was about, sometime before the middle of June, 1936.

Q. Where did you leave from for that trip?

A. We started from Aberdeen.

Q. No, I mean—

A. Oh, we left from Minneapolis to Aberdeen in company with Mr. White, Mr. Kruesi and Mr. Strike.

Q. Let me back up just a minute. What were you doing in Minneapolis, if I may ask?

A. I was invited to attend the annual managers' meeting of the Northwestern Public Service Company, Northern Power & Light and North Dakota Power & Light Company, which was being held in Minneapolis.

Q. Did you attend that managers' meeting at Minneapolis? A. Yes sir.

Q. All right. What did you do after that meeting was over? A. We then proceeded to Aberdeen by train.

Q. Did you go with anybody else?

A. With Mr. White, Mr. Kruesi and Mr. Strike.

Q. Now, Mr. Lakin, if you will please tell us in your own words the portions of the properties you visited and the facilities and operations which you inspected?

A. We started from Aberdeen by automobile, travelling west, inspecting the properties generally, proceeded to Mobridge, to Lemmon, to Mott, to Dickinson and to Bismarck. At that point Mr. Strike, Mr. White and Mr.

Kruesi parted from the party. The following day I, in company with Walt Renden made inspection trips from Bismarck up to the [Buelah] Power station of North Dakota Power & Light Company and over the transmission lines generally in the Bismarck district.

Q. At [Buelah], while you were at [Buelah], did you examine any particular facilities?

A. I investigated the plant capacities, the operating conditions generally, with regard to breakdowns, carrying capacities in the summer and winter. I talked with the operating men in the power plant at [Buelah].

Q. Did you make any investigation with reference to the fuel supply at that particular plant? A. Yes sir.

Q. Will you tell us about that, please?

A. The fuel supply was received from the Knife River Coal Mining Company, which is located adjacent to the [Buelah] plant.

Q. Is that what you engineers call a mine mouth plant?

A. Yes sir.

Q. You mentioned a Mr. Walt Renden. Do you know who he is?

A. Well, I guess his name is Walter Renden, and he was then district manager of the Bismarck district of North Dakota Power & Light.

Q. Well, I think on your itinerary, as you were describing it, you had been inspecting the transmission lines in the Bismarck area. Where did you go from there on your trip, if anywhere?

A. Proceeded from there over the transmission lines which terminated in Wishek, North Dakota, and from Wishek we inspected the electric line into Ellendale, North Dakota, and from Ellendale inspected the lines on into Aberdeen substation.

Q. Now, where is Aberdeen, Mr. Lakin? Is that in North Dakota? A. Aberdeen is in South Dakota.

Q. Well, are the Northern Power & Light lines located at Aberdeen? A. No sir.

Q. On what properties are the Aberdeen stations located? A. Northwestern Public Service Company.

Q. On your trip did you go through Barnard?

A. Yes sir.

Q. Did you observe any interconnection facilities along any points on that itinerary between Northern Power & Light and Northwestern Public Service Company?

A. That was an interconnection point between Northern Public Service Company and Northern Power & Light Company.

Q. You mean Barnard? A. Barnard.

Q. How about Aberdeen?

A. That was not an interconnection point.

Q. What was located at Aberdeen?

A. The substation facilities, including transformer to change the voltage from 33,000 to 22,000, for supply to Northern Power & Light Company, together with oil circuit breakers and auxiliary equipment, with a steel tower structure, making a complete substation.

Q. Did you also, in that journey, visit Ipswich? A. Yes.

Q. At Ipswich did you observe any interconnection facilities?

A. That was the interconnection of the facilities of Northwestern Public Service Company with Northern Power & Light Company.

Q. And did you observe them? A. Yes.

Q. All right, sir. Did your inspection trip terminate there, or was there any more?

A. Proceeded from Aberdeen on to Huron, the location of the general office of the Northwestern Public Service Company and the subsidiary companies in Dakota of United Public Utilities Corporation.

Q. Will you tell us in your own words, generally, what you did in Huron, if anything?

A. At Huron checked on the service that had been rendered, that was being rendered to Northern Power & Light Company from Northwestern Public Service; checked on the cost of the interconnection facilities; also [check] on the reason why the interconnection facilities had originally been made; and also checked production costs in some of the various plants.

Q. Did you make inquiry of any persons during this trip you just described, concerning facilities you were observing and were investigating?

A. I made inquiries of E. K. Albert.

Q. Who was he?

A. He was electrical engineer in charge of electric operation and construction in the general office in Huron.

Q. Anybody else? A. I [check] further with Mr. Stokke.

Q. Who was Mr. Stokke?

A. Mr. Stokke was then superintendent of production in the general office at Huron.

Q. Anybody else? A. Talked with Mr. Sandstedt.

Q. Who was he?

A. He was treasurer of Northwestern Public Service Company and the Dakota properties of U. P. U.

Q. By that don't you mean Northern Power & Light and North Dakota Power & Light? A. Yes sir.

Q. Anybody else that you recall?

A. That is all that I remember in particular.

Q. Did you talk with other people that you cannot remember the names of now or were they the only three you talked to?

A. I don't particularly remember talking with [other].

Q. Did you talk with the load dispatchers at Aberdeen?

A. Yes sir.

Q. By the way, while you were at Aberdeen did you check any of the logs? A. Yes, sir, I did.

Q. Well, does that terminate your inspection trip or was there any further inspection of the properties?

A. That terminated the inspection trip.

Q. All right. What did you do after you were through at Huron?

A. I proceeded to Chicago, to the office of Mr. Samuel W. White.

Q. What did you do when you reached Mr. White's office? Did you have a conversation with him? A. Yes sir.

Q. Do you recall the approximate date?

A. It was June 19th, 1936.

Q. During that conversation with Mr. White did you make any report to him concerning your inspection?

A. I did.

Q. Will you please tell us what you told him concerning that subject matter?

A. I first answered the principal question that he had asked me to check.

Q. And that was?

A. Which was the annual charge of $20,000 which was

A. I believe Mr. Albert was present at the time.

Q. Albert, not Sandstedt?

A. Albert was present with me at the time we were looking over the records.

Q. Do you remember the date or number of the work order on the Aberdeen substation?

A. I would have to guess, and I would say it was work order No. 420. That is merely a guess.

Q. Do you remember the date? A. No, I don't.

Q. Did you make a division of the structure as between the Northwestern's use of the substation and the interconnection with Northern Power & Light?

A. Yes, there was.

Q. Who gave you that division?

A. I think that came from both Mr. Albert and Mr. Sandstedt.

Q. And then who gave you the figures as to the division of labor? A. Division of labor?

Q. There was labor shown on these charges against that work order, wasn't there? A. Yes, sir.

Q. And who gave you the distribution of that labor to apply to the portion of that substation, construction labor and installation labor? A. I don't remember that.

Q. Well, somebody in the office there in Huron gave you that distribution?

A. I believe so, because I arrived at a definite figure for that portion of the interconnection.

Q. Now, did you call for the work order or work orders on the Gettysburg substation? A. Yes, sir.

Q. Who produced those for you? A. Mr. Sandstedt.

Q. Did you call for the accounting records showing the charges against that work order? A. Yes, sir.

Q. Do you remember the number of the work order?

A. No, sir.

Q. The date. A. No, sir.

Q. Are you able to give us the same sort of a description of that work order that you gave of the other one on Aberdeen? A. Yes.

Q. It was a book? A. It was a book.

Q. Who gave you the portions of the equipment of the Gettysburg substation used exclusively for interconnection with North Dakota Power & Light Company?

A. I don't remember.

Q. Someone in that office pointed them out to you?

A. Yes, sir.

Q. And they pointed out to you the charges on those records representing the cost of the material of that portion of the Aberdeen substation?

A. Yes. I satisfied myself that the charges, total charges, were within reason.

Q. Referring to the Gettysburg substation, did anybody point out to you the items of cost of specific items of equipment that appeared in that record and which were applicable solely to the portion of the Gettysburg substation used exclusively for interconnection with Northern Power and Light Company?

The Witness: A. I don't remember that anyone pointed out all the specific items. As I remember the situation, the Northwestern Public Service Company built the line into Gettysburg and constructed the 600 KVA stepdown transformer installation.

Mr. Benson: Q. How many banks of transformers were there in that substation? A. Two.

Q. I gather from what you said—and correct me if this is not correct—that you took the entire cost as recorded on the records which showed charges against the work order for this substation, and, in your figures, allocated the entire cost of the Gettysburg substation to interconnection facilities for the benefit of interconnection with Northern Power & Light?

A. As I remember, Mr. Benson, one bank of 600 KVA transformers, 22 KV, 2300 volts, was the property of Northern Power & Light Company.

Q. So in your figures you took one bank of transformers?

A. I believe that is correct.

Q. Now, how much of the structure did you allocate to the interconnection facilities? A. That I do not remember.

Q. Well, did somebody point out a figure on the charge sheet? A. Yes, sir.

Q. That you talked about? A. Yes, sir.

Q. And you took the figure that that person designated as the allocation?

A. I took the figure and the figure that was given me looked within reason.

Q. Did you find any overheads in the construction of the Aberdeen substation? A. Yes, I am quite sure I did.

Q. Did you take the overheads as shown on the records of the charges to the work order or work orders for the Aberdeen substation?

A. I believe I took the overheads as applied.

Q. And you put them into your computation?

A. Yes, sir.

Q. Did you do the same at Gettysburg? A. Yes, sir.

Q. So the overheads that you used in the figures that you used, when you talked to Mr. White and to the Board of Directors, included the overheads as allocated on the document or accounting record showing the charges to the work order on the Gettysburg substation?

A. On that particular thing, while I checked up the individual charges as they were able to put them together from their work orders, there were overlapping work orders and there were some that were definite work orders for the particular facilities for the interconnection, and I forgot that part of it, and made an estimate, a quick estimate of my own, to determine the approximate value of the facilities.

Q. Well, by your estimate, you mean based on past experience? A. Yes, sir.

Q. You mean you make a rule-of-thumb quick estimate?

A. Well, I would say it was an intelligent estimate.

Q. Yes, but I mean still a rule-of-thumb proposition,—not as a layman would do it, but as an engineer would do it?

A. Well, I don't know your definition of rule-of-thumb.

Mr. Benson: All right.

Q. What did you do with that estimate?

A. I used that estimate to form my opinion on the charges that were being considered, the charges of $20,000 from Northern Power & Light and Northwestern Public Service Company, as charges on the interconnection facilities owned by Northwestern Public Service Company.

Q. Where did you get your figures as to cost of the transmission line from Aberdeen to Barnard?

A. From Mr. Sandstedt.

Q. From this same work order record that you testified to as to where you got the cost of the Aberdeen substation?

A. Yes.

Q. And he pointed out what charges on that sheet, book record, were, according to his statement, chargeable entirely to the line from Aberdeen to Barnard?

A. There was a bit of conflict there, I remember, due to the fact that there was a line already constructed there.

Q. That is correct, but I am saying he pointed out what he charged as chargeable against the interconnection facility line? A. He pointed out the charges, yes.

Q. And was it on the same accounting record that you found the charges to the line to Ipswich?

A. I don't remember.

Q. Well, did anybody produce a record showing the charges against the work order for the construction of transmission line to Ipswich? A. Yes.

Q. And was it Mr. Sandstedt that pointed out, on that accounting record, which items were chargeable to the transmission line running from Aberdeen to Ipswich and interconnecting with Northern Power & Light?

A. Yes. I would like to say either Mr. Sandstedt or some one in his department.

Q. Yes. A. I am quite sure it was Mr. Sandstedt.

Q. What procedure did you follow to get the cost of the line from Highmore to Gettysburg?

A. That figure was received, or produced, produced, rather, by Mr. Sandstedt's office.

Q. The figure was produced by Sandstedt's office. You mean they did not bring any accounting record out on that one? A. Yes, they did.

Q. What was the nature of those accounting records?

A. Similar to the others.

Q. It was a book, a big sheet? A. Yes, sir.

Q. And he pointed out on that accounting record, or someone under his supervision pointed out to you the items on there chargeable to the work order covering the construction of the high tension line from Highmore to Gettysburg? A. Yes, sir.

Q. Did you ever check the material in place against any of these work orders?

A. The material in place was not checked. There was some discussion on the Gettysburg-Highmore line because of the fact that—

Mr. Benson: No question has been asked. No question has been asked.

Q. You left Huron on the 18th of June, 1936?
A. That is correct.
Q. What time? A. It was in the evening, I believe.
Q. You talked about building a line from Barnard to Ipswich? A. Yes, sir.
Q. Your talk was with Mr. White about that? A. Yes, sir.

Mr. Benson: I am referring to the conversation that you mentioned on direct examination.

Q. Was there a line from Barnard to Leola at that time?
A. A low voltage line, yes.
Q. Did you look at the [insullation] on that line?
A. I don't remember the particular line now.
Q. What was the type of construction? Flat?
A. As I remember, the type of construction was triangular.
Q. When did you go over that line?
A. I didn't go over all of it, just a portion of it.
Q. From where to where? A. Just out of Barnard.
Q. Who told you about the rest of the construction?
A. I believe that was Mr. Albert.
Q. Do you have the figures showing what you estimated would be the cost from Barnard to Ipswich?
A. It would be approximately $150,000.
Q. What type of construction?
A. That would be with 45,000 volt insulators, with a ridge pin supporting the upper wire, cross arm supporting the other two phase wires, with a neutral carried below the cross arm.
Q. How many miles between Barnard and Ipswich for that line? A. It was fifty plus or minus.
Q. Well, do you mean fifty plus or minus a fraction of a mile or fifty plus or minus one or several miles?
A. I believe the map indicated forty-seven miles.
Q. Which map?

A. The road map of the states of North and South Dakota.

Q. And that was your method of determining what the mileage would be?

A. I used a round figure of $150,000 as an estimated cost of that interconnection.

Q. Yes. What I asked you, your round figures as a mileage, you got that off the road map? A. Yes, sir.

Q. I see. Now, will you tell us what estimate you made of the cost of the 1,000 kilovolts which you said you told Mr. White would be installed at Ellendale, according to your alternate plan you were discussing? A. $130 per kw.

Q. And that was really a round figure? No examination into details of construction? A. No, sir. That is correct.

Q. I mean, that is what you figured it would cost, $130 a kw.? A. Yes, sir.

Q. Is that what you figured for Mobridge?

A. That is correct.

Q. Is that what you figured for Gettysburg? A. No, sir.

Q. What did you figure for Gettysburg?

A. $140 per kw.

Q. $140 per kw. A. Yes, sir.

Q. How much did you figure in for station construction at Ellendale? A. You mean building?

Q. Yes. A. I did not use any figure for station.

Q. In any of these figures, Ellendale, Mobridge, or Gettysburg? A. No, sir.

Q. But that is lumped in your estimate of $140 a kw, or $130? A. That is correct.

Q. So that time when you said $130, that really covered a complete station from the ground up?

A. That covered a station in addition to the station existing, assuming it would go in an adjacent location to the existing power plant at those points.

Q. How did you determine the necessity of 1000 kilowatts at Ellendale, 1000 at Mobridge, and 500 at Gettysburg?

A. That was the approximate amount that the system was shy of firm capacity with the loss of the large generating [unti] in Beulah power plant.

Q. Diesels located at Ellendale, Mobridge, and Gettysburg would give you the same voltage regulation as the

power coming up from the Northwestern Public Service Company system would give you?

A. Provided they were on the line operating.

Q. And if they were on the line operating they would give you a little better regulation?

A. Depending on how much load they were carrying.

Q. I believe you stated, in connection with your discussion of the five-mill rate, on direct examination, that the information which you had indicated that Northern Power & Light was selling dump power. Correct? A. Yes.

Q. How do you define dump power?

A. Power that is available when they have no other use for it on their system.

Q. Now, you talked about firm power in your examination. Will you give us your definition of firm power?

A. Firm power is that power which is available at all times.

Q. To whom?

A. Speaking as a general definition, we say firm power.

Q. Having in mind a buyer and a seller, what is the buyer's definition of firm power?

A. The buyer's definition is that power is available to him at any time.

Q. That he can take it at all times? A. Yes, sir.

Q. In any amount? A. No, sir.

Q. In any amount up to the contract limitation as to what he can take at any time? A. Yes, sir.

Q. You expressed various opinions here as an engineer. Can you tell us your understanding of what constitutes firm capacity of a power plant?

A. That capacity which is capable of generating power at any time.

Q. And what is firm capacity of a system?

The Witness: Your question is not plain, Mr. Benson.

Mr. Benson: You cannot understand what firm capacity of a system would be to a buyer who was buying from a system?

The Witness: Firm capacity of a system—buying from a system would be that capacity specified by one to the other.

Mr. Benson: Q. And the buyer would have the right to take energy at any time up to the amount specified as firm capacity? A. Yes, sir.

Q. Where did you get the information which you say was given to you which indicated that Northern Power & Light Company sales were dump power?

A. Because of the fact—

Mr. Benson: No, I say where did you get the information? I am not asking your conclusion.

The Witness: I got the information primarily from the dispatcher in the Aberdeen power plant and from Mr. Huychke, who was chief engineer of the Aberdeen power plant.

Mr. Benson: Q. Did you ever make a computation of the transmission losses from Beulah to Aberdeen? A. Yes.

Q. What were they?

A. The regulation was up to as high—up into 30 per cent without the interconnection.

Q. By that you mean there was a loss in transforming, in addition to the 30 per cent?

The Witness: No, sir.

Mr. Benson: Q. In normal operation what percentage of power would be lost in shipping it over those lines from Beulah and getting it into Aberdeen?

A. That power would flow in at the low periods, the low points of the load on the system.

Q. No, I asked you what percentage. I did not ask you to explain what you are going to say.

A. Between 15 and 20 per cent.

Q. And what information did you have on which you based that statement?

A. By calculation on assumed loads.

Q. I see. Where did you get the information on the wire size that you used?

A. I secured those from the map of the company.

Q. Who gave it to you? A. Mr. Albert.

Q. Who prepared the map, do you know? You did not prepare it? A. I did not.

Q. Something they had in the office when you got there, is that correct?

A. I find, by referring to a map which I had in my possession, that I have marked down the sizes of the conductors in several different locations, particularly those locations making up the main transmission feeds from the Beulah station into the interconnection points.

Q. Who made the map that you say Mr. Albert gave you?

A. Apparently the man who made it was ashamed of it and didn't put his name on.

Q. Then my question, that that was a map which they had there when you got there for the inspection trip, is correct, is that right?

The Witness: I would ask permission to refer to another map.

I do not have the information as to who prepared the map, and the ones on which I made notes regarding the size of the conductors or the maps on which I made notes regarding the size of the conductors.

Q. Who gave you the size of the conductors?

A. I do not remember exactly who gave them to me. I observed the sizes of the conductors generally.

Q. Who gave you the sizes of the wires?

A. Various people in the organization, including Mr. Renden, and I believe Mr. Stokke, Mr. Albert, and I was able to observe the approximate size.

Q. Observe that from where? A. From the ground.

Further Examination by Mr. Stafford.

Q. Mr. Lakin, did you keep a diary? A. No, sir.

Q. Did you keep a diary in 1936? A. Not as such, no.

Q. Are you [faimilar] with the term "surplus power"?

A. Yes, sir.

Q. What is surplus power?

A. Surplus power is that power which is available and can be used for some other purpose than the purposes of the company having such surplus power available.

Defendant offered the following testimony from the deposition of FRANCIS H. SCHEETZ, which was received in evidence except as otherwise noted:

Q. Will you state your full name and address, please?

A. Francis H. Scheetz, S c h e e t z, 15 old Gulph Road, Ardmore, Pennsylvania.

Q. What is your profession, Mr. Scheetz? A. Lawyer.

Q. Where is your office located? A. Philadelphia.

Q. What is the address in Philadelphia?

A. 1335 Land Title Building.

Q. Are you associated with a firm, Mr. Scheetz?

A. I am a partner in the firm of Evans, Bayard & Frick.

Q. How long have you been practicing law?

A. Since September, 1921. I became a partner in the firm in 1930.

Q. Of what bars are you a member?

A. Member of the bar of the Supreme Court of Pennsylvania, and the United States Supreme Court, and intervening federal courts.

Q. Mr. Scheetz, did you or the firm in which you are a partner represent the United Public Utilities Corporation, that is, is the United Public Utilities Corporation a client of yours, or your firm?

A. We do represent that corporation and have represented it since it was formed in late 1934. It became active, an active enterprise on January 1st, 1935.

Q. Have you been actively engaged in representing United Public Utilities Corporation throughout that period? A. Yes, sir.

Q. Mr. Scheetz, did you or your firm represent United Public Utilities Corporation, or any bondholders committee while that corporation was in federal receivership in 77B proceedings?

A. Our firm was counsel for a committee known as First Lien Bondholders Committee, for the first lien bonds of United Public Utilities Company. Mr. Ralph B. Evans of our firm was the attorney who did the legal work up until late May, 1934, when I came into the situation for the first time. About that time there was created a joint organization committee, the exact title of which I forget, and we became counsel for that also, in association with the firm of Pam & Hurd.

Mr. Benson: Just a moment. Oh, this is all on the 14th, is it?

The Witness: Yes.

Mr. Benson: All right.

The Witness: From Beulah into Bismarck, along the transmission lines extending between Beulah and Bismarck.

Q. On the 15th, what did you do?

A. I can't state definitely that this was on the 15th, but the next day we left from Bismarck—when I say "we" I mean Mr. Renden, who was then district manager of the Bismarck district—and I went over the transmission line back to the Beulah station to secure further information.

I then proceeded on down to Glen Ullen and over the transmission line from Glen Ullen and went on through over to Wishek, to Ellendale, and to Aberdeen.

Q. Did you follow the transmission lines that you talk about, or did you just look at them from a distance?

A. Generally, we followed the transmission lines.

Q. Did you get off the highways? A. I don't remember.

Q. Well, now, let's get this straight. You said you left Aberdeen the morning of the 14th day of June, 1936?

A. It was either the 13th or 14th.

Q. But you left Aberdeen in the morning? A. Yes, sir.

Q. And the day after you left Aberdeen you went as [——] Dickinson? A. Yes, sir.

Q. And where else on that day?

A. Generally, well, from, I think I described the trip from Aberdeen into Mobridge,—we then followed generally the line from Mobridge to Lemmon, then we cut cross country to the town of Mott and cross country to Dickinson.

Q. All right. That was all done in one day, is that correct? A. Yes.

Q. Then the next day, the second day out of Aberdeen, tell us what you did.

A. We left Dickinson early in the morning, I remember, and followed the line through to Glen Ullen, from Glen Ullen over the line to Beulah and from Beulah followed

the line into Bismarck, and there Mr. Strike, Mr. Kruesi and Mr. White—Mr. White, I think, left for Chicago.

Q. Now, on the third day what did you do?

The Witness: In company with Mr. Renden we drove back over the line generally extending between Bismarck, Mandan, on up to Beulah and back to Glen Ullen and into Bismarck, and over through Wishek and into Aberdeen, from Ellendale into Aberdeen,—as my memory serves me.

Q. Now, the fourth day, what did you do?

A. I proceeded on to Huron, to the general office.

Q. And did you do any work in Huron on that fourth day? A. Yes, sir.

Q. What time did you arrive in Huron?

A. I don't remember.

Q. And how many days did you stay in Huron?

A. I believe it was one day.

Q. What did you do while you were in Huron?

A. I checked on the costs going to make up the charges into the transmission lines interconnecting North Dakota with Northern Power & Light, primarily, and to secure information—well, strike that last part.

Q. You did not do anything else?

A. Nothing in particular. I believe Mr. Albert met me at Aberdeen and took me on down to Huron.

Q. Did you count the poles on the trip? A. No, sir.

Q. What? A. No, sir.

Q. What detailed examination did you make of the substation at Aberdeen, South Dakota?

A. General inspection regarding capacities and what was included in the substation.

Q. All right. Did you make a detailed record of what was included in the substation at Aberdeen? A. No, sir.

Q. Did you make a detailed record of what was included in the substation at Gettysburg? A. No, sir.

Q. Where did you get the information as to what was in the Gettlsburg substation?

A. I got the information from Mr. Albert, from photographs, from some information on the work orders in the Huron office.

Q. Do you know who made the photographs?

A. I do not.

Q. Who gave them to you?

A. I didn't have the photographs in my possession, except to look at them.

Q. You mean you know nothing about the source of the photographs? A. No, sir.

Q. I see. Were they pictures of the outside of the structure or the inside of the structure?

A. They were pictures of the structure.

Q. Who told you the pictures you were looking at were the Gettysburg substation? A. Mr. E. K. Albert.

Q. Where did you get the details as to what was in the Aberdeen substation?

A. From general observation of the major items making up the substation.

Q. Wait a minute. From general observation where?

A. At Aberdeen.

Q. At Aberteen. All right.

A. Of the major items in the substation, such as steel structures, switches, sectionalizing switches, oil circuit breakers, transformers.

Q. Where did you get the details?

A. I surveyed the details in Mr. Sandstedt's office at Huron.

Q. What documents were those details contained in?

A. Those were charges to the work orders for that particular work order involved.

Q. How many work orders did you examine on the Aberdeen substation? A. I don't remember.

Q. One or more? A. There may have been more than one.

Q. How many work orders did you examine on the Gettysburg substation or did you examine any work orders? A. I did examine work orders.

Q. How many did you examine?

A. I don't remember how many were involved.

Q. Did you say you made an investigation as to the cost of construction of the Aberdeen substation? A. Yes, sir.

Q. How was that investigation made and what documents did you have access to?

A. From the details of charges to the work orders.

Q. You stated completely the sources of your information? A. I beg your pardon?

Q. You have stated completely the sources of your information, have you? A. Yes, I believe so.

Q. Where did you get your information as to the cost of the Gettysburg substation?

A. From the details of charges to the work order or orders for that work.

Q. Who brought those charges to you? A. Mr. Sandstedt.

Q. When he brought you the documents or records containing the charges to the work order or orders, whichever it may have been, for Aberdeen substation, did he tell you what records they were? A. Yes, sir.

Q. Do you remember what they were?

A. I don't remember exactly what they were, no, sir.

Q. Well, can you describe them?

A. It was a book listing all the items and charges to the particular job.

Q. You mean to a particular work order?

A. Yes. And that is what I asked him to see on the Aberdeen substation.

Q. Did he explain to you which of the items were charges to that portion of Aberdeen's interconnecting substation and control equipment used for interconnection with Northern Power & Light Company? A. Generally.

Q. He pointed out the distinction as to the items charged in that account to that particular description of property, did he?

A. I, in some notes that I made arrived at a net figure for the interconnection to Northern.

Q. Where did you get the information to arrive at the net figure for the interconnection with Northern?

A. By general discussion with Mr. Sandstedt.

Q. So what I asked you before really should be answered yes. That is, he took these accounts that you are talking about and he told you the items that should be charged to that portion of the Aberdeen substation used solely for interconnection with Northern Power & Light Company?

A. I cannot answer that as a yes or no, but I can answer it by saying that I took off some charges from the particular work order which were either common to both Northern Power & Light or Northwestern Public Service Company, or which could be considered entirely Northwestern Public Service Company.

Q. And he told you which were exclusively for this interconnection service?

Mr. Morrison: Each of these exhibits we object to separately for the reason they prove or establish no issue in this case; they are irrelevant and immaterial. We make no objection to the foundation of the exhibits.

Mr. Stafford: One of the charges is the 1936 contract was not filed in compliance with the Federal Power Commission rules, and the charge is made with reference to the defendant, Northwestern Public Service Co. These letters show that that question was raised by the operating personnel and it was submitted back to Mr. Scheetz as general counsel of the sole stockholder to get his determination on it.

Mr. Fellows: And Scheetz as a lawyer sitting down there in Philadelphia made some advice which would overcome the terms of a statute of the United States. Does that prove that the dealing was legal because he gave it some opinion?

Mr. Stafford: It does prove that it was not our fault out here, or the fault of Northwestern Public Service Company.

The Court: If the law requires a contract to be filed and it was not filed, the action of somebody in the east or out here would not change the situation at all.

Mr. Stafford: I agree that would establish whether 205-D was violated or not, but it does show that Northwestern Public Service Co. was not running these companies in connection with this 1936 contract.

Mr. Morrison: They are usual written contracts. They bear the signature and they are the act of this joint board. That is what we are relying upon, and upon written contract, and upon that written contract rely. We went in here and paid a little more than seven million dollars for this property. Now, are they going to say the contracts amount to nothing?

The Court: The approval of some attorney—

Mr. Stafford: This is not the approval. It is a request for approval.

The Court: A request for approval does not prove ownership or management. I am asking a lawyer whether it is wise for me to do something. It doesn't prove I am owning

anything, or managing it, or anything of the kind. It is wholly immaterial. It doesn't add one iota to the evidence upon which this case has to be determined.

Mr. Stafford: Except it is direct proof of the matter here submitted.

The Court: It is proof that someone down there talked to someone in Philadelphia. It does not prove anything.

Mr. Stafford: It shows the people in South Dakota did talk to these stockholders instead of [decidint] the matters themselves.

The Court: Objection sustained.

Mr. Woods: For the purpose of making an offer of proof we offer in evidence Defendant's Exhibit 289 previously described.

Mr. Morrison: The offer is objected to on the same grounds.

The Court: Objection sustained.

Defendant's Exhibit 290, which is also referred to as Defendant's Exhibit 28 in the Scheetz deposition, was received in evidence. It consists of a letter from Scheetz to Peale dated August 12, 1936 responding but not replying to Peale's letter of July 16, 1936, in which Scheetz requests information concerning the transfer of energy by defendant and North Dakota Power & Light Company and the points at which such energy passes from one company to the other.

Defendant's Exhibit 291, which is also referred to as Defendant's Exhibit 29 in the Scheetz deposition, was received in evidence. It consists of a letter from White to Scheetz dated August 14, 1936, in answer to Scheetz' letter of August 12 to Peale. Among other things White states that defendant "has not admitted to the Federal Power Commission that they are engaged in interstate business". It further says:

North Dakota Power & Light Company does not deal with nor have a contract with Northwestern Public Serv-

ice Company; sells no energy to Northwestern and buys no energy from any one. It is, of course, conceivable that in case of a very bad breakdown in North Dakota Power & Light Company's plants, it might buy power in such an emergency from Northern which the latter would have to buy from Northwestern.

Northern has no excess power of its own; and, in fact, must necessarily buy every day from North Dakota or from Northwestern. It takes from North Dakota all of the excess energy that North Dakota can make. If that is not enough, it buys the deficiency from Northwestern. If that is too much, it sells the excess to Northwestern.

Defendant's Exhibit 292, which is also referred to as Defendant's Exhibit 30 in the Scheetz deposition, was received in evidence. It consists of a letter from White to Scheetz dated August 15, 1936 and reads as follows:

Attached please find copy of form of contract which is proposed to be executed between Northern Power & Light Company and Northwestern Public Service Company. Will you please read this over and let me know if you detect any dangers or weaknesses in the form?

As you will note, it is the underlying idea that surplus power of either company may be dumped onto the other fellow when the other fellow is willing and glad to get it, but not otherwise. Anything realized by the seller for such surplus power is practically so much velvet. Therefore, a low price is warranted. If, however, the buyer has an emergency requirement for additional energy which the seller really does not care to make and sell at the regular bargain price, and if the seller has to start up some of his high-cost standby plants just to fill the requirement of the buyer, then an additional charge will be made which will reimburse the seller for the extra expense to which he has been put in helping out the buyer in his emergency.

Defendant's Exhibit 293, which is also referred to as Defendant's Exhibit 31 in the Scheetz deposition, was received in evidence. It consists of a letter from White to Scheetz dated August 31, 1937 and reads as follows:

Regarding rough draft of Minutes of June 24th Meeting, I think the middle paragraph of two lines on page 3 should either be changed or deleted.

If I painted the picture correctly, I think it should be the [concensus] of the Board's opinion that we are continuously faced with a critical power situation on our Dakota properties and that a major step must be taken within the reasonably near future to relieve the pressure.

As matters now stand, I realize a need for action but, on account of the substantial amount of money involved, I have hesitated to recommend that we take such action immediately in the hope that we can get by safely at least through the December 1937 peak, and, as a result of that experience, make a little better guess as to the nature of the remedy which will be best for us.

Also, I have in mind that the postponement of any such expenditure into 1938 may enable us to accumulate the necessary cash.

On the next to the last page of the Minutes, in the last line, "four months" should read "five months".

Defendant's Exhibit 294, which is also referred to as Defendant's Exhibit 34 in the Scheetz deposition, was received in evidence. It consists of a letter from White to Scheetz dated June 11, 1941. It reads as follows:

As I believe you know, Dakota Public Service and Northwestern have been operating under a capacity and power interchange agreement, which was cancellable on one year's notice. As a background for their proposed expenditure of $750,000 for a new power plant at Aberdeen, Northwestern very properly insists that a mutually satisfactory long-term agreement should be executed. Such an agreement offers advantages to both companies but, in view of the possibility that one or both of these

companies might have new owners, with unknown sense of fairness, it is desirable that the proposed ten-year contract be drawn with provisions sufficiently comprehensive and concise to minimize the possibilities of arguments.

I enclosed draft of a proposed contract for which I shall ask consideration at the Directors Meeting, next Tuesday, in anticipation of which I will welcome your criticisms and suggestions.

I have in mind that the provision for installation of additional capacity can be made (and included under the contract) only by mutual consent of the contracting parties theoretically, offers room for bickering. For instance, if Dakota should want to install an oil engine plant or a gas engine plant, in 1944, at Dickinson, Northwestern might object on the ground that the system did not need additional capacity because there still would be an excess of reserve on account of the new addition at Aberdeen. The real reason for the Dickinson addition, however, would be to protect local service against transmission failures, and we actually plan to make that addition even though we anticipate that the joint system reserve capacity will be adequate. I think a provision for cases of this kind can be inserted in the preamble. In the main, I think the interchange arrangement is so desirable for both parties that, in actual practice, the contract would probably be made to work in order to maintain its advantages.

The balance of the Scheetz deposition was received in evidence and reads as follows:

Mr. Robinson: Let me state it this way, Mr. Scheetz,—whether Defendant's Exhibit 19 is the letter you sent to Mr. White in response to his letter of August 15, which is Defendant's Exhibit 30?

A. Yes, it is in response to his letters of August 14th and 15th, 1936.

Q. I also ask you whether Exhibit 19-A is the copy of the agreement referred to in Exhibit 19?

A. Well, I would say yes, because I find, on the next to

the last page, page 6, a circle around the word "other" with a question mark in the margin which is in my handwriting.

Mr. Robinson: Q. Mr. Scheetz, I note in Exhibit 19 for identification the first sentence reads:

> "Responsive to your letters of August 14th-15th, 1936, on the interchange of power between Northern Power & Light Company and Northwestern Public Service Company, I think the form of agreement submitted affords an adequate basis for spelling out details of administration."

Would you state, please, what you mean by the "form of agreement affords an adequate basis for spelling out details of administration"?

The Witness: A. My thought was not happily phrased. I meant that the agreement adequately stated the terms with sufficient clarity to make administration feasible.

Mr. Robinson: Q. Mr. Scheetz, were you present at a meeting of the Board of directors of United Public Utilities Corporation held August 28th, 1936, in Philadelphia?

A. I was.

Q. Mr. Scheetz, do you recall whether a resolution was adopted at that meeting expressing the concurrence of the Board of directors in the recommendation contained in the memorandum of August 14, 1936, for the installation of a new boiler at Beulah station of that company, together with the necessary changes in the walls and piping system of that station incidental to the installation, at a total cost estimated at $150,000? A. I do.

Q. And was such a resolution adopted (showing document to the witness)?

A. Yes, and I was responsible for the particular phrasing of the thing as a recommendation in line with my previously expressed legal opinion that these things should go to the operating companies as a recommendation.

Q. Were you present at the organization meeting of the board of directors of the United Public Utilities Corporation held in Philadelphia on March 17th, 1937? A. Yes.

Q. Do you recall whether the president reported to the board of directors of United Public Utilities Corporation

at that meeting the execution of contracts cancellable on ninety days notice, between subsidiaries of that corporation and The Middle West Service Company, for services to be rendered by The Middle West Service Company to the subsidiaries, at an annual cost of eight-tenths of one per cent of the gross earnings from merchandise and the sale of coal, the aggregate cost to such subsidiaries being estimated at thirty thousand dollars per annum?

A. I recall that Mr. White reported the execution of the contracts referred to. I recall the whole topic generally, and that it had been a matter for discussion, and, by refreshing my recollection here, I now recall that it was done at the meeting on March 17th, 1937.

Mr. Robinson: Pursuant to stipulation heretofore entered herein, I will now read, from page 13 of the minutes of the organization meeting of the board of directors of United Public Utilities Corporation held at Room 1335 Land Title Building, Philadelphia, Pennsylvania, on March 17th, 1937, at 10 A. M. (Reading):

> "The president reported the execution of contracts cancellable on ninety days notice, between subsidiaries of the corporation and The Middle West Service Company, for services to be rendered by The Middle West Service Company to the subsidiaries, at an annual cost of eight-tenths of one per cent of the gross earnings of such subsidiaries, excluding therefrom earnings from merchandising and the sale of coal, the aggregate cost to such subsidiaries being estimated at thirty thousand dollars per annum.
>
> "Upon motion duly made and seconded the following resolution was unanimously adopted:
>
> "Resolved, that the execution of contracts referred to above between subsidiaries of the corporation and The Middle West Service Company, be and they are hereby approved."

The foregoing portion of minutes was received in evidence.

Q. Mr. Scheetz, were you present at a regular meeting of the board of directors of United Public Utilities Corporation held in Philadelphia on June 24, 1937? A. Yes.

Mr. Robinson: Q. Were you present at a regular meeting of the board of directors of United Public Utilities Corporation held on December 21, 1937, in Philadelphia, Pennsylvania? A. Yes, sir.

Q. Were you present at a regular meeting of the board of directors of United Public Utilities Corporation held in Philadelphia on January 20th, 1938? A. Yes.

Mr. Robinson: Were you present at a regular meeting of the board of directors of United Public Utilities Corporation held in Philadelphia on June 15th, 1938? A. Yes.

Q. Do you recall whether the president made a report to the directors at that meeting that Mr. C. J. Strike has resigned as President of North Dakota Power & Light Company, Northern Power & Light Company, and Knife River Coal Mining Company, and that on July 1, 1938, Mr. A. B. Sanborn, formerly general manager of East Kootenay Power Company, Fernie, British Columbia, will become president and chief operating executive of these subsidiaries?

A. I have a definite recollection of Mr. White's having made that report to the directors. The fact that it was made at this particular meeting comes to me by refreshing my recollection from the minutes. I also recall that there was a memorandum, and I have one in my files somewhere, of description of Mr. Sanborn and his background. I don't find it at the moment. I had it here yesterday.

Q. I show you document marked Defendant's Exhibit 32 for identification, purporting to be a report to the directors of United Public Utilities Corporation, dated June 9, 1938, consisting of seven pages. I will ask you if that is the document to which you just referred.

A. This is the document to which I referred. It is a letter from Samuel W. White to the directors, dated June 9th, 1938, and deals not only with that subject, but also with an evaluation by the North Dakota Railroad Commission of the properties of North Dakota Power & Light Company and Northern Power & Light Company. A copy was given to me.

Q. Who gave you the copy? A. Mr. White.

Mr. Robinson: Q. Do you recall whether the president reported to the directors at that meeting that an appraisal

of the properties of North Dakota Power & Light Company and Northern Power & Light Company was completed by the North Dakota Railroad Commission about June 1, 1938, that the amounts of these appraisals, the possibility of the amounts being increased on later argument, and the possible effect of the final figures upon the rate structure and earnings of the two companies, were discussed?

The Witness: I definitely recall that Mr. White had that report at the meeting and commented on it and that discussion ensued. I think our information was that it had been completed, but, on refreshing my recollection further from the minutes, that the report did not come out until later in the year.

Mr. Robinson: Q. Do you recall whether a discussion was had at that meeting of the best methods of effecting a merger of the two companies should a merger be found desirable?

The Witness: Yes, the question of that merger had been under study for some time and was being held up for a number of reasons, including this valuation.

Mr. Robinson: Q. Mr. Scheetz, was Exhibit C to the complaint in this proceeding, that is the interchange capacity agreement between Northwestern Public Service Company, North Dakota Power & Light Company, and Northern Power & Light Company, dated January 1, 1938, presented to you for approval, by Mr. White?

A. Mr. White presented to me a draft of agreement which had emerged from the discussions and negotiations leading up to the execution of that agreement. To the best of my recollection he did that while I was here in Chicago in the latter part of 1938, and I remember studying it. It was complicated, for me, in some of the technical aspects—and of advising him orally. I do not think that he submitted to me the re-write following those comments before the ultimate execution.

Q. After Northern Power & Light and North Dakota Power & Light Companies were merged and Dakota Public Service Company came into being, did you have occasion to consider the advisability or necessity of executing

new contracts between Dakota Public Service Company and Northwestern Public Service Company, covering the matters of interconnection and interchange of capacity?

A. I did.

Q. Will you relate for us, please, what considerations you gave to this problem?

A. The merger raised again the question of the jurisdiction of the Federal Power Commission over these companies. Also, since Northern Company had been absorbed, by merger, by North Dakota Company, all of the provisions of the interchange and interconnection agreement were released, in so far as they dealt with the provisions between North Dakota Power & Light Company and Northern Power & Light Company. Dakota Public Service Company, the surviving corporation, succeeded to all the rights and assumed the obligations of Northern Company under those agreements.

The question of whether North Dakota Power & Light Company was subject to the Federal Power Act had given me a good deal of trouble, and, with the evolution of the law on it, I had come to realize that was a rear guard action and that, when the merger was completed, we would probably be in a situation where we would become subject to it.

Mr. Goldsmith raised—

Mr. Robinson: Who is Mr. Goldsmith, please?

The Witness: Karl Goldsmith is a lawyer practicing in Pierre, South Dakota, and he had acted as our correspondent in attending to local matters related to the merger in South Dakota. Another firm acting in the same capacity with respect to local matters in North Dakota was O'Hare, Cox Cox, of Bismarck, North Dakota.

The North Dakota and South Dakota counsel and Mr. C. L. Sandstedt, Vice-President and Treasurer of Dakota Public Service Company, had raised with me the question as to whether there should be a formal assignment by Northern Company of its rights and subject to its liabilities, under the two agreements with Northwestern. This led to an exchange of correspondence and discussion about it.

We then proceeded to prepare certificates of succession for filing. Ultimately they were filed. I was informed that Northwestern had filed the contracts as rate schedules.

Mr. Robinson: Q. Which contracts are you referring to there? A. Referring to energy contracts.

Q. Do you mean the contracts with Dakota Public Service or with its predecessors?

A. With its predecessors.

Where was I before that?

(Record read by the reporter as above recorded.)

The Witness: As this correspondence will show, the Federal Power Commission requested cancellations of those schedules, in so far as they related to Northern Company.

Then the Federal Power Commission asked for certificates of concurrence in the rate schedules from Dakota Public Service Company, and at that stage, in order to simplify matters, we decided that Dakota Public Service Company and Northwestern Public Service Company should execute new contracts on the same terms as the existing contracts, but drop out the portion that related to Northern. And such contracts were prepared locally and executed. They were not submitted to me, as I entrusted that work to Mr. Goldsmith. It was simply a copy job.

Mr. Robinson: Q. And do you recall, Mr. Scheetz, whether the contracts which you have just stated were prepared by Mr. Goldsmith and were executed locally were filed with the Federal Power Commission?

A. I was so advised. I was furnished with a copy of a letter from Martens & Goldsmith to the Federal Power Commission, dated January 5th, 1940, which is part of this Defendant's Exhibit 33 and which is included in Plaintiff's Exhibits 27 and 34 (R. p. 265, supra).

Q. Mr. Scheetz, will you tell us, please, over what period of time these negotiations that you have just been testifying to took place?

A. I am not sure I understand what you mean by nego-

Q. Mr. Scheetz, have you ever had any connection with Middle West Corporation, Middle West Service Company, or Northwestern Public Service Company?

A. I have had no connection of any kind with any of the corporations, except since February 11, 1947, I am the owner of 300 shares of common stock of Northwestern Public Service Company.

Q. Mr. Scheetz, who prepares the minutes of United Public Utilities Corporation, if you know?

A. From the outset—

Q. That is, the minutes of stockholders and directors?

A. From the outset we followed the practice of having the final minutes transcribed in our office. The preparation generally followed this course. The secretary would prepare his notes of what transpired in the meeting and I would also make notes, principally with regard to those things that had legal import or were of major importance. Usually the secretary prepared a draft and sent them to me and I reviewed them, edited them with regard for my own notes and recollection of what transpired in the meetings. I might say that, with very few exceptions, I attended all the meetings. Then the draft was usually sent to Mr. White for his criticisms, I would say invariably sent to Mr. White for any criticisms that he might have, to be returned to me, transcribed in our office, checked by me. Sufficient copies were made to furnish every director with a copy and they were invariably furnished, put in the hands of the directors usually at the opening of the meeting. The minutes themselves have been lodged in our office through the entire period, except on occasions when they were needed elsewhere.

Q. Mr. Scheetz, did the directors of United Public Utilities Corporation follow the practice of having the minutes read and approved, that is, the minutes of the previous meeting, read and approved at a subsequent meeting?

A. I would say invariably and I think that is reflected in the minutes.

Q. Were the minutes approved as written or as corrected?

A. Well, there were occasions when there were cor-

tiations. The consideration of the question of filing with the Federal Power Commission?

Q. And the possible execution of new contracts.

A. The whole matter was covered in a period from approximately August 21, 1939 to January 5, 1940. The decision to go ahead and execute new contracts, of course, was made earlier, and that is the time it took to complete it.

Mr. Robinson: Q. Were you present at a regular meeting of the Board of Directors of United Public Utilities Corporation held in Philadelphia on January 30, 1940, at which time you were appointed to record the minutes in the absence of the secretary?

The Witness: A. Yes.

Q. Do you recall whether, at that meeting, the president made a report to the directors with respect to Dakota Public Service Company, that the capacity charge payable to Northwestern Public Service Company under the interchange capacity agreement, will be at the rate of $20,433.60 until completion of the new unit at the Bismarck station? A. Only by refreshing my recollection.

Q. Will you do so, please? I will show you the minutes of that meeting, Mr. Scheetz, and ask you to refresh your recollection.

A. It does refresh my recollection and he did so report.

Q. And you have a present recollection that he did so report?

A. By refreshing my recollection from the minutes.

Q. Were you present at a regular meeting of the board of directors of United Public Utilities Corporation held in Philadelphia on September 25, 1940? A. Yes.

Q. Do you recall whether the president made a report to the directors at that meeting advising that a 4,000 kw addition to the Bismarck plant had been in operation since September 1, 1940, and that he at that time discussed the effect of such addition to the effective capacity of the company's generating facilities?

A. I recall generally that Mr. White reported the progress of the Bismarck installation to the board, and, by refreshing my recollection from the minutes, I can say

rections and approved as corrected. I am not sure that in the statement in the minutes where they say the minutes were approved it is always spelled out that they were approved as corrected. Mr. Robinson, may I add something to my statement about the method of taking the minutes in my presence at the meeting? I said that I was present at practically all the meetings. It is true that on occasions I would be called out of the meeting, in the office. I think it is equally true that that would be only for short intervals and that where important matters were before the board I did not leave the meeting. Naturally, it was over a long period of time and I would not want to have everyone think I was there every minute, but I was there usually throughout the whole meeting and seldom absent for any long interval.

Q. Mr. Scheetz, as counsel for United Public Utilities Corporation, when did you first give attention to the problem of the dealings of that corporation's subsidiaries, that is, Northern Power & Light Company, North Dakota Power & Light Company, Knife River Coal Mining Company, in their relationships with the defendant, Northwestern Public Service Company?

A. Mr. Robinson, I think you may have some of my letters. I don't know whether you have any that I need here or not. My recollection is that this question came up first early in 1936. At least by that time there had been referred to me the question of the sale of property at Blunt, South Dakota, by Northern Power & Light Company, to Northwestern Public Service Company. That property was in Northwestern's territory and leased to Northwestern. Recognizing that Northwestern and Northern—

Q. Mr. Scheetz, after having the problem of the relationships between the Dakota subsidiaries of United Public Utilities Corporation and Northwestern Public Service Company brought to your attention, did you render any advice to Mr. White as president of United Public Utilities Corporation, and to the directors of that corporation, with respect to the intercompany dealings between the Dakota subsidiaries and Northwestern Public Service Company?

A. Yes.

Q. Mr. Scheetz, will you please state what advice or opinions you rendered to Mr. White or the directors of United Public Utilities Corporation, with respect to the matter of supervising the dealings of that corporation's Dakota subsidiaries with Northwestern Public Service Company, if any?

Mr. Fellows: Objected to as incompetent, irrelevant and immaterial; no foundation laid.

Mr. Stafford: We think it is material what counsel advised these directors and the sole stockholder of these subsidiaries.

The Court: What difference does it make. Suppose he had advised him directly opposite to what he did, would that make any difference in the history of this case? If you are going to carry this case to what advice these men took or what advice they received—I don't care what some engineer or some attorney told these men. What I am interested in is what they did, not what somebody told them. It is wholly immaterial and the objection is sustained.

Mr. Woods: We will have to make an offer of proof. We offer to show the answer to that question as follows: "Answer: About the same time the Blunt transaction which I previously mentioned was under consideration, there was presented to me a question of the sale of coal from Knife River Coal Mining Company to North Dakota Power & Light Company, Northern Power & Light Company and Northwestern Public Service Company. I had to consider it under the Public Utility Holding Company Act of 1935. Also, because of the common directors and officers, I considered it from the standpoint of the principles of common law applicable in such a situation. I incorporated some of that in a letter to Samuel W. White, president of U. P. U. Corporation, a letter dated May 22nd, 1936. My [advise] was that, for the proper supervision of the relationships and for the protection of the officers and directors of those companies, of which Mr. White was one, that inter-company transactions should be referred to the board of directors of United Public Utilities Corporation as the owner of all the outstanding stocks and debt securities of those corporations, for consideration and action; that if

they approved a proposed action, they should make their recommendations to the board of directors of the operating companies to carry out the transaction, or, if they disapproved it, to record their disapproval or changes which they thought should be made. Another aspect of that problem which concerned me was the provisions of the Public Utility Holding Company Act, which might, under the circumstances make it possible for the Securities and Exchange Commission to find that the Dakota subsidiaries of U. P. U. Corporation would be found to be subsidiaries or affiliates of Northwestern Public Service Company, because of the common directors. I was concerned that the situation be handled in such a way as to avoid any such result."

Mr. Fellows: We make the same objection to the offer that was made to the question itself, with the further objection that no qualification is shown on the part of this witness to give any such advice; no foundation laid showing he had any knowledge or information which would enable him to give advice.

The Court: Objection sustained.

(Read from deposition)

Q. Mr. Scheetz, I show you Exhibit B to the complaint filed in this proceeding by Montana-Dakota Utilities Company, purporting to be a contract, an interconnection contract between Northwestern Public Service Company and Northern Power & Light Company, dated October 7, 1936, and ask you whether you have ever seen that contract?

A. Yes, [may] times.

Q. Mr. Scheetz, during the period in which the interconnection contract dated October 7th, 1936, was being negotiated, did you have occasion to discuss the problems arising in connection with the terms and provisions of that contract, with Mr. White?

A. I had occasion to review it and write an opinion to Samuel W. White, as president of U. P. U. Corporation, on August 21, 1936. Prior to that time I had discussions with Mr. White about the problem leading up to the ultimate contract.

Defendant's Exhibit 289 was marked for identification and offered in evidence by defendant. It is as follows:

Defendant's Exhibit 289.

United Public Utilities Corporation
Twenty North Wacker Drive - Chicago

July 16, 1936.

Mr. F. H. Scheetz,
Evans-Bayard & Frick,
1335 Land Title Bldg.,
Philadelphia, Pa.

Dear Mr. Scheetz:

I am enclosing herewith copy of Mr. White's letter of July 10th, to Mr. C. L. Sandstedt, regarding approval of the Federal Power Commission of any inter-company contracts that have been executed by the Dakota companies, together with Mr. Sandstedt's reply, dated July 14th.

Very truly yours,

C. McC. PEALE,
Treasurer.

Enclosures—2.

Northwestern Public Service Company
General Offices
Huron, South Dakota.

July 14, 1936.

Mr. S. W. White, President,
United Public Utilities Corporation,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. White:

This will acknowledge receipt of your letter of July 10th in regard to submitting inter-company contracts to the Federal Power Commission for their approval.

From time to time I have thought of this but in reading over the Act I decided that it was not necessary. The part

of the Act dealing with rates and contracts of this nature is rather vague and I assumed that the Power Commission could take jurisdiction if they wished to, but that some affirmative action would be necessary on their part.

We have never obtained a legal opinion on this matter and it occurs to me that possibly the Chicago legal department might have passed an opinion on similar contracts. We did not intend submitting these contracts to the Federal Power Commission but if you feel they should be submitted or that we should obtain a legal opinion as to the necessity of doing so will you kindly advise.

Yours very truly,

C. L. SANDSTEDT,
Secretary & Treasurer.

CLS/f

CC:CJS
FEK

July 10, 1936.

Mr. C. L. Sandstedt, Secy.,
c/o Northwestern Public Service Co.,
Huron, So. Dakota.

Dear Mr. Sandstedt:

Will you please advise me whether you have applied for, or received, approval of the Federal Power Commission of any of the inter-company contracts that have been executed by the Northwestern companies under the jurisdiction of your office. I have the impression that you registered your three utility companies as "public utilities" (doing an inter-state business) and, therefore, I assume that the Federal Power Act as amended by the Public Utility Holding Company Act is applicable to their contracts.

Very truly yours,

.....
President.

(End of Defendant's Exhibit 289).

A. C. O. Sandstedt, A. B. Sanborn, Samuel W. White, R. McClanahan.

Q. In 1945 did the Securities and Exchange Commission hold hearings with respect to the sale of the securities of Dakota Public Service Company by United Public Utilities Corporation to Montana-Dakota Utilities Co.? A. Yes.

Q. Were you present and representing United Public Utilities Corporation in all of those hearings, as its counsel?

A. There was only one hearing, on October 9, 1945. I was present and conducting the hearing on behalf of U. P. U. Corporation.

Q. What witnesses were present at that hearing?

Mr. Benson: Was this in the same 11-B proceeding?

The Witness: This hearing was a consolidated hearing on four proceedings: On the application of U. P. U. Corporation to sell, which was file No. 54-7; on the Section 11-B (1) proceedings against United and its subsidiary companies, under file 59-38; and there are two other proceedings, one file 59-73, United Public Utilities Corporation and its subsidiary companies which—the file number, that is my present recollection, the file number on the subsequent proceeding initiated by the Commission under Section 11-B (2), but I can verify that. And there is also another file number, 70-1110, involving United Public Utilities Corporation, which I would have to check to identify.

Mr. Robinson: Will you repeat my question?

(Question read as follows: "What witnesses were present at that hearing?")

The Witness: A. Samuel W. White and Kenneth E. Oakley, witnesses produced by me; Frederick R. Gamble, a witness produced by Paul Christopherson, Esq., counsel for Montana-Dakota Utilities Co.

Mr. Robinson: Q. And did Mr. Christopherson enter his appearance in these proceedings on behalf of Montana-Dakota Utilities Co.?

A. Yes, for a limited purpose, for the purpose of offering such evidence as the staff of the Commission desired, with respect to purchase.

Mr. Robinson: Q. Mr. Scheetz, did you cause the proceedings on 59-38 to be incorporated by reference in the hearings on the sale proceeding?

The Witness: At that hearing I moved the trial examiner to incorporate by reference in the notes of the proceeding the testimony appearing in the files of the commission as follows:

File No. 43-185, the hearing of May 8, 1939, which was the hearing on the merger of Northern Power & Light Company and North Dakota Power & Light Company, notes pages 1 to 113, inclusive, and 142 to 145, inclusive.

File No. 59-38, hearings on May 15, 1942, and May 16, 1942, notes of testimony pages 388 to 604, inclusive.

File No. 54-121, hearing of April 23, 1945, notes of testimony on pages 31 to 35, inclusive, 37 to 38, and 42 to 53, inclusive.

Files Nos. 54-79, 59-73 and 59-38, notes of testimony of the consolidated hearing of August 8, 1944, at pages 1172-3 and 1176-8, United Public Utilities Exhibit E-9.

In File 49-97, which was a consolidated hearing with other files, notes of testimony, pages 1141 to 1144, inclusive, the trial examiner ruled on that request and directed the incorporation.

Q. And was an order entered permitting that incorporation? A. Yes.

Mr. Benson: You mean the examiner made an order, then?

The Witness: Yes.

Mr. Benson: You mean the examiner dictated to the reporter in the room at that time?

The Witness: The examiner ruled on it, and the official stenographer took the ruling down and recorded it in the official notes of testimony.

Mr. Benson: So what you are stating here appears in the official notes?

The Witness: That is correct.

Mr. Benson: Is it a summary made by you?

that this report was made at this meeting, the substance of which is reflected in the minutes.

Q. Do you recall that such report of the president also stated to the directors that, beginning September 1, 1940, Dakota Public Service Company would collect capacity charges at an annual rate of $2811.60?

A. Yes, by refreshing my recollection from the minutes as to the details.

Q. Were you present at a regular meeting of the board of directors of United Public Utilities Corporation held in Philadelphia on February 7th, 1941? A. Yes.

Q. Do you recall whether at that meeting the president reported to the directors the amount of the final cost of the new 4,000 kw addition to the power plant at Bismarck?

A. Again I will say that I recall generally that the president was making periodic reports on the subject, but for the details of the report and the time of the report I must refresh my recollection from the minutes, which I do, and say on that basis he did so report.

Q. Do you recall whether the president brought to the attention of the board the fact that Northwestern Public Service Company would be entitled to collect monthly capacity charges from Dakota Public Service Company at the annual rate of $4276 beginning January 1, 1941?

A. I thought I had covered that by my previous answer, but if not I will make the same statement as to that question.

Q. Were you present at an organization meeting of the Board of Directors of United Public Utilities Corporation held at the office of the corporation at 15 Exchange Place, Jersey City, New Jersey, on April 30, 1941? A. Yes.

Q. Do you recall whether a proposed ten year contract for the pooling of electric generating capacity and interchange of energy between Dakota Public Service Company was discussed at that meeting?

A. I recall that such a proposed contract was discussed at a meeting of the board of directors and the minutes refresh my recollection that it occurred at that meeting.

Q. Do you recall whether the management was instructed by the board of directors at that meeting to

recommend to Dakota Public Service Company that such a long-term contract be negotiated, in order to assure that company of an adequate source of energy to meet its increasing requirements?

Mr. Benson: That is objected to on the ground that it is not competent proof, it is not the proper method of proving corporate transactions and actions and irrelevant and immaterial, and this entire method of reading counsel's conclusions is objected to.

The Witness: I recall that the board decided to make such a recommendation. I recall that I advised them to put it in the form of a recommendation, but I have to refresh my recollection to fix the date at this meeting.

Mr. Robinson: Q. Mr. Scheetz, do you have with you a memorandum prepared by you for your files dated June 17th, 1941?

A. I do. This memorandum was dictated by me to my secretary and it bears the date June 17th, 1941, and from that I deduce that I dictated it on that date, but if I did not it was the next day, referring to the date on which Mr. White was there. Perhaps I should say "shortly thereafter" instead of the next day.

Mr. Robinson: I now offer in evidence Defendant's Exhibit 36 for identification, both generally and for the specific purpose of establishing the fact that Mr. Scheetz and Mr. White did, on June 17th, 1941, discuss the Dakota interchange agreement, with particular respect to the variances in definitions and to the definition of, "Company's Maximum Demand", and for the fact that Mr. White made notes of all the suggested improvements and advised Mr. Scheetz that it was unnecessary for him to reply to Mr. White's letter of June 11th, 1941.

Mr. Robinson: Q. Mr. Scheetz, did you discuss with Mr. White, on June 17th, 1941, the Dakota interchange agreement, and did he make notes of all suggested improvements which you made and did he advise you that it was unnecessary for you to reply to his letter of June 1th, 1941? A. Yes.

Mr. Robinson: Q. Mr. Scheetz, I show you a portion of Exhibit F to the plaintiff's complaint in this proceeding, purporting to be a copy of a supplemental agreement made March 13, 1943, between Northwestern Public Service Company and Dakota Public Service Company, and ask you whether you prepared the original of that supplemental agreement? A. I did.

Q. Mr. Scheetz: Were you present at the regular meeting of the directors of United Public Utilities Corporation held on February 3, 1943? A. Yes.

Q. Do you recall whether he made any further explanation as to the necessity of abandoning that proposed installation by Northwestern Public Service Company of the Aberdeen plant and that such abandonment made preferable the proposed amendment?

The Witness: A. I know that the matter was gone into extensively in the board meeting and that Mr. White made an exposition of it. By refreshing my recollection from these minutes I can see that this is the substance of the exposition. It is a brief statement of the exposition.

Mr. Stafford: Q. And you prepared this brief statement of the exposition?

A. I did, and also prepared the resolution.

Q. Did you, subsequent to that date, consider any proposed modifications of the then proposed amendment of the 1941 contract, which modifications emanated from other persons? A. Yes.

Q. Will you describe what they were, please?

The Witness: Mr. White had furnished a copy of the memorandum of Mr. Ralph Stevenson to Mr. Kruesi dated February 11th, 1943.

Mr. Stafford: Q. Who is Mr. Ralph Stevenson?

A. I have always understood him to be counsel for Middle West Corporation, and I don't know whether he is counsel for Middle West Service Corporation but I have always understood him as acting for Middle West Corporation. As a result of that memorandum I recognized his point and advised Mr. White by this letter that I accepted the point, and sent five copies of the revised agreement to

Mr. White and returned the memorandum, and I also see, from my postscript, that I had a copy of Mr. White's letter of January 25, 1943, to Mr. Kruesi, which I returned to Mr. White.

Q. Mr. Scheetz, in 1942 did the Securities and Exchange Commission institute integration proceedings against United Public Utilities Corporation?

A. It was on November 3, 1941,—

Mr. Benson: Just so we understand at the inception what we are talking about, are you talking about proceedings under Section 11 of the Holding Company Act?

The Witness: Section 11-B (1) proceedings were instituted against the United and its subsidiary companies.

Mr. Benson: O. K. What was the date?

The Witness: Let me correct the date. The proceedings were ordered October 31, 1941, and the order was marked for release November 3, 1941.

Mr. Robinson: Q. Were you counsel representing the United Public Utilities Corporation and its subsidiaries in that proceeding? A. I was.

Q. Did that matter move to a hearing? A. It did.

Q. Do you recall on what date or dates that hearing or hearings were held?

A. The matter proceeded to hearing in several stages. The first stage was confined to the status of the ice companies and to gas companies in Arkansas, and resulted in the issuance of an order of divestment.

The next stage involved hearing on the integration status of all the other subsidiaries, and the hearings began on May 12th, 1942, continued through May 16, 1942, when they adjourned, to reconvene subject to the call of the trial examiner.

Mr. Robinson: Q. Were you present representing United Public Utilities Corporation and its subsidiaries in all of these hearings? A. Yes.

Q. That is, all of its subsidiaries? A. Yes.

Q. What witnesses were present on behalf of United Public Utilities Corporation and its Dakota Public Service Company subsidiary in these hearings, if you know?

The Witness: No, I have stated it exactly as I am reading it from my copy of the notes obtained from the Alderson Company, the official reporters for the commission.

Mr. Benson: But these numbers and pages and each of them which you moved be incorporated in the record were not read in the presence of Mr. Gamble or Mr. Chrostopherson?

The Witness: They were not.

Mr. Stafford: Q. Was any objection interposed by any party to that proceeding to your motion for the incorporation by reference of the testimony of preceding causes and the order entered thereafter under your motion?

The Witness: A. No.

Q. Mr. Scheetz, aside from the proceedings before the Securities and Exchange Commission, did you have any dealings with Mr. Christopherson in connection with the sale of the stock of Dakota Public Service Company by United Public Utilities Corporation to Montana-Dakota Utilities Co.?

The Witness: I had correspondence with Mr. Christopherson and I also was present at one meeting in Chicago with Mr. Christopherson and Mr. White in which certain terms of the proposed contract were under discussion.

Q. And Mr. Christopherson was representing Montana-Dakota Utilities Co. in these discussions? A. Yes.

Q. Did you ever invite Mr. Christopherson to look at the integration proceedings and the hearings thereon, that is 59-38?

The Witness: To the best of my recollection I suggested to Mr. Christopherson at one time, when we were preparing for the proceedings, that he read the testimony. I do not think that I directed his attention to any particular portion and I don't think that he ever accepted the invitation. I must confess that my recollection on it is hazy, but it is my best recollection that I went that far and no further.

I can give you the reason as to why I did it, but I don't know that I communicated that to him.

Mr. Robinson: What was that reason?

Q. Well, it had been my practice in all the situations where acting as counsel for holding companies on sales of subsidiaries to ask the counsel for the purchasing party to review the testimony which we had furnished to the commission, so that they could compare any presentation which they were making with regard to the companies, with that which we had made. And in this case I had just finished such an experience with counsel for Potomac Edison and American Gas & Electric Company, and, having it so strongly in my mind, that aids me in my present recollection in believing that I invited Mr. Christopherson to do the same thing.

Q. Mr. Scheetz, you testified that in the 1942 proceedings before the Securities and Exchange Commission, Nos. 59-38, you appeared for both United and all of its subsidiaries and was present throughout those proceedings; is that correct? A. That is.

Q. In those proceedings do you recall whether or not any of the contracts between the defendant in this case, Northwestern Public Service Company, and the Dakota subsidiaries of United Public Utilities Corporation were involved?

A. I do recall.

Q. Were they inquired into, in those proceedings?

A. Yes.

Q. Do you recall which of said contracts was inquired into?

Mr. Benson: We renew our objection to all this. Well, I guess we have a general objection. That stands, is that right counsel?

Mr. Stafford: To the whole thing.

The Witness: I would have to check the record to see how many of the contracts under which energy was exchanged between Northwestern and Dakota Public Service Company, or the predecessor subsidiaries, were explored, but I now recall that those which were currently in effect in May, 1942, were the subject of inquiry. The operations of the Dakota Public Service Company and Northwestern under the contracts were explored and the agreement which is familiarly referred to as the Central Office Agreement

was the subject of inquiry, and its operation. By Central Office Agreement I mean the agreement under which Northwestern Public Service Company and Dakota Public Service Company operated a joint office on a sharing of expense basis.

Mr. Benson: Was that called the joint management expense contract?

The Witness: The one I have, Mr. Benson, is called Agreement for Allocation of Joint Management Expenses.

Mr. Benson: When was it dated?

The Witness: Agreement dated July 1, 1939, between Northwestern Public Service Company, Dakota Public Service Company, and Knife River Coal Mining Company.

The Witness: There was another contractual arrangement which was explored, and that was the arrangement under which Knife River Coal Mining Company sold coal to Northwestern Public Service Company.

Mr. Stafford: Q. Did you, as counsel for United Public Utilities Corporation, take any position or advance any contentions in regard to the inquiry into those matters?

The Witness: A. It was not necessary to advance any contention. We were engaged in hearings to examine the integration status of United Public Utilities Corporation and its subsidiaries, and it was a question of bringing out the facts bearing on that problem. The hearings were adjourned before the cross-examination was completed and have never been reconvened so far as the residual of United Public Utilities is concerned.

Mr. Stafford: Q. Testimony was given and received, was it, with regard to these contracts about which you have testified? A. Yes.

Q. Did the Securities and Exchange Commission examiner and counsel cross-examine with reference to them?

A. Counsel for the staff of the Commission was Louis Davis, and he conducted an extensive examination of Mr. Sandstedt, Mr. Sanborn and Mr. White, on the relationships between the subsidiaries of United Public Utilities

Corporation and Northwestern Public Service Company, and the common directors and common officers.

Q. That was all gone into by Mr. Davis on cross-examination of the witnesses?

A. He cross-examined the witnesses extensively.

Q. There were three witnesses to whom you have alluded called on behalf of United Public Utilities Corporation?

A. Yes. I mentioned that Mr. McClanahan had been called on by United Public Utilities Corporation on accounting data. I don't recall at the moment—I would have to check the record and see whether he examined Mr. McClanahan on that phase of it. It did involve accounting matters.

Q. You mentioned just Mr. Sanborn, Mr. Sandstedt and Mr. White.

A. I may amplify that,—that I had Mr. Lakin present as a witness. He was present throughout the proceeding and I had him there not only for his testimony on the Ohio-Indiana properties, but anything I might need, of his knowledge on those other properties. At the moment I don't recall whether he was questioned on the subject of the other subsidiaries.

Unless Mr. Benson objects, there is one other point,—the question of the relationship of the subsidiaries of U. P. U. to Middle West Corporation was also explored.

Examination by Mr. Benson.

Q. Do you or your wife have any securities in the Middle West Corporation or any of its subsidiaries?

A. None whatever. For two days, about, I owned some stock in Middle West Corporation. I was running my sister's account.

Mr. Benson: Well, I am not interested, unless you had a real interest.

The Witness: I was in and out. As soon as I thought about it I realized I should not own any stock.

Q. Were you attorneys for any of the underwriting bankers in the sale of any United Public Utilities Company's securities?

A. We rendered legal services to Baker, Young & Company in particular matters, though not their general counsel, and I think that Baker, Young & Company dealt actively in the securities of United Public Utilities Company. I don't recall whether they participated in the underwriting, but we never represented them in connection with any underwriting.

Q. Who selected you as counsel for the committee that you testified to a little while ago?

A. I was not in the picture at that time. I can give you my understanding. Mr. Joseph Swain, of Baker, Young & Company, which later became Swain & Company,—it may have been Swain & Company at that time,—used our office on various matters, was a friend of Ralph B. Evans, who was then head of the firm, and I think it was on the recommendation of Mr. Swain that our firm was asked to be counsel for the First Lien Bondholders Committee.

Q. Were any of the members of that Committee members of Mr. Swain's firm? A. None other than Mr. Swain.

Q. When did you first take a part in these proceedings of the receivership of United Public Utilities Company?

A. The latter part of May, 1934.

Q. Will you refer to the board of directors' meeting, the minutes of June 24, 1937?

The Witness: I have it.

Mr. Benson: Q. Do you know who made that survey?

A. I have no present recollection.

Mr. Benson: I believe in your testimony on direct examination you made some statement as to North Dakota Power & Light Company succeeded to all the rights and obligations of Northern Power & Light Company?

The Witness: A. I did.

Q. And you meant to say that was under and pursuant to the provisions of the Delaware statutes?

A. And to the merger agreement itself.

Q. But also under the Delaware law?

A. That will be right.

Q. The integration proceedings before the Securities and Exchange Commission are still open?

A. That is right.

Q. There has been no 11-B(1) order issued?

A. There was an 11-B(1) order issued with respect to the ice company and the two Arkansas subsidiaries.

Q. That is the order you said required you to divest yourselves?

A. Yes. Now, when the time comes to approve the sale of the Dakota subsidiaries, the Commission noted the requirements of Section 11-B(1) with respect to that, because the Commission had always been trying to get U. P. U. Corporation to choose between its principal systems, so that the order on the sale was also under Section 11-B(1).

Q. Well, the order itself would show just how it was issued, wouldn't it? A. Yes.

Q. Did you furnish a copy of that to Mr. Christopherson?

A. Oh, I am sure he had one. He needed one for his own opinion on the underwriting. I am sure he got one direct. I may have a letter here sending him one.

Mr. Benson: Well, I am not interested. I just thought you might recall.

Q. Now, you did not mean to create the impression that the only transactions which were inquired into, in the integration proceedings, were the transactions between Northwestern Public Service Company and the North Dakota subsidiaries of United Public Utilities Corporation?

A. Of course not.

Q. And in those proceedings inquiry was also made into your relations with Middle West Service Company and the amount that was paid? A. That is correct.

Q. And you offered testimony on that?

A. That is correct.

Q. In other words, this proceeding was the same as in the integration proceeding of any other holding company; it went just as far as the commission wanted it to go, inquiring into all of the business of the holding company and the subsidiaries, as far as the commission wanted to go?

A. That is correct. Other than that I conceived it my duty to present to the Commission all the facts which

would be necessary for determination of the issue, and the Commission, of course, approached it from the same viewpoint, so the effort between the two of us was to get the complete picture.

Q. So this went into all the inter corporate relationships of the holding company and its subsidiaries?

A. That is right.

Q. And the relationship of the holding company and its subsidiaries with Middle West Service Company?

A. That is correct.

Q. And the relationship of the U. P. U. Corporation with United Public Utilities Company?

A. That is correct.

Q. And the interest of Middle West Corporation in U. P. U. Corporation?

A. That and United Public Service Corporation.

Q. Yes. How many hundred pages did you [way] there was in the entire record in the 11-B (1) proceeding?

A. I did not say.

The notes of testimony under the proceedings on Section 11 run to through page 1378. Thereafter there were other hearings, the volumes beginning with new numbering, and that must add about 300 pages.

STANLEY J. SICKEL was called as a witness by the defendant, and sworn, and testified as follows:

Direct Examination, by Mr. Royhl.

Q. Will you state your name to the record?

A. Stanley J. Sickel.

Q. You have been on the stand before during the trial of this action? A. Yes.

Q. I think you gave some of your history and associations. How old are you? A. I am 37.

Q. What is your business or profession?

A. Electrical engineer.

Q. When and where were you graduated, if you graduated?

A. I graduated from South Dakota School of Mines, in Rapid City, in 1931.

Q. Had you done any utility work prior to that time?

A. Yes, I was employed by Northwestern Public Service Company in summers of 1927, 1928, 1929. Employed by American Telephone and Telegraph Company in the summer of 1930.

Q. What were your duties during those years under that employment?

A. Line construction, surveying, maintenance work.

Q. I take it that was just during the school vacation?

A. That is correct.

Q. After 1931, what did you do?

A. I got out of school in the spring of 1931. I had various jobs until early in 1932. Occasional work that I could pick up. I operated a radio station in Mitchell from early in 1932 until some time in 1933. Shortly afterwards I went back to work for Northwestern.

Q. In what capacity?

A. My first job in 1933, labor in the Mitchell power plant.

Q. How long were you in that work?

A. I was in the plant from 1933 to 1936, as I recall it. I worked as helper for about six months, as fireman for perhaps a year, and as switchboard operator for the balance of the time.

Q. At that time was the dispatcher's office located in Mitchell?

A. No, it was not. It had been moved slightly before that. I think the Mitchell plant did do the dispatching on one shift for the south end of the system.

Q. You were there you say, until 1936, as an engineman. What then did you do?

A. As I recall about the first of January, 1936, I transferred to the Mitchell Division office as foreman in the service department. I was there for about a year.

Q. What were your duties in that department?

A. Maintenance for the distribution system, transmission line. Assisting the electric superintendent in routine operation and maintenance.

Q. That would be what district?

A. On the Mitchell division.

Q. What then did you do?

A. I was transferred then to the district office at Clark,

South Dakota, where I was superintendent for about three years.

Q. That took you up to 1939? A. To the middle of 1940.

Q. What were your duties there as district manager?

A. We operated eleven small towns out of the Clark district and I was in charge of maintaining service, maintenance of lines, reading meters, collecting bills, all of the operations of the utilities in this group of towns.

Q. Then what did you do?

A. Then I was transferred to Huron as assistant to the man who was then superintendent of transmission and distribution, who was Mr. Bayles.

Q. Is that the same Mr. Bayles whose name appears here on some of these exhibits? A. That is the man.

Q. How long did you act in that capacity as assistant to Mr. Bayles?

A. I was his assistant until he was called into the service in the fall of 1942, at which time I became acting superintendent.

Q. Before you were taken into the Huron office you were an employee of the Northwestern, the defendant, were you? A. That is correct.

Q. Now, did you become a part of the joint management staff after you were taken into the Huron office?

A. Yes, my duties took me all over the entire property.

Q. That would be North Dakota and South Dakota, would it? A. Yes.

Q. That was following the merger of the North Dakota corporation or companies up there, into Dakota Public Service Company?

A. It was at the time I went to Huron, yes.

Q. And afterwards?

A. The Knife River Coal Mining Company, of course, was included.

Q. The Knife River Coal Mining Company. From that time on you say you acted as assistant until Mr. Bayles went into service, and then you were acting superintendent of distribution and transmission. A. That is correct.

Q. And still a part of the inter-management staff, were you, joint management staff? A. Yes.

Q. What were your duties as assistant in that department?

A. I had charge of the safety and accident prevention

program. I assisted in preparing work orders. I assisted Mr. Bayles in the supervision of the line and service crews operating in the various divisions. I did drafting and engineering work on substation and transmission line design, and supervisory work in connection with construction as it was done, as it passed from the design stage into the construction stage.

Q. Do you know what the practice and policy of the joint management staff was concerning originating work orders? Are you familiar with that? A. Yes.

Q. If such an order would originate in your department did you prepare the work orders?

A. The work orders did not customarily originate in the joint management office. They originated on the division and were submitted first to the joint office for approval, and if approved were then submitted to the proper party in Chicago for approval.

Q. Following out that plan, do you know whether or not it was the practice that you, as chief of your department, would approve any work order originating in your department?

A. Yes. Those would not be built without our approval.

Q. Do you know what the practice was concerning the submitting of these work orders to the Chicago owners before they were acted upon in the field? A. Yes.

Q. What was that practice?

A. After approval in our office, the construction or retirement work order was then forwarded to Chicago for approval by the appropriate party. If it were a work order that originated in the Dakota companies or Knife River Co., it was approved by Mr. White.

Q. Samuel W. White?

A. Yes. If it were to do with the Northwestern Public Service Co. it was approved by Mr. Kruesi, and I believe in either case it was also approved by Middle West engineering staff, as to engineering.

Q. And that practice was followed out during the period these companies were interconnected?

A. That was the practice, yes.

Q. You say you got a degree in electrical engineering from the School of Mines? A. Yes.

Q. As of 1931? A. That is correct.

Defendant's Exhibit 329 was received in evidence. It reads as follows:

Defendant's Exhibit 329.

Original Cost Tabulation.

Interconnection Facilities.

I. A portion of the Aberdeen Substation.....	65,864.84
II. The Aberdeen-Barnard and Aberdeen-Ipswich Lines	105,337.65
III. The Gettysburg Substation	20,420.62
IV. The Highmore-Gettysburg Line.....	106,158.78
Total to Interconnection as of July 1, 1941..	297,781.89

S. J. SICKEL

2-28-47

I. Aberdeen Substation.

The Aberdeen sub consists of a six-bay steel structure with equipment as follows:

First Bay—Oil circuit breaker and accessories to control 38000 volt line to Barnard.

Second Bay—Oil circuit breaker and accessories to control 38000 volt line to Ipswich.

Third Bay—Step-up transformers 33000 to 38000 volts to match N. W. P. S. 33000 volt system and DPS 38000 volt system.

Fourth Bay—Oil circuit breaker and accessories to meter and control power through transformer in #3 bay.

Fifth Bay—Oil circuit breaker and accessories for Webster line.

Sixth Bay—Oil circuit breaker and accessories for Redfield line.

The first four bays are used in the interconnection; the fifth and sixth are for N. W. P. S. Co.'s own use.

Tabulation of Costs—Aberdeen Sub.

Structure $17,013.85—Charge four bays or 4/6 this item	$11,342.57
Foundations—Charge 4/6 of $3,016.52	2,011.01
Control and Metering on switchboard—three out of five circuit breakers—Charge 3/5 of 3,078.74	1,847.24
Control cables to circuit breakers—Charge 3/5 of 498.89	299.39
2—Arresters 37/50 KV Oxide Film Type	3,169.24
2—Oil circuit breaker 50 KV	4,770.29
1—Oil circuit breaker 37 KV	2,239.91
4—Potential transformer 22 KV	2,470.23
6—Current transformer 50 KV	2,653.17
1—Potential transformer 34.5 KV	438.60
From W. O. 404—Total Material	$31,241.65
Substation Labor—Charge 4/6 of 5,352.61	3,568.41
Total	$34,810.06
Incidentals	3,550.63
Total Direct Charges	$38,360.69
Supervision @ 9.6 %	3,682.63
Interest @ 3.12%	1,227.54
Total from W. O. #404 to Aberdeen Sub.	$43,270.86

Besides the primary work order, additional chargeable items were installed from various sources as indicated:

3—Current Transformer 37 KV from original sub	$ 1,314.18
1—Autotransformer 3750 KVA on W. O. #1081	5,165.00
Labor	100.41
Incidentals	116.00
Supervisions and interest	835.98
1—Potential transformer 22 KV (PWO)	703.26
1—Bus-tie transformer 5000 KVA W. O. #2127	13,761.04
2—Sets ground relays—W. O. #2129—Half of $1196.22	598.11
7/1/41—Total Aberdeen Sub to Interconnection	$65,864.84

II. Aberdeen-Barnard and Aberdeen-Ipswich Lines.

Materials			
50' Poles	27	19.91	$ 537.68
45' Poles	60	15.15	908.85
40' "	322	13.81	4,447.58
35' "	746	12.98	9,687.06
10' Crossarm	1519	1.58	2,396.64
72" Brace	1258	.76	951.96
Pins (hvy)	5101		3,276.56
Anchors	417		747.45
Anchor Rod	90		66.08
Guy wire	30719'		381.28
Guy hook	700		53.94
Strain Plate	670		51.30
Bayonets	77		106.32
Static Clamp	1082		89.14
Machine bolt—11"	995		80.53
" " —14"	1271		119.80
DA bolt—18"	417		66.22
Log Bolt	1209		40.16
½ x 6" carriage bolt	3400		132.56
⅜ x 4½ " "	2224		46.30
Spur washer	5998		105.27
Guy strand ¼" SM	333000'		2,872.60
Eyelets	261		86.29
Guy Clamps	1465		317.38
Machine bolt 6"	1664	.07	109.64
Machine bolt 10"	2310	.12	284.28
Pintype Insulator 45 KV	3371	2.44	8,217.19
Conductor—2/0 ACSR	140,740#	.23	32,452.71
Strain Ins. (4 Unit)	192	9.32	1,789.62
Strain Clamp (Al.)	427		413.26
Armor Tape Al.	1521		394.82
Tie wire #4 Al.	1086		366.86
A. B. Switch 3 p. 50 KV	3		560.98
Subtotal—Material			$ 72,158.31
Labor			15,766.57
Incidentals			8,968.34
Supervision			9,301.75
Interest During Const.			3,023.07
Total			$109,218.04
Minor Additions Subsequent to W. O. #404			
Barnard Line			676.44
Ipswich Line			1,983.80
Minor Retirements Subsequent to W. O. #404			
Barnard Line			(289.54)
Ipswich Line			(6,251.09)
Total as of 7/1/41			$105,337.65

Analysis W. O. #404.

Per Work Order:		
Total Material plus labor	$146,535.10	
Total Incidentals	15,045.49	(= 10.2% of itemized Mat'l. + Labor)
Total Direct Charge	$161,580.59	
Total Supervision	15,506.95	(= 9.6 % of direct chg.)
Total Interest	5,039.06	(= 3.12% " " ")
Work Order Total	$182,126.60	
Aberdeen-Barnard and Aberdeen-Ipswich Lines:		
Total Material per books	$ 72,158.31	
Total labor on poles	11,682.42	
Total labor on conductors	5,029.15	
Credit—labor on Undercircuit	(945.00)	(10.5 Miles @ 90.00 per mile)
Total	$ 87,924.88	
Incidentals prorata @ 10.2%	8,968.34	
Total Direct	96,893.22	
Supervision @ 9.6 %	9,301.75	
Interest @ 3.12%	3,023.07	
Total Cost Lines	$109,218.04	
Aberdeen Substation:		
Material per allocation	$ 31,241.65	
Labor per allocation	3,568.41	
Total	$ 34,810.06	
Incidentals prorata @ 10.2%	3,550.63	
Total Direct Chg.	$ 38,360.69	
Supervision @ 9.6 %	3,682.63	
Interest @ 3.12%	1,227.54	
Total from W. O. #404	$ 43,270.86	

III. Gettysburg Substation.

The Gettysburg sub was built to make possible joining the 22000-volt system of N. P. L. Co. with the 33000 volt system of NWPSCo. to meter the flow of power either way over the interconnection and to serve as step-down to supply the local loads of the town of Gettysburg. It was constructed on W. O. #420, started in 1929 and completed in 1930. Original cost items from W. O. #420 were:

Steel sub structure complete	$ 1,284.70
Circuit breaker & metering equipment	3,328.24
2—voltage regulators	2,319.93
Foundations	314.70
High voltage arresters—2 sets	2,141.34
Labor	1,796.17
Incidentals	1,872.54
Supervision	1,801.17
Interest	432.21
Subtotal from #420	$15,291.00

Added by transfer were:

Fence—auth N-254	214.17
Overheads	42.83
3—Transformers—200 KVA auth N-18	3,126.50
Overheads	357.00
2—Transformers, from stock	97.30
Original cost at time of construction	19,128.80

Subsequently metering equipment was added:

1936—Meter	38.10
Overheads	1.14
33000 volt CT & PT	1,000.00
Overheads	30.00
1938—2 Combination demand meters	197.07
Installation	57.12
Overheads	7.63
Retired—1936 meter Deduct	(38.10)
Overheads "	(1.14)
Total original cost as of July 1, 1941	$20,420.62

IV. Highmore-Gettysburg Line.

From N-138:

Charge additional 5' height of 327 poles Highmore to Harrold			$ 1,800.03
Additional labor @ $1.00 per pole estimated			327.00
Subtotal from N-138			$ 2,127.03

From W. O. #397:

Charge half of material for 26 miles:

Half of:	799 crossarms	$ 1,352.79	
	628 braces	556.71	
	1608 carriage bolts	72.09	
	642 10" M. bolt	48.15	
	182 14" M. bolt	10.98	
	48 16" DA bolt	7.20	
	1205 insulator pins	348.84	
	689 45 KV insulator	939.88	
	19,500# ACSR wire	13,788.83	
	227 tie wire	70.69	
	43 strain insulator	236.85	
	Labor on conductors	2,669.65	
	Incidentals	2,992.00	
	Supervision	2,142.61	
	Interest	421.16	
Subtotal to Interconnection		½ × $25,681.04 =	$12,840.52
Additional height on 366 poles			1,991.45
Additional labor for erecting taller poles	@ 1.00 est.		366.00
Labor to mount crossarm and braces	@ .80 est.		292.80
Subtotal from W. O. #397			$15,500.77

From W. O. #420:

29—30' Poles		159.00
596—35' "		7,577.95
40—40' "		581.40
15—45' "		250.60
9—50' "		174.00
1154—10' crossarm		1,996.04
572—18" DA bolt		85.80
46—12" M bolt		3.45
276—14" M bolt		24.84
1564—pole-top pin		1,688.40
2492—carriage bolt		83.55
1212—10" M bolt		90.88
2680—1⅜ steel pin		856.81
514—washer		14.39
146—anchor		367.76
49—anchor log & 8' rod		41.28
13265—⅜ guy strand		445.52
101—strain plate		8.64
458—guy hook		33.21
411—guy clamp		69.35
724—⅛ x 4" log		21.72
155,448#-ACSR wire—4/0		37,861.35
1341#-#4 tie wire		428.58
252—armour wire		87.84
4871—45 KV insulator		9,877.61
107—strain unit		742.64
Material subtotal		$63,572.61
Labor on Structures @ 90% of Total		$ 5,986.30
Labor on Conductors @ 78.1% of Total		3,664.95
Incidentals — prorata)		7,050.00
Supervision ") @ 72.6% of total)		6,770.00
Interest ")		1,627.00
Total from W. O. #420		$88,670.86

Summarized: Highmore to Gettysburg line allocated to interconnection:

From auth. N-138		$ 2,127.03
From W. O. #397		15,500.77
From W. O. #420		88,670.86
Subtotal—Original Cost		$106,298.66
Subsequent changes to July 1941:		
Misc. minor additions	$ 470.71	
Misc. minor retirements	610.59	
Net ret.	$ 139.88	(139.88)
Original Cost as of July 1, 1941		$106,158.78

Q. Did you prepare that? A. I did.

Q. From what source did you prepare this tabulation, Defendant's Exhibit 329?

A. These are in most cases figures taken from the final return sheet, which is the permanent record and is found attached to the construction work order. In some cases an engineering allocation has to be made of those figures, and, of course, are my allocations. They are not shown in exactly that form.

Q. Are the papers and records from which you prepared this Exhibit 329, are they here in Court in evidence?

A. They are in evidence, yes.

Q. Do you know the tabulation which you have made here is a true and correct tabulation of the instruments that you have mentioned and which are now here in evidence?

A. Where tabulated they are true and correct and where allocated they are my best judgment.

Q. I presume you have made some computations also?

A. That has been necessary in some cases.

Q. And are those computations true and correct?

A. They are.

Q. Generally speaking, what is this Exhibit 329?

A. This is an inventory per books of the various pieces of equipment and material and tabulation of labor and overhead that went into the construction of the line from Aberdeen to Ipswich; the line from Aberdeen to Barnard; the portion of the Aberdeen sub used for the interconnection; the line from Blunt to Gettysburg that was used for part of the interconnection, and a portion of the charges on the line from Highmore to Blunt which are chargeable to interconnection.

Q. What is the first study on this tabulation? I notice you have these classified in three or four sub-divided studies?

A. The first classification I have taken up is the Aberdeen substation.

Q. For how long have you been well and intimately familiar with these interconnecting properties?

A. These that we are discussing as part of the interconnection facilities?

Q. Yes?

A. I have been acquainted with them in a rough way for ten years or more, very actively since 1940.

Q. In your activities, do you have occasion to keep these properties more or less checked as a part of [you] routine duties?

A. That is part of my job, to see they are maintained and kept in proper state of repair.

Q. Then you have a personal knowledge of the property?

A. Yes, I do.

Q. I take it your first paragraph under "Aberdeen substation" is more or less descriptive of the type of structure?

A. That is the basis upon which the allocation has to be made. The structure itself is a large steel structure, consisting of several bays, each bay having its own equipment in it. Part of the bays being used for interconnection, part for Northwestern's own use. The entire structure was built in one lump sum and there is no means of allocating except on ratio basis.

Q. In what ratio was that ascribed to the defendant's own use and to the use of the interconnection facilities? I am speaking of the structure proper?

A. Of the structure itself, four bays or four sections are used to facilitate the interconnection, or make interconnection possible. Two bays are used for Northwestern's own use, so of the six bays I have allocated four to interconnection and two to Northwestern's own use.

Q. You also generally describe, I think, the equipment that is housed in the structure, do you not? A. Yes.

Q. Is an allocation made of the equipment or does that work itself out in your tabulation here?

A. Generally speaking the items of equipment can be identified item by item and charged or not charged, as indicated. The only items which have to be allocated are the structure itself and the labor, incidentals, supervision and interest. The remaining items as tabulated here are physical inventory and I referred back to the books to get the prices.

Q. Then you have actually inventoried this interconnecting facility property? A. Yes.

Q. Now, under your tabulation of "Costs, Aberdeen Sub," you have itemized those, have you?

A. That is correct.

Q. From what did you take your costs?

A. The costs are shown on the final return sheets which are in evidence.

[Which are in Defendant's Exhibit 55-19 (R. p. 741; supra).]

Q. There was some discussion here when Mr. Elvig was on the stand for the plaintiff concerning overheads, which included on the work order an account No. 60, and an account No. 61 and an account No. 62. Did you check those items? A. Yes.

Q. Item by item as shown by the journal vouchers and the cash vouchers?

A. They are shown properly segregated on the final return sheet, although on the ledger they are lumped together.

Q. So this tabulation is an actual inventory of the properties that go into this classification? A. Oh, yes.

Q. And the costs that are used are the record costs, are they? A. That is correct.

Q. Now, were you able to check out the so-called incidentals?

A. By "checking out" do you mean to determine what they consisted of?

Q. Yes? A. Yes.

Q. Did you so determine?

A. Yes, I did. We made a complete check of every item.

Q. I take it those were allocated to the Aberdeen sub, and to the Aberdeen Barnard line, and Ipswich line, etc., were they?

A. They were allocated—perhaps I will have to explain that a little more. Many of the items could not be identified as to whether they were used on the line or whether they were used on the sub. If I might use an example, the item of crew expense, truck expense, which was simply classed as incidentals. From this distance it would be totally impossible to determine whether they was used in completing the line or substation. So what I have done, I have indicated on the fourth page, analysis of work order 404. I have taken the total material, plus

labor, total incidentals, which worked out about 10.2% on the items, material and labor, and I have pro-rated the incidentals on both the lines and the Aberdeen sub, and a portion of the sub which was not used as interconnection, and the portion of the Aberdeen Barnard which was credited against the entire contract, and I have apportioned the incidentals, pro-rated among those five separate categories on Pro-rate basis with reference to total material plus labor which had been charged to each one.

Q. Were you able to satisfy yourself that all of those items were part of the so-called interconnection facilities?

A. Yes, except those for which I deducted.

Q. What do you say you deducted those for?

A. If you will refer to page 4, I have set up on the first line the total material plus labor, of the complete job. The job consisted of complete Aberdeen sub, part of which was charged to interconnection, part of which was not. It consisted of Aberdeen Barnard line. It consisted of entire construction of Aberdeen Barnard line, and it consisted of the line from Aberdeen to Ipswich. There was really a total of five items. It figured out 10.2 on the itemized charges. Leaving that picture there, we go back and find out what material and labor is properly chargeable to Aberdeen Ipswich line. Then we apply the same 10.2 against the material and labor on Aberdeen Ipswich line and that will give us a figure for the proper amount of incidentals to charge against that line. Similarly with each of the others. By this approach, when we are all through, I have deducted the incidentals which are not properly chargeable to the interconnection in the same ratio as you have added them on where they are properly chargeable.

Q. Have you made a true and correct distribution of those amounts? A. To the best of my ability, yes.

Q. Does that involve some engineering questions? And engineering experience? A. It does, yes.

Q. As so tabulated by you, what do you find the amount of the cost of the Aberdeen substation, under the interconnection figures?

A. I arrived at a total as of July 1, 1941, of $65,864.84.

Q. That is the same figure that appears on Page 1 of the tabulation under that same heading, isn't it? A. Yes.

Q. Under the roman numeral one? A. Yes.

Q. What was the next classification, "Aberdeen Barnard," "Aberdeen Ipswich" line?

A. Yes. Those are on Page 3. Both of these lines, I might mention were built on the same work order as the Aberdeen sub. There was no allocation made at the time of the construction between what went on the Barnard line and what went on the Ipswich line. Under the system of accounting in use in those days there was no necessity for making such a break down. They were built simultaneously and part of the same job, and there was no allocation made. So they are both part of the interconnection facilities and I have not attempted to break it down. I have combined Barnard line and Ipswich line.

Q. You know of your own knowledge, do you, that the items contained in this classification are true and correct and properly applied to that cost? A. That is correct.

Q. Does that include items of incidentals, supervision and interest?

A. Yes, pro-rated in the same manner as Aberdeen sub.

Q. What was supervision on the Aberdeen sub?

A. In dollars?

Q. No, in per cent.

A. Supervision is 9.6%.

Q. I observe there, the figure, interest, 3.12%. Was that interest as charged against the work?

A. Yes. That interest is figured each month by journal voucher against the total uncompleted value of the construction as of that date. In other words, if you spend $2,000 the first month, at the end of that month, for the following month the interest charge would be per centage of the $2000. If you added another $3000 the following month the interest charge would be on $5000.

Q. At what rate? A. I believe ½% a month.

Q. Then the total interest which you charged at the Aberdeen sub was $1227.54?

A. That is right. That represented the fact that construction was started on the substation and material was purchased and held there inactive for some months, before the substation actually went into the service.

	January	February	March	April	May	June	July	August	September	October	Nove
1941											
Beulah	2 638 110	2 499 776	2 888 382	2 737 180	3 008 618	2 882 008	2 084 186	3 085 618	2 860 886	2 791 966	3 031 9
Bismarck	449 300	485 800	422 300	386 800	488 700	840 600	894 300	796 700	669 800	796 300	669 3
Mobridge	113 600	100 800	86 300	89 600	80 600	84 300	56 800	23 300	38 800	60 100	73 8
Dickinson	(276 600)	(238 800)	(321 300)	(318 000)	(316 900)	(332 100)	(360 600)	(373 800)	(336 800)	(361 100)	(330 2
Misc.	4 568	(6 181)	(8 410)	(7 486)	(7 119)	(4 088)	1 401	818	(5 018)	(6 761)	(3 1
1942											
Beulah	3 081 800	2 776 600	2 816 900	2 947 100	3 106 800	3 038 900	3 194 400	3 146 800	2088 300	2 015 800	1 814 3
Bismarck	810 100	689 200	606 700	686 100	689 300	582 300	880 400	884 800	880 900	1 460 800	1 220 2
Mobridge	96 100	172 100	81 700	100 800	100 600	81 900	30 600	16 900	38 000	89 100	120 8
Dickinson	(348 300)	(306 700)	(344 600)	(313 300)	(328 200)	(313 900)	(338 900)	(341 800)	(339 400)	(264 800)	(255 2
Misc.	(10 476)	(9 703)	8 073	(4 896)	(8 193)	(8 106)	(4 381)	(4 984)	4 298	8 644	(2 1
1943											
Beulah	3 166 800	2 990 900	2 936 700	3 121 800	3 299 800	3 191 000	2 867 000	2 646 800	3 172 800	3 088 000	3 186 7
Bismarck	879 300	839 000	631 100	466 600	562 800	537 400	899 800	882 800	284 800	633 800	489 10
Mobridge	120 100	81 900	83 880	74 000	83 400	77 100	89 900	53 400	87 900	96 600	42 4
Dickinson	(360 300)	(310 400)	(322 900)	(312 800)	(320 100)	(282 900)	(383 000)	(782 800)	(832 800)	(336 900)	(369 1
Misc.	(11 696)	(9 768)	(8 361)	(9 821)	(9 838)	(8 [illegible]5)	(4 968)	(3 847)	(5 662)	(8 858)	(10 3
1944											
Beulah	3 236 000	2 896 300	3 442 800	3 121 900	2 183 700	1 776 900	2 896 400	3 186 800	3 042 400	3 258 700	3 091 6
Bismarck	572 600	630 000	514 100	651 800	1 341 800	1 196 400	602 100	704 700	737 200	496 700	539 1
Mobridge	114 200	182 800	177 400	188 300	172 400	171 800	162 900	150 400	146 300	161 000	182 1
Dickinson	(391 300)	(329 700)	(387 200)	(338 800)	(334 900)	(300 800)	(366 800)	(389 900)	(342 300)	(338 800)	(314 8
Misc.	(14 728)	(10 118)	(10 780)	(9 229)	(7 378)	(486)	(3 963)	(5 728)	(6 961)	(7 196)	(9 1
1945											
Beulah	3 212 100	2 890 000	3 340 800	3 281 100	3 216 700	3 087 800	3 178 800	3 038 000	3 126 200		
Bismarck	512 400	864 100	535 300	684 900	831 100	977 000	814 100	870 100	641 800		
Mobridge	120 800	116 700	148 400	187 200	186 000	160 800	184 200	147 900	138 000		
Dickinson	(360 800)	(308 800)	(376 100)	(364 400)	(348 800)	(335 800)	(382 800)	(372 800)	(334 700)		
Misc.	(6 814)	(10 956)	(9 044)	(6 682)	(8 807)	(7 981)	(6 883)	(6 870)	(8 073)		

	September	October	November	December	Net Wtr. Outrut (Thousands)	%
	2 860 886	2 791 966	3 031 981	3 079 322	34851.7	81.8%
	669 800	796 300	669 300	684 700	7086.8	16.6%
	38 800	60 100	73 800	72 000	776.8	1.9%
	(336 800)	(361 100)	(330 200)	(376 000)	(0)	0
	(5 018)	(6 761)	(3 102)	(9 321)	(0)	0
				Total	42,884.8	
	2088 300	2 015 800	1 814 800	2 049 000	33990.8	75.6%
	880 900	1 460 800	1 220 200	885 100	9963.6	22.2%
	38 000	89 100	120 800	96 200	979.4	2.2%
	(339 400)	(264 800)	(255 200)	(372 100)	(0)	0
	4 298	8 644	(2 129)	(11 121)	(0)	0
				Total	44,933.8	
	3 172 800	3 088 000	3 186 700	3 269 800	36825.3	81.2%
	284 800	633 800	489 100	697 300	7692.1	16.8%
	87 900	96 600	42 400	97 900	908.4	2.0%
	(832 800)	(336 900)	(369 100)	(398 100)	(0)	0
	(5 662)	(8 858)	(10 334)	(11 801)	(0)	0
				Total	45,828.8	
	3 042 400	3 258 700	3 091 600	3 286 600	35359.8	77.4%
	737 200	496 700	539 100	562 900	8447.1	18.5%
	146 300	161 000	182 100	135 200	1891.8	4.1%
	(342 300)	(338 800)	(314 800)	(384 700)	(0)	0
	(6 961)	(7 196)	(9 161)	(10 306)	(0)	0
				Total	45,698.7	
	3 126 200				28184.8	78.8%
	641 600				6300.6	17.6%
	138 000				1298.8	3.6%
	(334 700)				(0)	0
	(8 073)				(0)	0
				Total	35,784.2	
			5 Year Total		214,279.0	

5 Year T

5 - Year Total (Thousands)

Beulah	(168,992.1	÷	214,279.0) X 100	=	78.8%
Bismarck	(39,429.7	÷	214,279.0) X 100	=	18.8%
Mobridge	(5,857.2	÷	214,279.0) X 100	=	2.7%
Total					100%

( ) Parenthesis Indicates Red Figures

Q. I think you stated that under that classification, supervision, that an amount of 9.6% was used. What was that figured against?

A. That is based upon the total of the direct charges.

Q. That would be an actual cost item?

A. Oh, yes. Out of pocket expense.

Q. Are you familiar as an electric Engineer with the rates of supervision, beginning in 1929 and 1930, along in there, down to the present time? A. I believe so.

Q. Do you know what those generally were in practice and operation during the years?

A. Depending a little on the individual job. It will vary on different jobs, different classes of work, but figures from 9, 10, 11%, in that range, are very good, customarily.

Q. Were they during the years from 1930? A. Yes.

Q. I think this construction was originally completed along in 1930, as the record shows?

A. That is my understanding.

Q. Has there been some change since the inauguration of the Federal Power Commission, where companies are subject to interstate commerce of the Power Act?

A. Very definitely there have been changes that came in with the uniform system of accounts and record keeping in 1937.

Q. That would start some time about 1937? A. Yes.

Q. Have we any records or files in this case, as exhibits, that reflect the overheads that were used back through the years on this type of construction?

A. There is in evidence appraisals of the North Dakota State Railroad Commission.

Q. Those are Plaintiff's Exhibits 13 and 14 (R. p. 242, supra). A. Perhaps they are.

Q. Do you know what they provide?

A. In a general way, yes.

Q. What do you find they provide?

A. Around 10, 11, 12%, I believe.

Q. Those reflect the policy and practice of the North Dakota Commission in supervision of rates for electrical utility companies, do they?

A. That would represent the amount of overhead which they allowed to be used in preparing rate base.

Q. Was there anything further here that you observed that reflected the practices in the early '30's?

A. The Lucas and Luick report set forth in some estimating figures for construction which they were recommending in which the overheads are set out, I believe.

Q. I show you Plaintiff's Exhibit 82-14 (R. p. 607, supra), and ask you if that is the record and exhibit to which you refer? A. Yes.

Q. Does that reflect the practice on or about the time that that survey was made by a reputable engineer?

A. I think it would be an accurate reflection, yes.

Q. What would that show?

A. Here is an estimate on page 88, estimating cost of lines, to which they add a flat plus 20%. That is, 1, 2, 3, 4, 5, 6, 7, in seven instances they have added 20% on their estimate on page 91. Dealing with distribution they have added 25%. I haven't had a chance to study this.

Q. Do you know what Mr. Helmick's study, which has been marked Exhibit 226 in this case, showed so far as overheads was concerned? A. Yes, I checked that.

Q. What did you find that to be in the year 1927?

A. According to my recollection there were overheads estimated in that appraisal from 17 to 22%. Varying with different classes of construction.

Q. Now, referring to the Barnard-Aberdeen-Ipswich line. Your sub-division 2. appearing on page 3, of this Exhibit 329. What do you find the totals of those to be?

A. The total cost, or portion of the total cost chargeable to interconnection [anounts] to $105,337.65, as of July 1, 1941.

Q. And you have checked the items and inventoried these the same way as you did the Aberdeen sub?

A. I have not checked these item by item as physical inventory of the line, but I am thoroughly familiar with the line and I identified all items as being items used in construction.

Q. And your costs were taken from what?

A. Costs were taken from the final return sheets attached to the work order.

Q. What did you allow there for supervision?

A. That would be the same percentage as applied to Aberdeen sub, 9.06%.

Q. And interest 3.12? A. 3.12, yes.

Q. And incidentals were actual material that went into the work, were they?

A. Actual material or legitimate expense. Not all of them represent material, of course.

Q. Were you satisfied as to the items being properly chargeable to that construction? A. Yes.

Q. On page 4 of your analysis you have already testified concerning that, haven't you?

A. I believe so, unless there is some other question.

Q. On page 5, under Roman numeral III, you tabulate the Gettysburg substation. Have you arrived at that in the same manner as you have arrived at these other costs?

A. Yes. These are costs taken from the final return sheets on which it was built plus the additional requirements and additions to bring it up to date of 1941.

Final return sheets are in Defendant's Exhibit 55-20 (R. p. 749, supra).

Q. Are they true and correct? A. They are.

Q. What is the original cost, as you found, for that construction?

A. The original cost as of July 1, 1941, represents $20,420.62.

Q. And you carried that to page 1, and put it in the tabulation in that amount, did you? A. Yes.

Q. That is true also of the Aberdeen-Barnard-Ipswich lines? You carried that to page 1 and put it in your tabulation? A. Yes.

Q. Will you discuss the Gettysburg substation for a moment. Generally speaking, what is that construction?

A. It consists of a steel structure, about which are lightning arrestors. On the structure are mounted cut switches or bus work. At the time of construction there were two banks of transformers installed there. That is, in 1930, when it was built. Because at that time the Dakota system was 22,000 volts, on Northern, and on Northwestern 33,000, so the two banks of transformers were put in, to step down from 33,000 down to 2400, and back up to 22,000. From the 2400 stage voltage was taken off to supply the town of Gettysburg. There was also step down regulators to meter power whichever way it may be flowing. Then there was fencing and a little land.

Q. Was that substation used or useful to defendant in the interchange of energy?

A. That depends on the date. Early in the contract it was necessary to have that substation there in order to match voltages. The structure transformers and low side circuit breakers were essential to interconnection at the time it was built. In 1940 when the line from Bowdle to Gettysburg was converted to 33,000, then both lines coming in were at 33,000 and there was no further need for the transformers or low side switches there as part of the interconnection. From that date on they were used simply to supply the town of Gettysburg.

Q. Was that a part of the defendant system or part of the Dakota system?

A. The town of Gettysburg was a Dakota town.

Q. Stepping down the energy, down to 2400, was essential only in the operation of the Dakota company's business in Gettysburg? A. That is correct.

Q. You say after 1940 no part of the substation there was used or essential to the defendant company in the interchange of energy?

A. No. The matter of equipment was still essential in the interconnection.

Q. Outside of the metering connection there was?

A. No.

Q. And you have prepared this Gettysburg substation appraisal the same way as you have prepared the other appraisals in the interconnecting facilities?

A. Yes. This is the total per books as if it were all used for the interconnection.

Q. That is, you have not allocated this to the Dakota company merely because it was used or useful to them only, or largely? A. No.

Q. I note there the Highmore-Gettysburg line on page 6, and it ends over on page 7, doesn't it?

A. That is correct.

Q. Is that prepared in the same way? A. Not entirely.

Q. Will you explain that, please, to the Court?

A. There is more allocation which has to be made here. These lines were built, portions of them, at various times, and again as in the case of Aberdeen, two or three jobs

were frequently done on the same work order, and it is necessary to go back and make an engineering allocation and segregation of the labor and material that went into part of the job and what went into the other part. Fortunately that can be done in most cases because you can identify material of 33,000 and distinguish it from the material used on the undercircuit.

Q. Did you do that? A. Yes.

Q. You worked it out on that basis, did you?

A. To the best of my ability, yes.

Q. I take it you have the same intimate knowledge concerning that property as these other properties?

A. I am very familiar with it.

Q. What did you make that total?

A. Perhaps I ought to itemize that because it was built at different times. The total consists of a charge for additional five feet of pole heighth only for the construction from Highmore to Harrold, and estimated labor to go with it, $21,271.00, and $15,500.00, to work order 397. Add amounts $88,670.00, from work order 420. The total chargeable to interconnection of these items amounts to $106,298.66. That is as of time of construction. There was miscellaneous minor retirements of $139.00 for that. Brings us to the original cost as of January 1, 1941, $106,158.78.

Q. You picked up these retirements and deducted them?

A. Yes.

Q. On what part of the line did you charge five feet of pole to the interconnecting facilities?

A. In fact, all the way from Highmore to Blunt. It was done on two different work orders, to my belief, there was. With the distribution circuit they run up to feed the towns of Ree Heights, Highmore, Harrold, Blunt in the other direction. Our distribution circuit, I am willing to concede, had to have some poles had there been no interconnection, so I have charged to the interconnection the additional five feet made necessary to used poles for the interconnection. In other words, the total cost of the poles themselves, surveying, right of way, construction, all of that is not charged to the interconnection. Only the additional cost of five foot longer poles.

Q. I notice you have also placed some of the labor to this classification, too, in the handling of these poles?

A. I have made an estimate on Page 6. I have estimated that the additional five foot longer pole, the hauling of it to its location, the digging of the hole, which would have to be six inches deeper for five foot taller pole, erecting pole, tamping, would probably amount to a dollar a pole. That is my estimate.

Q. Is that according to your experience as an engineer?

A. That is conservative.

Q. This final amount, $106,158.78, you have carried forward on Page 1 of the tabulation? A. That is correct.

Q. Now, what do you make the cost of the total interconnection facilities?

A. Arrived at by my allocations, $297,781.89.

Q. Is there anything else you desire to comment on, on this subject?

A. I don't believe so. Only, perhaps, the point that to the extent there is allocations involved in here, it is more in the nature of an appraisal. We expect to come out within a few dollars one way or the other of what an independent appraisal would put on it. It is not a thing you expect to come out to a penny. Two to five per cent leeway would ordinarily be left.

Q. Is that engineering practice? A. Yes.

Q. Going back just a moment to the interconnection facilities which you have, according to your data, tabulated as approximately 297 thousand. What is properly chargeable against that as a fixed charge? What is your opinion?

A. Fixed charges would include interest, depreciation, maintenance, operation and taxes. Do you want me to put a value on each of those?

Q. Yes. A. As of the time these were built?

Q. That is right.

A. I will explain that taxes and maintenance costs have gone up since these were built, and interest costs have gone down. In other words, the total will be correct.

Q. How about taxes? A. I think taxes have gone up.

Q. Go ahead.

A. The figures generally accepted in the 30's, before the war, were 6% for interest; 3⅓% for depreciation; on this

type of equipment; between 2% and 3% for [manitenance] and taxes, and roughly 1% for operation. That will total about 13%. 13% is a very commonly used figure.

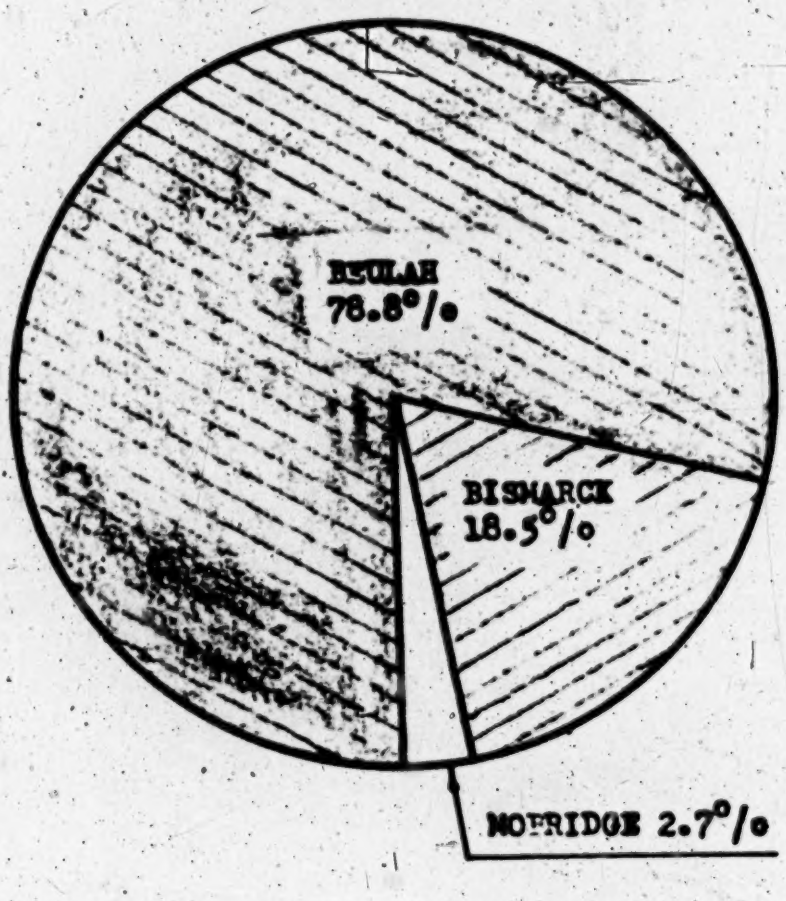
Q. In the electrical engineering profession? A. Yes.

Defendant's Exhibit 330 was received in evidence. It is as follows:

Defendant's Exhibit 330.

DPS

Input To Transmission System *



BY PLANTS - 1941 TO 1945 INCL.

Beulah	168,992.1	=	78.8°/o
Bismarck	39,429.7	=	18.5°/o
Mobridge	5,857.2	=	2.7°/o
Total	214,279.0 (x1000)KWH		=100°/o

*Sources: Station Logs
Monthly Efficiency Reports

Defendant's Exhibit 330-A was received in evidence. It is as follows:



Q. I am referring now to Exhibit 330, which is entitled "Input to Transmission system" and also Exhibit 330-A, which is entitled "Output to transmission by plant."

A. Yes.

Q. Did you prepare Defendant's Exhibit 330-A? A. Yes.

Q. From the books and records of the interconnected companies that are here in court?

A. Yes, they are all in court, I believe.

Q. Are these computations and figures true and correct?

A. Yes, they are.

Q. Now, what do you mean "Output to transmission"? Just generally?

A. Each of these plants on the north end or on the south end, or the combined system, each plant was located where there were loads. In other words, the [Puelah] plant had some local load. The Bismarck plant had some local load, in the town of Bismarck. The Dickinson plant had local load in the town of Dickinson. Each of these plants also were interconnected with the transmission system. Depending on the size of the plant with reference to its location and with reference to its local load, each plant put more or less out onto the transmission. In some cases, the very small plants, all that they produced was used locally and none of it got out on the transmission system. In other cases, such as [Buelah], they had very little load at the location of their plant, and the bulk of their power was sent out onto the transmission system. The round total put on the transmission system came from these various plants in proportion to which they had capacity exceeding their local need.

Q. I take it, from Exhibit 330-A, it is a compilation of the Dakota companies' generating plants or units that went out on the transmission?

A. These are compiled from the actual meter readings showing what power left the plant and got out onto the transmission system, yes.

Q. What is Exhibit 330, generally speaking?

A. Exhibit 330 is simply a graphic form of representing out of a given number, a million kilowatt hours, or any representative figure, the proportion which came from the various plants into the total pool of transmission on the Dakota system.

Q. Now will you indicate more particularly the source of those figures, so far as metering is concerned? You say you took them from meters?

A. Take the [Buelah] plant. It is the largest producer. The [Buelah] plant had meters installed, integrating meters installed, first, that in the generators themselves. Secondly on the local loads which, in this case, would be the town of [Buelah], the [Buelah]-Kill Deer line, and the Knife River mine. Those three were taken off of the bus. Then they had three meters installed on the substation feeders, that is the feed that goes out from the plant to the transmission line. In any case those readings are recorded on substation logs, the substation feeder readings, daily, monthly, annually, and by reference to those substation logs you can determine how many kilowatt hours any given day, any given month, left that plant and went out onto the transmission system. The same thing exactly happened at the other plants.

Q. I take it that this Exhibit 330 and 330-A determined perhaps to the Dakota companies, the cost of power that went out on the transmission lines by computing the cost of the several plants and their per centages that went onto the transmission?

A. Northwestern Public Service Company, the entire power, and Dakota's power under different conditions, could only purchase power that was on the transmission, and except as power got onto the transmission it would not be available for sale. But the proportion in which the various plants put power onto the transmission, the costs prevailing in those plants, would all, of course, be a proper method of determining what the cost of such power was.

Q. Now, this graph, that indicates by curves a distribution of these per centages, does it?

A. That represents the average over the five year period which was considered. I total over the five year period, I should say.

Q. That is the total over the five year period, and the per centage shown?

A. The per centage in each case is the total that transmission plant contributed to the total transmission power. It goes up into astronomical sums. Over the five year period the total was 35 million kilowatt hours, so it has been necessary to reduce it to per centages.

Q. Those figures on Exhibit 330, [Buelah], 168,992.1. What does that mean?

A. You have to actually add three more ciphers. That represents 168 million plus from [Buelah].

Q. Is that the same at Bismarck and Mobridge? A. Yes.

Q. I observe on Exhibit 330-A there are some stations that are stations that are off the load. What do you mean by that?

A. By that I mean that they produced no net contributions to the transmission system. In other words, over an annual period, or any given period of any length, they actually took more power off the transmission than they put out into it. They represent no net contribution to the system.

Q. You have designated those as "other units"?

A. Yes. I think on your copy they are identified as "Miscellaneous". They include, Mott, Mandan, Ellendale, Gettysburg and Lemmon.

Defendant's Exhibit 331 was received in evidence. It is as follows:

Q. As a matter of electrical enginering, does transmission loss vary? A. Definitely.

Q. With conditions, etc.? A. Yes.

Q. Will you kind of tell us about that?

A. Transmission loss is, of course, a combination of the amount of power transmitted, and how far it goes and at what voltage and over what size of wire. On a complex system of transmission wires, with plants scattered about and with various lines scattered about, it is virtually impossible to pick out a given unit of power and say it is power coming from such and such a place, or went to such and such a place, or traveled over a known route. In other words, it is as if a large tank of water was being filled by a dozen different faucets, and you went out and took out a pail of water, you could not tell which faucet it came from, if I might use a very crude [anology]. The only thing that is known on the system is what the total losses in transmission were. That we can calculate correctly. We know what went in and we know what came out, and the difference is what we lost in transmission. And because of the fact that conditions on transmission systems vary from time to time, even from minute to minute, one moment you may have a thousand kilowatts flowing out over a transmission line, and fifteen minutes later power may be flowing in over that line. Losses are impossible to calculate. Given a steady condition where things don't change from an hour at a time, say, you could go out and read the meters and you could calculate it. But under conditions as they are there is no way I know of that you can calculate on anything but theoretical basis.

Q. The item of losses which you use on Exhibits 331 and 331-A, are those losses from all causes or just transmission line losses?

A. That represents a number of factors. That represents losses in stability in transformers which are a factor. It represents losses which we class as unaccounted for. I made an effort to eliminate that as far as possible, but there are still losses due to low meter readings, that is, meters that have been disabled for a portion of a month. There is also losses unaccounted for on a system in addition to strictly line losses. In each case these will include losses in stability in substations, because in all cases the

TRANSMISSION KWH LOSSES DPS SYSTEM YEARLY & 5 YEAR PERIOD

Defendant's Exhibit 331.

		JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER
1941	Generation	3,370,410	3,166,276	3,489,752	3,266,050	3,626,618	3,599,705	3,813,426	3,915,412	3,519,806	3,680,766
	Load	2,856,962	2,785,252	2,770,774	2,598,759	2,785,639	2,795,543	2,998,332	3,054,692	2,782,151	2,865,990
	Loss	513,448	381,024	718,978	667,291	840,979	804,162	815,094	860,720	737,655	814,776
	% Loss	15.2%	12.0%	20.6%	20.4%	20.4%	22.4%	21.4%	22.0%	21.0%	22.1%
1942	Generation	~~3,768,000~~ * ~~3,768,600~~	3,628,200	~~3,838,600~~ * ~~3,837,300~~	3,890,000	3,930,700	3,683,900	3,810,000	4,081,100	3,978,600	3,637,100
	Load	3,190,043	2,910,205	2,745,353	2,975,328	2,898,978	2,724,491	2,734,528	2,962,013	2,956,346	2,724,361
	Loss	~~578,957~~ * ~~577,557~~	717,995	~~1,093,247~~ * ~~1,091,947~~	914,672	1,031,722	959,409	1,075,472	1,119,087	1,022,054	912,739
	% Loss	~~15.4~~ * ~~15.3~~	19.8%	~~28.5~~ * ~~28.4~~	23.6%	26.3%	26.0%	28.2%	27.4%	25.8%	25.1%
1943	Generation	4,203,000	3,898,300	3,729,350	3,698,200	3,956,200	3,854,700	3,687,300	3,918,500	3,701,300	3,899,100
	Load	3,304,375	3,102,107	2,760,843	2,859,336	3,026,101	2,863,367	2,686,910	2,894,627	2,942,686	2,928,116
	Loss	898,625	796,193	968,507	838,864	930,099	989,333	1,000,390	1,023,873	758,814	970,984
	% Loss	21.3%	20.4%	26.0%	22.7%	23.5%	25.6%	27.1%	26.2%	20.4%	25.0%
1944	Generation	4,004,800	3,737,200	4,198,700	4,000,300	3,760,000	3,188,100	3,725,900	4,064,300	3,970,000	4,006,300
	Load	3,184,094	3,002,139	3,163,880	3,106,439	2,675,114	2,591,818	2,836,703	2,933,956	3,027,601	2,971,427
	Loss	820,706	735,061	1,034,820	893,861	1,084,886	596,282	889,197	1,130,344	942,399	1,034,873
	% Loss	20.5%	19.7%	24.6%	22.4%	28.8%	18.7%	23.8%	27.8%	23.8%	25.8%
1945	Generation	4,020,000	3,496,800	4,135,200	4,239,800	4,286,500	4,176,000	4,194,500	4,146,400	3,995,400	
	Load	3,109,394	3,076,336	3,029,526	3,300,804	3,184,213	3,175,692	3,091,247	3,094,587	3,152,272	
	Loss	910,606	420,464	1,105,674	938,996	1,102,287	1,000,308	1,103,253	1,051,813	843,128	
	% Loss	22.6%	12.0%	26.8%	22.2%	25.8%	24.0%	26.4%	25.4%	21.1%	

		1941	1942	1943	1944	1945	5 year period
	Generation	43,379,024	~~43,379,024~~ * ~~43,379,560~~	46,477,150	46,748,800	36,690,600	~~214,654,574~~ *
	Load	34,379,482	34,648,437	35,444,017	35,635,378	28,214,071	168,321,385
	Loss	8,999,542	~~8,730,587~~ * ~~8,731,123~~	11,033,133	11,113,422	8,476,529	~~50,333,189~~ *
	% Loss	20.8%	~~20.1~~ * ~~20.1~~	23.8%	23.8%	23.1%	~~23.4~~ *

* Error discovered on final check
Corrected figures

T	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	YEAR
412	3,519,806	3,680,766	3,816,581	4,114,222	43,379,024
692	2,782,151	2,865,990	3,062,586	3,022,802	34,379,482
720	737,655	814,776	753,995	1,091,420	8,999,542
0%	21.0%	22.1%	19.8%	26.6%	20.8%
100	3,978,600	3,637,100	3,302,600	4,136,800	~~43,379,024~~ * ~~43,379,560~~
013	2,956,346	2,724,361	2,715,096	3,111,295	34,648,437
087	1,022,054	912,739	587,504	1,025,505	~~8,730,587~~ * ~~8,731,123~~
4%	25.8%	25.1%	17.8%	25.0%	~~20.1~~ * 20.1%
500	3,701,500	3,899,100	3 868,300	4,062,700	46,477,150
627	2,942,686	2,928,116	2,936,272	3,137,277	35,444,017
873	758,814	970,984	932,028	925,423	11,033,133
2%	20.4%	25.0%	22.5%	22.8%	23.8%
300	3,970,000	4,006,300	3,933,200	4,160,000	46,748,800
956	3,027,601	2,971,427	2,970,110	3,172,097	35,635,378
344	942,399	1,034,873	963,090	987,903	11,113,422
8%	23.8%	25.8%	24.5%	23.7%	23.8%
400	3,995,400				36,690,600
587	3,152,272				28,214,071
813	843,128				8,476,529
4%	21.1%				23.1%

S.J.S. CNEL

Defendant's Exhibit 331-A was received in evidence. It is as follows:

Defendant's Exhibit 331-A.

Transmission Losses DPS System.

In tracing the flow of power between DPS and NWPS systems it is apparent that some losses occur enroute from the point of delivery to the point at which power is used. Were accurate metering installed and available, and had the lines between plants been used only to transfer power between systems, the losses which occurred in transmission could be determined.

Transmission line losses can be calculated on a theoretical basis with a fair degree of accuracy, but only if all conditions are known. Losses vary with the amount and direction of power flow, with the installed transformer capacities, with characteristics of the load and power factor and a number of other variables which fluctuate from day to day, hour to hour and even from minute to minute. A set of conditions can be assumed and the losses calculated, but such losses are only accurate as long as the conditions remain exactly as assumed. In utility operation the variations on a widespread system are almost infinite and calculating of losses on a set of assumed conditions is not only of questionable accuracy but may be actually misleading.

To bring the matter of transmission losses out of the field of speculation, a study has been prepared to establish what actually did happen on the DPS system during the past five years. Earlier figures could have been set up equally well but records prior to 1941 are now no longer complete or available.

Considering the DPS transmission system as a whole, it extends from Beulah on the north down through Glen Ullin; divides there with one path through Bismarck and Wishek to Bowdle and Aberdeen; the other path to Bowdle and Aberdeen via Mobridge. Some facts are known or can be reconstructed from available records; the power fed into this system from the various generating plants, the

power taken from the system by the numerous intervening load points, and the power delivered and received at Gettysburg and Aberdeen.

These records in fact are all that are needed to determine the losses which occurred on the system

1—The input to the system

2—The [redacted] output

and

3—The difference between input and output, which is loss.

Set out in tabular form on the attached exhibit, these losses may be summarized thus:

	Input	Output	Loss	% Loss
1941	43.4	34.4	9.0	20.8
1942	45.6	34.6	10.9	24.0
1943	46.4	35.4	11.0	23.8
1944	46.7	35.6	11.1	23.8
9 months 1945	36.7	28.2	8.5	23.1
			5-year average	23.1%

From this point, with actual losses on the transmission system established by the records, the only question remains as to whether this 23% loss should be assessed proportionally between power sold to Northwestern and power sold to other users; or whether Northwestern should be charged a disproportionate share of such losses.

Considering that the flow of power to Northwestern was predominately during off-peak periods when lines were lightly loaded, it is likely that an equally good argument can be advanced for charging transmission losses at a lower-than-average rate as for charging at higher-than-average.

In any event the total deliveries to Northwestern during this 5-year period amounted to less than 50 million KWH while the DPS transmission system was actually carrying 218 million. Furthermore DPS losses in 1941, when 12 million KWH were delivered to Northwestern, were actually slightly lower than in 1942 and 1943 when 11 million was delivered.

Therefore, having no sound engineering basis which would justify a different allocation, the preceding % loss figures may be taken as properly assignable to loss in transmitting power to all users including Northwestern.

S. J. SICKEL.

Q. Now, referring to papers marked Defendant's Exhibits 331 and 331-A, did you prepare those papers?

A. Yes.

Q. And from what sources did you take the data?

A. From the substation logs and from district efficiency reports.

Q. They are part of the records and files here in court?

A. Yes.

Q. Are these true and correct? A. They are.

Q. You know them to be such, do you? A. Yes.

Q. I notice you have made some ten corrections on this copy?

A. I think those are supposed to be corrected on all copies. It was figured that was in error when first prepared and discovered when rechecked.

Q. Generally speaking, what does Exhibit 331 demonstrate?

A. I have taken, in preparing the tabulation on Exhibit 331, I have taken the total in-put to the transmission system, as I discussed in this previous line of testimony, the total in-put to the transmission system and set it down in one line. Below it I have totalled the total so-called loads taken off the transmission system. In other words, it is a totalization of what was delivered to Northwestern Public Service Company and what was delivered to individual substation and all individual users off of the transmission system. The in-put comes from substation after readings, and the out-put from the transmission comes from the efficiency report readings. The difference is loss, and that represents the total kilowatt hours lost in the operation of the Dakota transmission system.

Q. Have you figured that out in kilowatt hours and also in percentages?

A. Yes. It varies a little from year to year. The total

over a five year period in kilowatt hours amounted to 50 million kilowatt hours, out of generation of 218 million. The per cent lost, 23.1% over a five year period.

Q. So these exhibits, 331 and 331-A are transmission losses of the Dakota Public Service Co. transmission?

A. Yes, that is the Dakota Public Service Co.

Q. What does Exhibit 331-A show, just generally?

A. Exhibit 331-A shows the total losses on the system can be determined effectively by measuring in-put and measuring out-put.

Q. Which is an explanation of Exhibit 331-A?

A. That is correct.

Q. Predicated on engineering knowledge and study?

A. Yes.

Q. Do you desire to explain Exhibits 331 and 331-A any further now that they are received in evidence, as to the method of preparation or as to the use or usefulness of the exhibit in this litigation?

A. I believe I mentioned that these were not matters of opinion. They are tabulations of actual meter readings, which represent the actual loss that had prevailed on the Dakota Public Service Co. during this five year period.

Q. That includes 1941, through October 19, 1945?

A. Yes. This represents the period over which the heaviest transfer of power between companies occurred. That could have been reconstructed earlier had the figures been available, but they haven't been preserved earlier than 1941 and we cannot now reconstruct them. These representing the loss during the period when 10, 11, 12 million dump power were being sold to Northwestern Public Service Co., and represent the largest losses.

Q. In computing cost of generation, is this Exhibit 331 and 331-A useful?

A. They are useful. In other words, you have to know from which plants the power or transmission was derived, and you have to have some factual basis on which to allocate losses in transmission in either case.

Q. That, then, together with the kilowatt hours, plus the cost of kilowatt hours, is the basis of cost of energy, isn't it?

A. That would represent what it would cost to deliver it at Aberdeen or Gettysburg.

in-put readings were on the low side of the [tranformer]. Transformer losses are included in these losses.

Q. In addition to transmission losses?

A. In addition to line losses.

Defendant's Exhibit 332 was received in evidence. It is as follows:

Defendant's Exhibit 332.

DPS (& Predecessors) Peaks & Cap.

Year	Peak*	Firm Capacity*	Reserve
44	13,230	9,955	(3,275)
43	11,770	9,955	(1,815)
42	11,680	9,955	(1,725)
41	12,850	9,955	(2,895)
40	11,930	9,955	(1,975)
39	11,451	7,455	(3,996)
38	10,414	7,455	(2,959)
37	9,940	7,470	(1,470)

Combined System.

Year	Peak*	Firm*	Reserve
44	29,410	29,895	485
43	26,030	30,745	4,715
42	25,920	29,245	3,325
41	28,840	29,245	405
40	28,611	29,245	634
39	27,720	25,265	(2,455)
38	25,564	25,265	(299)
37	23,855	25,265	1,410

* Source: Exhibit B Supplement to Interch. Cap. Agr.

Note: Figures in parentheses denote red in original.

S. J. SICKEL

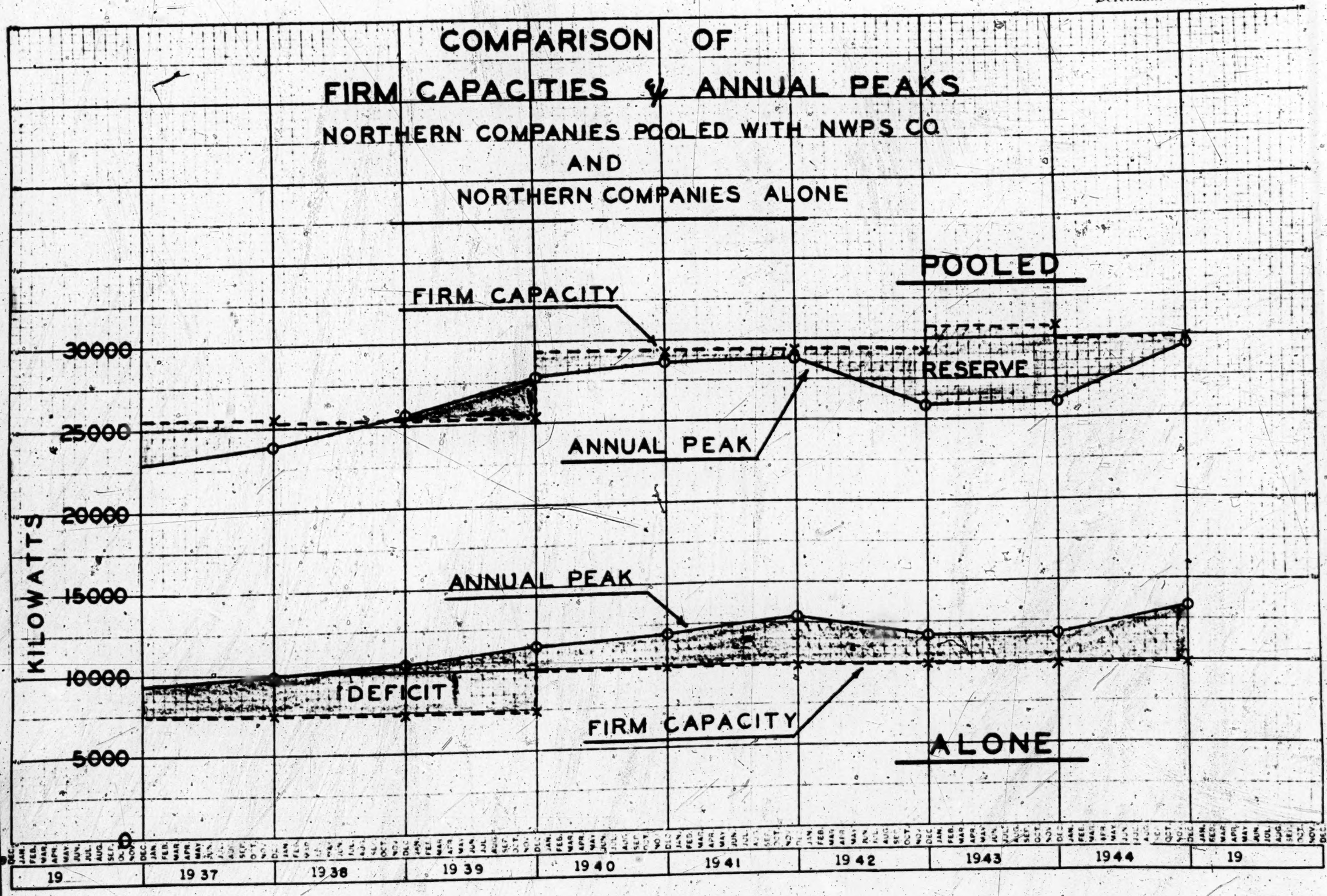
3/1/48.

Defendant's Exhibit 332-A was received in evidence. It is as follows:

Defendant's Exhibit 332-A.

COMPARISON OF FIRM CAPACITIES & ANNUAL PEAKS

NORTHERN COMPANIES POOLED WITH NWPS CO AND NORTHERN COMPANIES ALONE



Q. I show you exhibits marked 332 and 332-A and ask you if you prepared those? A. Yes.

Q. What generally is shown on Exhibit 332?

A. 332 is a tabulation of peak capacities for Dakota Public Service Co. and its predecessors on its own basis. In other words, its own peak load for its own customers. Alongside of it, its own firm capacity for the same years, and reserves or deficits between peak loads and firm capacity for each year. Below that is shown the combined figures which represents the same total of Dakota interconnected with Northwestern as a combined system.

Q. And they are tabulated in the same way as you have mentioned for the Dakota companies? A. Yes, same basis.

Q. I notice these run from 1937 to 1944, both inclusive?

A. That is correct.

Q. Will the 1937 to 1939 total include both Northern Power and Light and North Dakota Power & Light?

A. Yes.

Q. You have combined them, have you? A. Yes.

Q. From what sources have you taken this information which is here tabulated?

A. These sources were taken from Exhibit B's supplement to interchange agreement. Subsequently I found they are not as yet in evidence so they have been rechecked against operating records which are in evidence.

Q. And are these tabulations and computations true and correct? A. To the best of my knowledge, yes.

Q. I take it the graph, Exhibit 332-A, simply demonstrates the so-called capacities of the combined system and of the Dakota system alone?

A. That is correct. It is simply a visual presentation of the same figures on the tabulation.

Q. You say these both are true and correct?

A. Yes, they are.

Q. Going back to 332. In each the combined and also in the Dakota Public Service Co. compilation, you have the peaks. Those are the peaks that appear in the contract of 1941 and its supplement of 1943? A. Yes.

Q. Originating in 1938?

A. They are also shown on these annual load curves.

Q. Your next columns in both the combined and in the Dakota compilations, those columns are indicated as firm

capacity. Will you indicate what you mean, as an electrical engineer, by firm capacity?

A. Firm capacity is, I believe, a generally recognized term in the utility industry. On systems of this size it is taken as the total effective capacity minus the largest single one unit on the system.

Q. That is, applying that to the year 1944, on the Dakota system, I observe under firm capacity for that year you have 9955? A. That is correct.

Q. What do you mean by that figure?

A. The total installed capacity of Dakota Public Service Co. was 13,955 kilowatts in capacity that year. Deducting the largest unit—perhaps I ought to explain in the first place, this firm capacity has to do with reliable operation of the system. It is customary to arrive at firm capacity by deducting loss of the largest single one unit of the system and comparing the firm capacity thereby arrived at with the peak loads. In this case was the 4,000 kilowatt unit at Bismarck. Deducting 4,000 from 13,955, gives us 9955, firm capacity on that system.

Q. You use a peak for that year on the Dakota system of 13,230? A. Yes.

Q. After deducting your largest unit of 4,000 k. w., you have under the column headed "Reserve" a red figure of 3275. What is meant by that?

A. That means they were short 3275 kilowatts of having what we call a firm system. In other words, their firm capacity was short 3275 k. w. of being enough to carry their own peak.

Q. Then in the year 1944, if they had ideal situation, they had sufficient capacity to carry their peak? A. Yes.

Q. Does that apply to the combined system?

A. With this restriction referring to the combined system. By adding the two systems together the largest single unit on the combined system became 5000 kilowatt unit, which was 5000 at Aberdeen and Mitchell. The deduction then is 5000 and not 4000.

Q. Then for the year 1944, they actually had capacity of 34,985? A. Yes.

Q. And to make out the firm capacity you deducted 5000 from 34,895, leaving 29,895? A. Yes.

Q. Which, as opposed to the peak that year, left them a reserve, did it? A. Yes. Not much, but a reserve.

Q. Would you call the combined system in this compilation or computation a firm system?

A. A firm system. That is correct.

Q. When they are combined? A. As a combined system.

Q. I observe when you get down to the years 1939 and 1938 you run into the red there. A. That is true.

Q. Will you explain to us what created that, or what changed it?

A. In adding capacity, generating capacity on the systems you add it in blocks. In other words you will notice that working up the line of combined systems was showing increase in loads, a thousand or two thousand kilowatts each year, that much higher than the preceding year. It is not practical or economical to add capacity in a small piece or pieces each year to take care of that year's load growth. Actually you let yourself run a little bit in the red and then you put in a block of 5000 or 10,000 capacity, which brings you way above firm for a little while. Then your load gradually eats that up until you run into the red, then you put in another block of capacity. At the time of which you speak you will notice the combined system are a little short, beginning early in 1938. In 1939 they were widely short of being firm, and at that time the Bismarck turbine was on order and in the process of being installed. At least, the preliminaries were under way. That brought it up into the firm category again the following year, in 1940. In 1941 the firm reserve had dropped again to 400 kilowatts, and it was contemplated at that time a 7500 kilowatt turbine at Aberdeen would be in operation in 1942. Of course, the war intervened and the turbine could not be installed. It never was installed until 1945 because of the war. But at the same time there was a substantial drop in loads due to the introduction of daylight saving time in 1942, which had the effect of giving the combined system additional generation. So consequently the combined system goes up to a very favorable firm position again even though the third turbine at Aberdeen was not installed at that time.

Q. Let's go back to 1942. I observe the peak over the combined system for 1942 was 25,920, and that the combined system peak for 1941 was 28,840. You say that was a factor in adjusting your reserve capacity?

A. Yes. The reduction in peak caused by daylight saving time. It reduced the peak demand on the system, which had the effect of producing larger reserve.

Q. There is some 3000 kilowatt hours that your peak went off in the year 1942? A. Yes, nearly 3000.

Q. You say that was due to the change in daylight savings time?

A. Yes. I can explain that in this way. The annual peak in the winter time comes between five and six p. m., at which time the commercial loads, stores and offices and industrial loads pile on top of the light load, because in December at that time of year it is dark by six o'clock. The combination of one load on top of the other produces the annual peak. Now, when daylight saving time was introduced, it set the closing hour ahead in stores and offices and factories and what-not, closed up and went home before it got dark. So there wasn't the combination of one peak on top of the other to produce that peak from five to six.

Q. That is the explanation of the situation, is it?

A. Yes.

Q. Now, referring to Exhibit 332-A, is that just a reflection of the data that appears on Exhibit 332? A. Yes.

Q. Will you explain that somewhat?

A. Well, starting with the topmost curve, the one which is a broken line, running horizontally and jumps vertically and runs horizontally again, that dotted line represents the firm capacity of the combined or pooled system, of Northwestern Public Service Co. plus the Dakota companies.

Q. By that point, do I understand, running from January 1, 1937 to January 1, 1940, that firm was 25,000?

A. As a matter of fact there was a slight reduction at the end of 1937. I guess it don't show there. Yes, that is correct.

Q. Then I notice it jumped to about 29,000?

A. Yes, in 1940 it became about 29,000.

Q. And carried over to January 1, 1943, that 29,000?

A. That is right.

Q. And then jumped again there? A. Yes.

Q. To about 31,000? A. That is correct.

Q. And it remained there for a year and dropped to 30,000?

A. Yes. I can explain why those jumps happened.

Q. If you will?

A. The first increase is shown in this curve at the end of 1939, actually took place during 1940, but it was after the 1939 peak. The first reference to the generator at Bismarck. Approximately 900 kilowatts. Total of Dakota and Northwestern that year. Then there was no change until 1942, at which time additional boilers were secured at Aberdeen, at least one additional boiler, which enabled Northwestern to put more capacity into service than they had previously been able to do. In other words, there was more generating capacity at Aberdeen than there was steam to run it. At that time we were able to get a boiler from War Production Board and install it, which gave us an increase in capacity there in 1942.

Q. What caused it to drop at the end of 1943?

A. At that time, according to my recollection, there was a unit in Aberdeen which was derated, or cut down and moved outside to make room for the new 7500 unit being installed. That is my memory of it.

Q. Starting over to the left of that top graph there, which covers the combined or pooled system. I observe from the left that you have a line which is marked "Annual Peak" that runs in a straight line from cipher to cipher at the end of each year, does it?

A. Yes. That, of course, you can take intermediate places between one circle and another and see the peak in March, or April or May was so much. It only refers to the annual peak.

Q. You are just merely connecting annual peaks?

A. Yes.

Q. The annual peak then is indicated by the cipher?

A. Yes.

Q. Now, the green markings which are between your firm capacity and your annual peak line. What does that indicate?

A. Where it is green indicates the firm capacity was greater than the annual peak, meaning there was a firm reserve.

Q. Then, next to that, do you call the next one orange?

A. I think it is orange.

Q. What does that indicate?

A. That indicates where the peak was higher or larger than the firm capacity. Then we show it in orange, indicating deficit.

Q. And that was indicated on your Exhibit 332?

A. That is correct.

Q. From there on, it would be from 1940 through to January 1, 1945, there was a continuous reserve, was there? A. Yes, there was. Firm reserve.

Q. And that last year indicates from 400 to—

A. It got up to 4000, nearly 5000, in 1943.

Q. In 1943 to 1945. And it was at 1943 where this daylight saving time come in, and is an element in fixing and determining that added firm capacity?

A. That accounts for it, yes. May I introduce something else?

Q. Yes.

A. At the same time daylight saving time went in there were other factors. We had loss of population, a number of [shall business] went out of business. It was all war factors, but it was not exclusively daylight savings time.

Q. Dropping down a curve. At least one of the Dakota companies appears to be in orange?

A. They had a deficit each year. They were never firm.

Q. As a unit and by themselves, they never had firm capacity during those years?

A. No. They were deficient. The closest they were to firm was at the beginning of 1937, when they were short 1470 kilowatts. Their maximum deficiency was in 1939, or almost 4000 kilowatts. With the addition of the [Buelah] turbine in 1940 the situation improved slightly but they were still 1975 kilowatts in the red, and they became progressively worse until in 1944 they were 3275.

Q. It is a fact, is it not, that the Dakota systems' demand increased more rapidly than defendant's demand?

A. I think it increased more rapidly the most of this period, yes.

Q. Do you have anything else you desire to discuss on that? A. I don't believe so.

Q. Have you demonstrated what a power pool is by these Exhibits 332, and 332-A?

A. I think probably they show the advantage of a power pool without explaining what a power pool is.

Q. Will you tell us what it is?

A. A power pool is a method of operation whereby by interconnecting two or more systems, in effect, you make the same and given amount of reserve capacity serve the purposes of both systems. Assume you had two utility plants, and each one had one engine with a thousand kilowatt load. Each plant in order to carry their service to their customers would have to have a separate engine to take care of times when their engine was being overhauled. By combining two plants with a transmission line, you can make one spare engine serve as a spare for both of them. That is a saving of 50%, but it illustrates the principle. The same thing can be extended by connecting two systems together. When the Dakota stood by themselves, or had they stood by themselves, they would have been required on a service basis to have spare equal to the largest single unit on their system, which would be 4000 kilowatts in later days. Northwestern would have been required to have its 5000. But by combining Dakota with Northwestern, the same 5000 which Northwestern was providing for reserve could also become reserve for Dakota, and it was not necessary for them to provide any reserve on their own property.

Q. Is there a method or practice in computing the cost or a charge to be made in such power pools?

A. There is quite—I imagine there is a great many ramifications. The same principles are quite commonly used, although there might be many different details.

Q. What is it, generally speaking?

A. The general principle, I believe, is that the total loads are combined, the total effective capacities are combined, the difference between the total loads and total capacities represents the pool reserve. Then this pool reserve is allocated to various subscribers. They that are providing some of this pool reserve, they are compensated for what they are putting into the pool. If their own capacity is less than their own loads, they in turn compensate the more adequate companies and pay for their deficiencies. In other words, the company that receives capacity from the pool pays for it. The company

that contributes capacity to the pool are compensated for it.

Q. Do you have any compilation or do we have any record here in evidence showing how that worked out under the contract arrangement between the defendant and the Dakota company? A. You mean the mechanics?

Q. Not the mechanics, but the extent to which payments of each was made.

A. In one of plaintiff's exhibits there was a tabulation about reserve capacity charges.

Q. Do you have some exhibit there now?

A. I have a copy of 82-9 (R. p. 595, supra).

Q. Will that demonstrate what you are talking about?

A. It demonstrates the charges which were made for reserve capacity, if I understand your question.

Q. Where one company or the other had a deficiency in reserve a charge was made against one or more companies?

A. Yes. The company that was deficient compensated the company that had an excess.

Q. Does that Exhibit 82-9 show the amount of the deficiency?

A. No, it does not. It just simply shows payment.

Q. I want to talk to you about the Bowdle to Ipswich and Bowdle to Wishek lines. To what extent have you a personal and intimate knowledge of this transmission line, both as they originally were and as they were replaced down through the years?

A. The Bowdle Wishek line was rebuilt, reconstructed, prior to the time I was in the Huron office, and I know something about the operating experience with the old line, but I had never seen it personally. The Bowdle to Ipswich line and the Bowdle substation were built during my time at Huron and I am quite familiar with them.

Q. Are there any records here in evidence showing the condition of these lines in the early 30's, and the recommendation made by engineers concerning the replacement of those lines?

A. There is quite an explanation of the work order covering the Bowdle Ipswich line, and the reasons for its replacement. I don't recall whether there is corresponding explanation of the Bowdle Wishek line or not.

Q. There is some engineering study here in evidence. Do you have in mind what that is? About 1928?

A. There is the Lucas & Luick report (R. p. 607, supra).

Q. Are you familiar with that? A. Reasonably.

Q. Did they make recommendations concerning these transmission lines?

A. It makes recommendations as to raising the voltage on them, and construction of certain tie lines.

Q. I call your attention to Page 29, 30 and 31, of Exhibit 82-14, the Lucas & Luick report, as of 1928, concerning the transmission system of the Dakota companies. I will ask you if your are familiar with that in some degree? A. Yes.

Q. Will you explain the purpose of a transmission system over an electric company system?

A. The purpose of the transmission system is to get power from where it is produced to where it is needed. It is not economical to put utility generating stations in every little town and every place where there is a load. The economical system is to spot generating plants at various suitable locations, not too many locations, keep the number of spots relatively small, and then distribute this power, transmit this power to the various points where it is to be used by means of transmission lines.

Q. Is that regular and approved construction in the operation of a system? A. Yes.

Q. Now, to what extent are such transmission lines necessary for the preservation or protection of the service of the system?

A. The transmission line first of all has to be of high enough voltage, heavy enough conductor, with relation to its length and amount of load it is going to carry, to deliver power to a consumer without excessive fluctuations in voltage and irregularity in stability, to the point where the customer has adequate dependable service. Transmission lines have to be provided not only adequate to carry such loads under normal conditions but to a certain amount of abnormal conditions or operating difficulties, storms, troubles of one sort or another, and a certain amount of that has to be provided for so reasonably good service can still be maintained.

Q. That is, you can't construct transmission lines then

upon what you call ideal, normal basis of operation. You have to prepare for trouble?

A. You have to make certain provision for line outages and equipment outages, which happen with a degree of regularity.

Q. As applied to these 22,000 volts transmission lines, which I believe Mr. Elvig and Mr. Helmick said had been replaced by Dakota system, do you know whether or not that 22,000 volts transmission system would be sufficient under ideal operating conditions? A. Yes, I know.

Q. Would it, or wouldn't it? A. No.

Q. If it would not be sufficient under ideal operating conditions it certainly would not be sufficient in troublesome times, would it? A. No.

Q. Now, why wouldn't the 22,000 volts transmission system, originally contained in the Dakota system, why were they not sufficient?

A. Under the very best conditions, perhaps I misinterpreted your previous question, under perfect conditions, and with no line out of service, no trouble anywhere on the system, with the Mobridge and Bismarck plants operating and with the interconnection at Aberdeen, to stabilize the end of the system, under those conditions, loads could have been carried on 22 KV system. However, it necessitated both lines, from Beulah and Bismarck to Wishek and Bowdle, and the second line from Beulah to Glen Ullin, Mobridge to Bowdle, it necessited both of those lines in continuous service to carry loads. There is approximately three hundred miles of line in each leg, and any mischance that affected any point in that 600 miles of total line could put the system out of business because the only remaining line would not be adequate to carry the load, at 22KV.

Q. Do you know whether or not it was necessary for the preservation of the service of the Dakota companies that this voltage be increased in the transmission system?

A. Yes, I know.

Mr. Fellows:

Q. On what do you base your knowledge? Where do you get your opinion you are testifying about?

A. I can't define knowledge and opinion in this case. I know what conditions prevailed up there.

The Court: He wants to know how do you know?

A. I know from my experience, my travels along that property, my supervision of the property, prior to the time of the cut-over to 40,000 volts.

Q. When was that? A. It was cut over in 1940 or 1941.

By Mr. Royhl:

Q. Do you know whether or not it was necessary for the preservation of the service of the Dakota companies that this voltage be increased in the transmission system?

A. Satisfactory voltage levels and voltage stability could not be maintained with 22,000 volt system. Conversion to 38,000 volts made a material improvement in service to Dakota Public Service Co. customers to a point that service became satisfactory.

Q. Now, to what extent, if at all, was energy purchased by the defendant company, the surplus energy from the Dakota companies, a factor in instituting the enlargement or reinforcement of this transmission system of the Dakota system, if at all?

A. It was a negligible factor, if at all.

Q. Was it at all a determining factor with respect to that transmission replacement? A. No.

Q. After you became active in the Dakota company system, were the lines on the entire east side stabilized to 40,000 volts?

A. They were all converted to 40,000 except their section from Wishek to Ellendale, after I came to the Huron office.

Q. In your opinion is there any justification to charging any part of the fixed charges for the replacement of this particular transmission lines to the defendant company?

A. No justification.

Q. Do I understand after you became employed by the defendant, and later in the joint management, and the inter-company arrangement, that the dispatcher's office was always at Aberdeen?

A. Yes. Since 1933 it has always been at Aberdeen.

Q. Do you know whether or not it is necessary that any electrical system have a dispatcher?

A. Any system of any extent, yes.

Q. What is the province or duty of this dispatcher, or these dispatchers? A. As done on our system?

Q. Yes.

A. The dispatcher keeps watch of the loads on the system. Apportions those loads among the plants. He likewise keeps watch over what equipment is in service and what equipment is out of service, and makes use of that knowledge and those conditions in allocating the load from the various plants. The dispatcher keeps track and systemizes the operation and the transmission of the production system.

Q. Was that done at Aberdeen for this interconnected system up until October 19, 1945? A. Yes.

Q. You had occasion to observe that, I take it, the last several years, prior to the discontinuance? A. Yes.

Q. This dispatcher then must be kept informed concerning any boilers that are down or any generating unit that is out of service?

A. The dispatcher is the man to whom is entrusted the maintenance of service on the system. Service inasmuch as it is affected to available generating plants, and as it may be affected on available transmission lines. As operated on our system, any outage of any transmission line, for example, is immediately reported to the dispatcher. He supervises the isolation and getting it straightened out. Similarly the routine of taking generating equipment out of service for repairs. The dispatcher schedules what equipment was to be taken off at certain times and when it shall go back on, to the end that an adequate reserve, as much reserve as possible is continually provided on the system. The dispatcher is the watch dog of the service.

Q. How extensive a force did you have in the Aberdeen office during this period of the interconnected company?

A. Two men.

Q. Was that a 24 hour operation?

A. Each man worked an eight hour shift, and one or the other was then available for call in the remaining eight hours.

Q. Do you know whether or not any charge was made by the defendant company for office space for these dispatchers?

A. The dispatchers, to the best of my knowledge, were carried like myself, as a part of the joint management employees and I assume that a part of their salaries and expense was allocated back to the operating companies.

Q. That is, they were paid by all of the interconnected companies? A. They were on the same basis.

Q. Do you know whether or not the Dakota companies provided the interconnected companies in operating this dispatcher's office in Aberdeen, do you know whether the Dakota companies had separate dispatchers?

A. Yes, I know.

Q. Did they? A. No.

Q. To what extent did you personally have any opportunity of conferring with Samuel W. White?

A. I met Mr. White on his periodic trips, inspection trips over the property. I travelled with him when he made these trips.

Q. On those occasions did you discuss the transmission lines and the substations and the new work installation?

A. Yes, in detail.

Q. Was he informed and advised concerning them?

A. Yes.

Q. How often would Mr. White make these trips with you or other staff employees?

A. Mr. White made, as I recall, an annual trip. These may have been supplemented in some cases by special trips for some special purpose. But I recall the annual trips particularly.

Q. Did you have occasion to discuss some of the transmission and operating problems of the Dakota system with a Mr. Lakin? A. Yes.

Q. Were you ever a director or an officer of either of the interconnected corporations? A. No.

Q. During your entire service? A. No.

Q. Were you familiar with the policy and practice of the joint operating force in the care of the interconnected companies? A. I believe so.

Q. As to loyalties, etc.? A. I believe so.

Q. What was that policy?

A. As far as my personal observation goes I never seen any but the most scrupulous care in fairness between the two companies as to charges or rates or various points of contact.

Q. Do you know, Mr. Sickel, what the policy and practice of the combined systems, and the joint management of the combined systems was concerning the operation of generating units? A. Yes, I know.

Q. What was that?

A. The general policy of this system, this interconnected system, was to generate load, first of all, in the cheapest producing plants. As the load daily increased to the point where the cheapest plant was loaded, then the next cheapest plant was brought on the line to bring up the load. As that plant became loaded, then the next more expensive plant, and so on down the line, corrected always or influenced always by other considerations, such as voltage, or power flow, or limitation of transmission or distribution. But the general practice was to load the cheapest plant first, and then bring on the remaining plants in the order of their cost of production.

Q. What was your lowest cost plant?

A. The lowest cost plant was Beulah.

Q. And next in order was what?

A. Next in order would be Bismarck as of the later years of the contract.

Q. Was that reflected upon the so-called logs that were kept and maintained in the dispatcher's office?

A. It would be indicated by the logs of the various plants. It would be better indicated by the daily system load graphs which were prepared by the dispatcher.

Q. Were those daily load graphs taken from the logs?

A. Yes, they are compilation of the data on the various plant logs.

Defendant's Exhibits 333 and 334 were received in evidence. They consist of daily load graphs on the combined systems of Dakota Public Service Company and defendant for the years 1944 and 1945. As a sample of the type of information which is contained in these graphs, the load graph for Saturday, June 30, 1945, which was referred to in the evidence, is reproduced herein:

Aberdeen	88 000	77 300
Mitchell	88 800	80 700
Yankton	18 500	19 530
Huron	6 500	8 000
Armour	500	480
Webster	500	440
Beulah	135 100	122 100
Bismarck	56 700	48 187
Redridge	15 000	12 700
total	410 600	365 437

Saturday
6-30-45
Light Rain

23400

17620

Total Load Scale

2 Boiler at Mitchell down for repairs
3 " " Bismarck on line @ 9⁰⁰ P.M.

Beulah

Aberdeen

Mitchell

Bismarck

Yankton

Mobridge

Huron

Webster

Armour

12000
11000
10000
9000
8000
7000
6000
5000
4000
3000
2000
1000
750
500
250
100
50

12 N 1 2 3 4 5 6 7 8 9 10 11 12 N 1 2 3 4 5 6 7 8 9 10 11 12 N

Page from Defendant's Exhibits 333 and 334. 1719

Q. I show you exhibits marked Defendant's Exhibits 333 and 334, described generally as daily load graphs. Were those such graphs on the combined systems? A. Yes.

Q. They are a part of the so-called Exhibit 55 (R. p. 376, supra)? A. I understand they are.

Q. Will you pick out a representative day and demonstrate the policy and practice of that operation of the combined systems, so far as base loads were concerned?

A. Any day in this period should show it, except you might hit a random day when some major equipment was out of service.

Q. Referring to the graph at the top—

A. The day at which I am looking happens to be Saturday, June 30, 1945.

Q. Is the top curve black? A. The pencil curve, yes.

Q. What does that refer to?

A. That uppermost curve which is entitled "Total equals ½ scale", that is the combined operation of all of the plants on the combined system hour by hour. In other words, at midnight, referring to this scale, where the curve comes out at the left hand side of the scale, on mine it is around 8000. It might be 7 or 8 or 10,000.

Q. Would that be the demands of the system?

A. That times 2. It would be 16,000 in my case. It means at that hour, ending at midnight, that was the integrated generation for the system at that hour.

Q. Then it shows the change of demand of the combined systems, does it, as it proceeds across the page to the right?

A. This indicates the way the system load fluctuates from hour to hour. Actually the midnight reading, you might say, is finishing up the load from the day before. Then it drops down uniformly to the so-called graveyard period between two and perhaps six in the morning. That is the lowest period on the system always. That is the low point of the day. As the load starts to increase in the morning it raises quite steadily to noon. There is generally then quite a slow decline after twelve o'clock noon, carrying on through the afternoon, and another rise later in the evening at dusk. Depending on the time of the year, that might occur at five o'clock, and might not occur until eight o'clock, depending on what season the day

happened to represent. But the graphs are uniform to that extent.

Q. Is the next curve the green curve on the exhibit?

A. It is, yes.

Q. Is that designated Beulah? A. Yes.

Q. What does that show?

A. That shows the integrated load in the Beulah plant hour by hour over the twenty-four hours of the day.

Q. On the exhibit that you are demonstrating there, is that quite a uniform load?

A. On the curve at which I am looking it starts 6000 kilowatts at midnight, 5100 at 1:00 a. m., 5100 at 2:00 a. m., 4900 at 3:00 a. m., 5100 at 4:00 a. m., 5400 at 5:00 a. m., dropping to 4600, and then dropping to 4300, back again to 5300 at 8:00 a. m., dropping to 5,000 at 9 and 10, and then back up to the neighborhood of 6000, and 6200 across the page. In the Beulah plant the lowest reading during the twenty-four hours [are] 4200. The maximum 6000.

Q. What was the generating capacity of that station?

A. 6000.

Q. So that was kept pretty firm all of the way?

A. Not firm. It was kept at a uniform rate at practically full load around the clock.

Q. Was that, as you say, the practice in the operation of the combined system of that plant?

A. Beulah being the low cost producer would be loaded to the maximum.

Q. What is the next curve there?

A. They cross here. In some cases Mitchell may be above Aberdeen, or Aberdeen above Mitchell. You have a red one showing Aberdeen and running roughly parallel is a blue one for Mitchell.

Q. Were they low cost plants?

A. They were steam plants and as such were lower cost producers than the Diesel plants, but they were higher cost than Beulah or Bismarck.

Q. Referring to the graphs or curves which demonstrates the operation or generation at Mitchell, Aberdeen and Bismarck. Were those kept on for 24 hours?

A. Yes.

Q. Did they run as consistently as the Beulah plant?

A. No. Both Mitchell and Aberdeen dropped back to.

light generation or reduced generation during this so-called graveyard period at night. They also take wider fluctuations during the daytime period. I think that will be reflected on that quite generally. Mitchell dropped back to about 40% capacity during this early morning period. Aberdeen dropped back to about 20% of their rated capacity during this early morning period. Comparing that with Beulah which stayed in the neighborhood of 80% capacity during the graveyard period.

Q. At what point would energy be received by the defendant company from the Dakota companies in respect to the periods when those plants were backed down, Mitchell and Aberdeen. Would it be at those times?

A. Yes, almost exclusively.

Q. That would be some time between midnight and six o'clock in the morning?

A. Yes. As the Aberdeen and Mitchell plants were backed down that permitted the power to flow in from the northern system.

Q. What you have said about the Mitchell and Aberdeen plants, is that quite similar to Bismarck?

A. No. Bismarck was operated very nearly like Beulah. Bismarck had smaller installed capacity than Beulah. Bismarck only had 4,000 kilowatts of ordinary running capacity. Beulah had 6,000. For that reason Bismarck would not go as high as Beulah. But if you will notice on most of these curves, at least on the one I am examining here, Bismarck's load low point was 1500 kilowatts. Their maximum for that day was 3600 kilowatts. In other words, Bismarck dropped about 50%, or a little less, of their full load rating.

Q. I notice you have the next curve there, a yellow mark for Yankton? A. Yes.

Q. What capacity was at Yankton?

A. Yankton was a [Deisel] plant. Depending a little on just what day you were looking at, but approximately 2000 [kilowat] capacity.

Q. 4000 to 4500, would you have there?

A. 2000, 2200 kilowatts. In that neighborhood.

Q. I notice on this exhibit they were called in late in the day. When was Yankton called in by the dispatcher on the exhibit you are reading from?

A. They shut down at 2 o'clock in the morning and were

off until 7 o'clock in the morning, at which time they were called back on. That is quite a uniform operating practice with regard to Yankton.

Q. What was the peak generation as of that day you are looking at?

A. Their peak for this particular day was 1800 kilowatts which was at noon.

Q. Will you refer to the Mobridge curve and discuss that?

A. Mobridge had installed capacity of 1000 kilowatts, approximately. Steam turbine. Mobridge ran around the clock, 24 hours a day. Most of their output was consumed in the town of Mobridge. The excess of their installed capacity over the requirements of the town of Mobridge were very slight in comparison with the size of the system loads. They made very little net contribution to the system. As a result of this the Mobridge plant operated day in and day out at about a normal load. They dropped during the graveyard period but picked up again during the daytime shift and dropped off again in the evening. On this particular graph I am examining Mobridge produced 300 kilowatts from 1 to 5 a. m., and then gradually picked up with their local load, and held more or less at that load until 2 p. m. and then gradually dropped back to about 500 kilowatts until a brief evening peak, at which time they went up to 800 again.

Q. At Bismarck and Mobridge, do you operate those plants generally with central steam heating plants?

A. Mobridge and Bismarck, yes.

Q. That was a factor in their operation, was it?

A. Yes, very much so. I might amplify that. I don't recall whether the Mobridge plant kept their steam heating mains hot all summer or not. Bismarck was required to keep their boilers hot and keep the turbines spinning all of the time in order to provide steam. In Mobridge, during the heating season.

Q. In addition to the generating plants you have discussed, I notice, at least I see on these exhibits, the dispatcher has called in at divers times scattered plants like Mott, Ellendale, Webster, Huron, etc. Is that right?

A. Yes.

Q. When were those minor generating plants called in?

A. Those were the highest cost plants on the system. Operating costs were prohibitive on them except for, perhaps, breakdown of every other generation, and upon occasion when equipment was out of service, or lines might be out of service, but only for a brief period each day those small plants were called on as might be required when the load exceeded the capacity of the efficient plants.

Q. And those plants on the combined system would include Webster, Armour, Redfield, Dickinson, and others?

A. There were really two classes of plants there. There are what we have thought of as the better class of Diesel plant, larger units, more efficient. That would include Dickinson, Webster, Armour, Yankton. Those were good Diesel plants, used daily, almost, on peak service to help the system over a brief hour or two at noon or evening, when the peak loads were very severe. Then there was the last line of defense which were the little one cylinder or two cylinder engines at Mott, Gettysburg, Highmore, Clark, Lemmon. There may have been some others, but they were the last plants to go on because they were not plants ordinarily used. Used only for breakdown service.

Q. I take it that those secondary plants were generally called in at your peak periods as shown by the detailed combined scale at the top curve? A. Yes.

Q. They only came on when those peaks were arrived at on the combined scale? A. That is right.

Q. Do you have anything else you desire to say on that?

A. I don't believe so.

Q. You made a statement about the ordinary trend. Have you demonstrated in these curves the ordinary trend in the operation of the combined system?

A. The ordinary trend—

Q. The ordinary or uniform trend, if everything was working normally?

A. Yes. I think if you examine any 20 or 30 consecutive days, eliminate any odd day when something might be out of service, I believe it is quite evident the policy that was followed on this.

Q. There are exceptions when something would be out of service. Would that be if they were repairing a boiler or cleaning a boiler in one of the big plants?

A. All of this equipment requires periodic taking out of

service for maintenance and repairs. Boilers, turbines, Diesels. Part of the load dispatcher's job was to schedule the outages of those pieces of equipment so necessary routine maintenance could be done without disrupting the system. When I speak of being out, you might take boilers. Some plants have spare boiler capacity, some do not. In some cases when a boiler came out of service, that meant a net reduction in the capacity of that plant. In other words, they might not start their second turbine, or they might run their one turbine on reduced load. That might last for three or four days or a week, but it was scheduled so only a safe amount of equipment was taken out for maintenance at any one time.

Q. That would be the explanation of the uniform curves which you have described? A. Yes.

Q. Or one of the explanations? A. Yes.

Q. You have described the power pool arrangement as a form or process for the combined loads of the two systems. Is that correct? A. That is correct.

Q. I think that your Exhibits 332-A and 332 (R. pp. 1703 and 1702, supra), show by graphs or charts the firm capacity of the Dakota system alone, and also the firm capacity of the combined system as pooled. Do you know what the effect was on the defendant's system from this power pooling arrangements?

A. You mean on similar basis to them?

Q. Yes.

A. The Northwestern Public Service Company, in that period, had, as I recall—I believe that period covers seven years?

Q. It covers from 1937 to 1944, inclusive. Eight years.

A. Out of that eight year period there was three years when Northwestern Public Service Company were firm on their own account, with no pool. The remaining five years, Northwestern would have had a deficit without the pool.

Q. Deficit as far as firm capacity is concerned? A. Yes.

Q. Do you mean by that, that the defendant received no benefits from this power pool?

A. Certainly not. Both companies were benefited by the pooling of their reserves to the point that the combined reserves were then available to either party when needed.

Q. If and when needed? A. Yes.

Q. Do you know whether or not in the years shown, 1937 to 1944, both inclusive, there ever was any demand made by the Dakota company systems to the defendant under this power pool, that was not complied with? I am speaking of demand for energy.

A. To the best of my knowledge there was never a requirement of power to be supplied by Northwestern which was not supplied in full, and in many cases the amount supplied was greatly in excess of the [——] for which Northwestern was being compensated in reserve capacity charges.

Q. Then I take it, from your testimony, that the firming up of benefits was a function of this power pool to both the Dakota companies and to the defendant? A. Certainly.

Q. And was that the basis upon which the interconnection facilities were furnished and paid for by the two parties, and as far as rentals was concerned, and carrying charge?

A. Without the interconnection facilities there could have been no pooling.

Q. Do you know how much of the interconnection facility cost was being carried by the defendant during all of this period? A. Yes.

Q. Do I understand that at the time of the rebuilding or replacing of the transmission lines of the Dakota companies, I am referring now to Bowdle-Wishek and Bowdle-Ipswich transmission lines, that one of them was rebuilt or replaced about 1936? A. I believe that is correct.

Q. Were the wires strung at that time, or just poles set?

A. It was completely replaced.

Q. Which was replaced last?

A. The Bowdle-Ipswich line.

Q. Do you have personal knowledge of the Bowdle Ipswich line that was replaced? A. Yes.

Q. What was its condition before it was replaced?

A. The Bowdle Ipswich line was in a poor state of repair, by personal examination.

Q. You knew that from your own examination? A. Yes.

Q. I show you Defendant's Exhibit 82-20 (R. p. 651, supra), and note particularly the signatures attached thereto, and I will ask you if you recognize those signatures? A. Yes, I do.

Q. Are they the signatures of the person presumed to have signed that exhibit? A. I believe they are. They are.

Q. That is your opinion? A. Yes.

Cross-Examination.

By Mr. Morrison:

Q. Mr. Sickel, how long have you lived at Huron, about?

A. Since August, 1940.

Q. That would be eight years?

A. Eight years in August, yes.

Q. To be brief, prior to that time, you were employed at Mitchell and other points on the line of this defendant?

A. Yes.

Q. Have you always had, since 1940, your office in Huron? A. Yes.

Q. Is that the place where is located the defendant in this case? A. Yes.

Q. And in that office is the president and vice president and treasurer and yourself and all of the rest of the help?

A. No.

Q. Some of the help? A. Yes.

Q. Most of them, and the office help? A. Yes.

Q. You have never had an office on the northern property have you? A. No.

Q. If I understand you correctly, during the approximate eight years, we will say that, over at Huron, your job was looking after the interests and property of the Northern companies as well as the defendant in this case. Is that right? A. Supervisory nature, yes.

Q. And you had that supervisory authority both over the Northern properties and the properties in the south?

A. Insofar as it [obtained] to my department.

Q. If any question came up in which was involved the interests of both the Northern company and the one where you had the office and lived and the officers were, you represented both of them, did you, in the exercise of your judgment? A. Subject to the people who were over me.

Q. What? A. Subject to the people I was responsible to.

Q. Then the ones right on top, that you were responsible to, they were doing the same thing, weren't they, if you know? A. I don't know.

Q. You knew when you were in daily contact with the president and treasurer and vice president and secretary, weren't you? A. Yes.

Q. You mean to say here in answer to my question you don't know how they were carrying on in both of these companies, as far as it pertained to the work that you did? You knew that, didn't you?

A. I don't know what you mean by carrying on.

Q. In the dispatch of their business?

A. I knew roughly what their duties were.

Q. And saw them exercise it? A. In some cases.

Q. As far as pertains to your matters? A. Yes.

Q. And during all of that time, as pertains to items in which you were involved, you know that they were representing or claiming to represent both the northern companies and the defendant in this case. Is that right?

A. I believe that is right.

Q. As I understand, you claim to have a personal and intimate knowledge of the properties of the northern companies? A. A good working knowledge, yes.

Q. You have been over that property?

A. A number of times.

Q. You have kept track of the items of construction and the costs thereof? A. Yes, that is my job.

Q. Traveled over the entire property?

A. I believe I have seen it all.

Q. Now, so I may get just a general, over-all picture here, if I can, I am going to ask you, Beulah is located in the northwest corner of this property?

A. Northwest, that is right.

Q. About how far north and west of Bismarck is Beulah?

A. Approximately eighty miles, by road.

Q. And this Beulah of which we speak, is a small, little place, at which there is a coal mine near?

A. Coal mine and a town.

Q. The town is very small?

A. I don't know what your definition of small is. The town is 600 to 800 people.

Q. Is there a line running south from Beulah that hits Mandan?

A. There is two lines from Beulah. One goes southeasterly through Mandan.

Q. And the other where?

A. The other goes almost due south to Glen Ullin.

Q. And Glen Ullin is west of Bismarck, between Bismarck and Dickinson? A. Yes.

Q. Now, there are a number of small towns, or towns, rather, that are serviced in that locality. Is that right?

A. In which locality?

Q. In the locality of Beulah? A. Yes.

Q. Now, in the Dickinson area is Richardson, Taylor, Gladstone, Lehigh and Belfield?

A. They are in the Dickinson area, yes.

Q. And that is, then, about how many miles approximately to Beulah?

Q. Do you understand the question?

A. No, I don't. You say, "And that." I don't know what you are referring to.

Q. The territory served by these towns.

A. I will tell you where the nearest one is from Beulah, and the fartherest one, if you like.

Q. Tell me.

A. The fartherest one would be Belfield, which is beyond Dickinson.

Q. And the closest one?

A. I believe the closest one would, perhaps, be Taylor. It might be sixty or seventy miles.

Q. Now, in the area in which is located Bismarck, are there a number of small towns served there?

A. Yes, quite a number.

Q. Are those towns, Burke, Braddock, Center, Dawson, Steele, Driscoll, Sterling, McKenzie and others?

A. They are not all in the Bismarck area. They are handled out of the Bismarck division, however.

Q. They are right up there in that territory, aren't they, within fifty miles or so? A. No.

Q. Any of them more than that?

A. The fartherest town would be, I believe, Mott, which is almost due south of Dickinson. That puts it approximately 100 miles west of Bismarck. The fartherest town east would be, I don't know, Dawson, Driscoll, one of those towns. That would be 75 miles, perhaps, or more, east.

Q. Am I correct in this, that where, from the highline,

you have a small town hooked on, you have a transformer, or some way of reducing voltage to serve that town?

A. Yes, generally speaking.

Q. That is true in each town that you serve?

A. Except as two or three towns may be served from one transformer.

Q. And in that operation, at each place where there is a transformer to make a breakdown to serve one town, or a number there connected, there is a certain loss in that operation? A. Yes.

Q. And that is true of all towns that are served from the high line, is it?

A. That is true wherever there is a transformer.

Q. You know that as a practical matter of engineering?

A. Certainly.

Q. Now, you are familiar with the current produced at Beulah, you say?

A. I am not familiar with the current. You will have to explain that question.

Q. You know what current means, don't you? Is that juice?

A. Do you mean am I familiar with the amount they produced?

Q. Can you answer that question or not? A. No.

Q. You have a 6000 meter, or what do you call it, at Beulah? A. We have two generators that total 6,000.

Q. Are they 6000 each? A. No, they total 6000.

Q. And the total at Bismarck is 4000?

A. No. 4000 is the major unit. I believe there is a smaller one of 1000.

Q. 5000 at Bismarck? A. That is right.

Q. And then 1000 at Mobridge, approximately?

A. That is right.

Q. Would it be your opinion that approximately 70% of the power generated at Beulah would be used feeding towns in the areas that you have named here?

A. I would not venture an opinion on that.

Q. Can you give me any idea at all? A. No.

Q. You could not?

A. I could make a calculation but I would not venture an opinion on it.

Q. Anyway, the power that goes to this defendant from Beulah or these other towns is delivered at Aberdeen?

A. That is correct. And Gettysburg.

Q. Gettysburg, of course, is south of Aberdeen, and west?

A. Yes.

Q. And the power that goes to Gettysburg, is that taken off at Bowdle, and shot straight down to Gettysburg, or does it come from Aberdeen? I want to get how you would move it when you get into South Dakota. Do you take it from Aberdeen or Bowdle to get it over to Gettysburg?

A. The line runs from Bowdle to Gettysburg.

Q. Now, all of the properties of the defendant in this case are in South Dakota? A. No.

Q. What have you got in North Dakota? A. Nothing.

Q. Then your answer was yes?

A. No. We have property in Nebraska.

Q. I mean as far as involved in this law suit?

A. Your question was all of the properties.

Q. All of the properties of this—or there is no property of this defendant located in North Dakota?

A. Not to my knowledge, no.

Q. And the property of the northern companies, that is in North Dakota and comes down into a portion of South Dakota? A. Yes.

Q. You are up to Lemmon, come down east along the Milwaukee and then you drift down to Gettysburg, and down in that territory in South Dakota?

A. That is approximately correct.

Q. Is this true, that of the juice, energy, that is generated at Beulah, that reaches Aberdeen, travels approximately 300 miles?

A. That would be approximately correct.

Q. Is it true with this 38 volt high line?

A. Those are 38,000 volt high lines.

Q. At least, this is true. The power taken from the north company by this defendant is delivered at Aberdeen. There is no question about that? A. That is correct.

Q. Now, you had a means and manner here by which you said you calculated the loss, the line loss. Is that right?

A. That is correct.

Q. Now, in talking about those line losses, I am getting

down to Aberdeen, the point of delivery, which there seems to be no dispute about. You understand that? A. Yes.

Q. Now, in moving current on a line of this size, 38,000 volts, I think you said the loss is far greater, the last fifty miles, is it not, than it would be the fifty miles near to the place that you generate it? A. No, that is not correct.

Q. Then, the farther you move electric energy, as I understand you to say, the less the loss would be?

A. No, that is not what I said.

Q. Is it true that where you attempt to move energy 300 miles on a line of 38,000 voltage, that you would probably lose it all? A. No, that is not true.

Q. Can that be done?

A. Can you select a set of conditions when you would lose it all?

Q. You know this line, don't you? A. Very well.

Q. You have been over it? A. Many times.

Q. Can you transport energy 300 miles over this voltage line, and when you got down to Aberdeen would you have any voltage to deliver? Do you understand that?

A. I certainly do.

Q. Much or little?

A. In this case it amounted to 38 million kilowatt hours a year.

Q. You know Strike, do you? A. Yes.

Q. He has some evidence in this case. I am going to call your attention to it and then ask your opinion. Page 61. He was asked the question whether or not you could transport this amount of energy, and he gave the distance—

"A. Technically the transmission of energy, 38,000 volts, 285 miles, is almost a practical impossibility, due to the resistance you have in that distance of miles."

Q. Do you understand that answer?

A. I understand what he is saying.

Q. Do you concur in that or not? A. No.

Q. I am going back again to the items you say you considered in getting at the line loss. Do you have a meter at each small town or towns that are served, when the line is tapped and energy taken in there?

A. No. Some of them are not located at the point of take-off.

Q. Tell me about how many of them are not metered before the point of take-off?

A. That varies from year to year as meters are inoperative at certain times, as they become damaged. One meter may be out for a month. It might be out for three months. It is not the same ones. There are some that have no meters.

Q. There are some that have no meters at all? A. Yes.

Q. How many are there of those?

A. I can name them, I think.

Q. About how many? A. I would guess three.

Q. How then, do you measure the juice [of] the energy that is taken off at those points?

A. We still have a record of what the customers use at those points from the customers' billing. In those cases, which are negligible in number, in those cases we take the customers' billings and add to them 10% for distribution loss, and take that as the amount taken from the transmission.

Q. Then in that one calculation we do have an estimate of 10% where you have no figures. Is that right?

A. In those three towns, yes.

Q. And to that extent, at least, you would not have an accurate measurement, as you claim, by meters, would you?

A. It would be off about a thousandth of one per cent.

Q. I am asking you if you have an accurate measurement? A. Not perfectly accurate, no.

Q. In what other places are there where you don't have the meters? I think you mentioned some where they would be out or were not in use?

A. I can't quote from memory. I would have to look at the efficiency reports.

Q. Are there some? A. Yes.

Q. Estimate about the number.

A. At any given time there might be perhaps a dozen.

Q. And then in those instances would you operate the same—Would you get at your figures the same as you did in these other three? A. Yes.

Q. And in this instance again some one would have to estimate? A. Estimate the distribution losses.

Q. There would be no accurate way to determine that?

A. The consumption was metered.

Q. I am asking you about the entire amount. Of course, we know the consumption is metered. That leaves a percentage if you haven't measured in some way?

A. The entire amount consists of 90% which is metered and 10% which is estimated in those towns.

Q. That is your estimate? A. My best estimate.

Q. On the Pollock line are there meters? Pollock, Hague, Strasburg, Mound City?

A. I don't recall. I would have to look at that to refresh my mind. There is a meter as I recall it, installed at the point where the Hague-Pollock line takes off of transmission. There are no meters on the individual towns of Hague, Strasburg, etc.

Q. So for those you would have to estimate, the same process that you used for the other ones you have described? A. That is correct.

Q. And any account of that would be an estimate?

A. Yes, that is correct.

Q. Now, is it true that there are no meters, Leola to Wetonka, and the territory there that is served?

A. There is a meter at Wetonka and Leola. That is which Dakota Public Service buys power from Northwestern.

Q. How about Hoven and Tolstoy and the farming territory there?

A. I don't recall whether there are meters there or not.

Q. May be or may not be?

A. I could not state from memory.

Q. How about Napoleon, Braddock, Hazleton?

A. Metering at Napoleon.

Q. And these other towns?

A. No. The outage back and forth is metered at Napoleon.

Q. How do you get at then the amount of energy used in the towns in this last group where there aren't [meteres]? Do you use the same process you used before?

A. You take the total metering at Napoleon which includes all of those towns.

Q. Anyway, to sum this all up, there are estimates, quite

a number of them, in your figures of the amount of power losses. Is that right? A. There are estimates in it, yes.

Q. Now, then, I want to show you Exhibit 331 (R. p. 1695, supra). I want you to look at that. You didn't mean to tell the Court, in that exhibit you had figured accurately, from a meter, all of the information that is contained in it, did you?. Say yes, or no.

A. The results are accurate.

Q. I ask you to point out in that exhibit any statement that you have made showing that you rely in part on an estimate any place. Read it to me.

A. No, there is nothing in this statement as to estimates.

Q. Now, I want to ask you another thing. This exhibit you prepared when?

A. I prepared it, I believe, in February, and I made one correction since the trial has begun.

Q. February of what year? A. This year.

Q. There was no record in the form that you have got it condensed here at any time in the books of this defendant, was there? A. You mean in that form?

Q. In this form that you have got it here? A. No.

Q. And what you did, in the preparation of this exhibit, as an employee of the company, you figured out for use here in court, this Exhibit 331? A. That is correct.

Q. And it is based, in part at least, upon estimates, and not upon any reading of meters? A. In part, yes.

Q. "To bring the matter of transmission issues out of the field of speculation a study has been prepared to establish what actually did happen on the DPL system during the past five years. Earlier figures could have been set up equally as well but records prior to 1941 are no longer complete or available." You wrote that, didn't you?

A. Yes, I did.

Q. Now, in your experience as an engineer, is there a basis on which can be reasonably [figures] out the line loss on any particular line that is known and described?

A. Yes.

Q. There is a basis? A. Yes.

Q. And engineer, and in engineering, is that quite standard? A. Yes.

Q. Is one of the fundamentals considered in that calcu-

lation the distance the energy is moved? I am just taking that one element. Is distance one of the items? A. Yes.

Q. And where it grows into hundreds of miles, one, two, three hundred miles, is it a very important item? A. Yes.

Q. Now, in this case, if the energy that this defendant received travelled about the lines a hundred miles before it got to Aberdeen, would there be a bigger loss, in your opinion, in that hundred miles, than the first hundred or two hundred miles travelled? A. No.

Q. In other words, it would not make any difference, according to this setup there, how far, in your opinion, it travelled?

A. Certainly it would make a difference. Make a major difference.

Q. Would the loss the last portion of the trip farther away from the site of production be greater than close to it?

A. The loss in the last hundred miles would be less than in the first hundred miles.

Q. It would be just the opposite to what I am trying to say?

A. You tell me what you are trying to say. You have asked me twice if the loss in the last hundred miles was larger than in the loss in the first hundred miles. The answer is no, it is not. The major loss comes in the first hundred miles.

Q. Is the loss larger in transmission of 300 miles than 100 miles? A. Yes.

Q. I show you Exhibit 330 (R. p. 1689, supra). I notice on this exhibit, on this wagon wheel, what do you call it? A. A pie.

Q. That you have Beulah, 78.8%? A. That is correct.

Q. Does that mean that that per centage of power generated at Beulah is delivered to the defendant company at Aberdeen? A. No.

Q. What does it mean?

A. That means that of the power that appeared on the transmission system, the total transmission system pool, of Dakota Public Service Company, of all of those kilowatts on that system, 78.8% came from Beulah.

Q. And the line was replenished at Bismarck and other spots, where you had smaller generating units?

A. I don't understand replenished.

Q. Putting more juice in it?

A. There was a lesser amount put in at Bismarck and a lesser amount at Mobridge.

Q. I understand you to say when work was done, Bowdle to Ipswich, Bowdle to Wishek, Bowdle to Selby, substation at Bowdle, you had something to do with the actual work? A. Not with all of them.

Q. Did you have with some of them? A. Yes.

Q. Which ones?

A. Bowdle to Ipswich line and the Bowdle substation.

Q. Is that the work order in which they are combined and you said they were all done at one time? A. No.

Q. What is that item you said was all done at one time and it was not separated?

A. There was one work order, 404, I believe, on which Aberdeen-Ipswich, Aberdeen-Barnard and Aberdeen sub were built.

Q. Is this 404? A. It appears to be.

Q. And that includes what?

A. This includes Aberdeen substation, the Barnard substation, Aberdeen to Ipswich line, and the Aberdeen to Barnard line.

Q. Did you prepare that work order?

A. No, this is made in 1930.

Q. So you had nothing to do with that at all? A. No.

Q. Did you have anything to do with the construction at that time? A. No.

Q. Did I understand you to say you looked that property over afterwards, and you made out this plat, what was there, and to make allocation of the different items in expense in it?

A. Yes. I am very familiar with the property.

Q. Now, in order to break this down and find out what those different items cost, what did you have to do?

A. I have to select which material went into each station, and whether it went into lines or station.

Q. Did you have any record of details of the amount of material that went separately into each station?

A. Not separately, no.

Q. What else did you have to do?

A. I had to allocate labor. Substation labor, I believe, is set out separately. I had to allocate substation labor between Barnard sub and Aberdeen sub.

Q. How long was that after the labor had been performed? A. 17, 18 years.

Q. And the record was so kept, as I understand, that you had to go there on the job and kind of figure out for yourself what went in here and what went in there. Is that right? A. To some extent, yes. Yes, that is right.

Q. What other items did you have to do the same thing on, on these four jobs?

A. The incidentals are allocated among the various jobs, on per centage basis of material.

Q. First you have to make up a slate yourself and figure out what they want for labor, material, and all of that, in each one? A. That is not exactly correct.

Q. Did you have any written record showing what it was in detail? A. Yes, we had written records in detail.

Q. Did it show particularly what went into each station, or was it all bunched?

A. I can't answer that question as you have asked it with a yes or no answer.

Q. Anyway, looking at this work order, the items are not specified definitely and in detail as to each station. Is that right? A. That is correct.

Q. And you had to go, seventeen years afterwards, and figure out what was put in there from your observation and study there. Is that right? A. Yes.

Q. You testified yesterday and gave some figures of the expenditures that were made on the Bowdle Wishek line, and I think you said in 1936 there was $127,690.00. Have you that memo? A. I didn't make that statement.

Q. Did you give the expenditure made on the Bowdle to Wishek line? A. No.

Q. You were here in court the last week, weren't you?

A. Part of the week.

Q. You heard all of the testimony of Elvig? A. Yes.

Q. And Dan Helmick? A. Yes.

Q. You sat back of Mr. Royhl? A. That is right.

Q. You examined every exhibit that went in evidence?

A. Yes.

Q. Looked it over? A. Yes.

Q. In this exhibit submitted did you find a statement that purported to come from the books of this company, showing expenditure, Bowdle to Ipswich, in 1936, of $127,690.00?

A. I can't swear to the exact amount. I heard the testimony.

Q. I call your attention to Exhibit 82-22 (R. p. 661, supra), that was introduced here last week. You saw and examined that, didn't you? A. I believe I did.

Q. And it shows up there in the corner the expenditures of 111 thousand dollars? Is that the total? A. 111,873.01.

Q. Did you make any check, or have any check of this, made? A. No.

Q. Now, without finding those other exhibits, I am going to call your attention to this, assuming that there was spent in 1936, on the Bowdle Wishek line, the amount of $127,690.00, Bowdle to Ipswich in 1941, $50,850.00, Bowdle to Selby in 1940, $19,000.00, Bowdle substation $46,525.00.

A. I think those are approximately correct.

Q. And you know from your knowledge of the property and the examination of the records, that those expenditures were made substantially at that time, in substantially those amounts, as shown by the records?

A. They sound alright to me.

Q. The total of that expenditure, totalled up, as I add it, is $227,000.00? A. That is about right.

Q. Now, the work that was done in 1941 and 1940, was that under your supervision? A. Partially.

Q. What else did you have to do besides furnish supervision of those three jobs?

A. I had a good many other duties.

Q. You are familiar, I think you said yesterday, in figuring fixed charges that include depreciation, interest, taxes, etc.? A. In a general way, yes.

Q. And there is a standard you use for that, isn't there? General standard?

A. There is some generally accepted figures, yes.

Q. And the base of one of those, do you have to estimate the life of the property? A. Yes.

Q. What is the ordinary life of property of this character as you estimate it?

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A. The pole line property, are you referring to?

Q. The property involved here.

A. That might vary widely.

Q. Give me the maximum and the other end.

A. The poorly built line might need replacement in twenty years or less. A well built line, as we try to build them, should be good for thirty years.

Q. Do you know how long the line was in operation, Bowdle to Wishek line, at the time of this new improvement? A. The old line, you are referring to?

Q. Yes? A. No, I don't know.

Q. Do you know how long the line from Bowdle to Ipswich had been in operation? A. No.

Q. Do you know how long the line from Bowdle to Selby, had been in operation? A. No.

Q. Or the line from Bowdle to the substation?

A. No, I don't know.

Q. Did you look over the property yourself, before the improvements were made?

A. Yes. I don't mean to say I passed on the improvement, but I saw the property before it was taken down at the time the improvements were made.

Q. Now, at that time, when you looked it over, this portion of the line had been serving its customers, hadn't it? A. Yes.

Q. And it had been doing that for a period of from ten to fifteen years, at least, hadn't it?

A. I don't know what the period was.

Q. It was some considerable period? A. Yes.

Q. And the voltage of the line was 22,000?

A. That is correct.

Q. And then it became necessary to put in a line, a high line of 38,000 volts. Is that right?

A. Yes, it was necessary.

Q. And the voltage was raised from 22,000 to 38,000. Is that right? A. That is correct.

Q. Have you the figures of the amount of energy taken by the defendant company from the northern companies in the year 1938? A. I don't have them with me.

Q. Can you give them, please? In 1938 they were 6,251,670. Is that right?

A. You are referring to what, total [delivers] to Northwestern?

Q. Yes, in the year 1938? A. Net or gross?

Q. Gross?

A. No, I can't tell from these figures. If you have an exhibit I would like to look at it. I believe your figure is correct.

Q. That is what was delivered by the northern company in 1938. Is that right?

A. That is what I understand this exhibit (Plaintiff's Exhibit 82-10, R. p. 597, supra) shows.

Q. In 1939, that exhibit shows, 6,688,515?

A. That is correct.

Q. In 1940, 7,044,662? A. That is correct.

Q. Those totalled together, make 21 million, substantially do they not? A. Yes.

Q. Now, in 1941, the volume delivered was 11,314,400?

A. Correct.

Q. And in 1942, 12,102,000? A. Correct.

Q. And in 1943, 11,621,000? A. Correct.

Q. And those totalled together amount to 35 million kilowatts? A. Approximately.

Q. Immediately after this line was built, and the voltage raised, and which you said was of no benefit to this defendant at all, they took and received from the northern company in the three years after that line was first put into operation 35 million kilowatts. Is that right?

A. Is it right that they received 25 million kilowatts?

Q. Yes? A. That is correct.

Q. During those three years? A. That is correct.

Q. Does that same exhibit show the amount the northern company received from the defendant in 1938?

A. Yes.

Q. And that is 2,142,540?

A. According to this, that is correct.

Q. In 1939, 2,433,920? A. Yes.

Q. And in 1940, 1,983,340? A. That is correct.

Q. Those three total, 6,500,000? A. I believe so.

Q. Turn to the three years on that exhibit immediately after this line was rebuilt, and in 1941 the northern company received from the defendant, 1,380,684?

A. That is right.

Q. And in 1942, 1,006,460? A. Correct.

Q. And in 1943, 1,319,940? A. That is correct.

Q. And that totals 3,700,000 kilowatts. Is that right?

A. That is about right.

Q. Now, this company in the south wanted and needed power during that time, didn't they? A. No.

Q. Did they take it from the northern company during that period? A. Yes.

Q. Did they take from 1941 to 1943, inclusive, 35 million kilowatts? A. That is about correct.

Q. Did they have use for it down below? A. Yes.

Q. Did you sell it? A. Certainly.

Q. Did they have any tie-in to get it from outside, to get it outside of this northern company?

A. No. They could have generated it themselves.

Q. Did they have something to generate it with?

A. Certainly.

Q. In other words, the amount sent south was the difference between 21 million and 35 million that the defendant got in those three years. Is that right?

Mr. Royhl: What three years are you referring to?

Mr. Morrison: 1938, '39, '40, the first three.

A. No.

Q. Was there an increase from 1938, '39 and '40, for 1941, '42 and '43, an increase of what they got, of the difference between 21 million and 35 million?

A. Yes, that is correct.

Q. And likewise, in the property, in the current flowing north, was there a decrease from 1938, '39 and '40, this 6,500,000, to 3,700,000? A. That is correct.

Q. Anyway you did give an opinion here yesterday?

A. As to what?

Q. As to the benefit, if any, that the defendant received from what was done by the northern companies in improvement, rebuilding, construction, etc., of these lines?

A. That is correct. I gave an opinion.

Q. And you said, in substance, your opinion was that as far as the defendant was concerned, their gain, if any,

was just negligible, you used that word, in this whole transaction. Is that right?

A. By comparison is what I said.

Q. Do you still have that picture before you? A. Yes.

Redirect Examination, by Mr. Royhl.

Q. Counsel has shown you a tabulation, Exhibit 82-10 (R. p. 597, supra), and which indicates that after and including 1940, or after 1940, the Dakota company received less energy from the defendant than it did in prior years. Is that correct? A. That is correct.

Q. Had there been any change in the generating capacity and facilities of the Dakota company on and during 1940?

A. Yes. In 1940 a 4000 kilowatt turbine was [installted] at Bismarck.

Q. How big a factor was that?

A. Bismarck was a major contributor to the system.

Q. Was that addition at Bismarck a contributing factor in the generating capacity of the Dakota company?

A. Yes, it was.

Q. Also was the replacing of the transmission lines a factor in the distribution of the Dakota companies' energy?

A. Are you referring now to sales to Dakota or purchase from Dakota?

Q. In their own system. Was that a conserving of their own energy, the replacing of their transmission lines. Was the replacing of the transmission lines a factor in the capacity of the Dakota company? A. Yes, it was a factor.

Q. In what way?

A. It was a factor in getting power reliably from the plants to the customer.

Q. Now, you have stated that the defendant company could generate its own energy. Is that right?

A. That is true.

Q. That is, that the purchase of energy from the Dakota company was not a necessity at any time during the years counsel inquired about?

A. Generally speaking, it was not.

Q. That is, they could generate their own. Is that right?

A. Certainly.

Q. And they had the facilities to do it? A. Certainly.

Q. Counsel [ask] you concerning place of delivery of energy to the defendant, and I think you said at one place, Aberdeen. Was such energy delivered both at Aberdeen and Gettysburg? A. Yes.

Q. Do you know whether or not the Dakota company could deliver energy to the defendant under and through the 22,000 volt transmission line? A. Yes.

Q. And under what circumstances and conditions?

A. They could deliver off peak energy to the defendant on the 22,000 volt transmission system.

Q. Why do you say off peak?

A. Because the 22,000 volt system, when it was 22,000 volt system, was completely loaded for service to Dakota's own customers over peak periods of the day. Off peak there was transmission capacity still available for delivery of dump power to Northwestern.

Q. And when was the bulk of the energy purchased by the defendant company from the Dakota company?

A. Off peak.

Q. Do you desire to explain, Mr. Sickel, concerning the line losses from the transmission line, concerning which you were inquired about on cross-examination?

Q. You were inquired concerning the loss of energy in distribution where the energy was taken off the transmission line and used on the Dakota companies' own system, weren't you? A. Yes.

Q. I think you estimated that at approximately 10%?

A. Yes.

Q. Will you explain that?

A. In some cases it was necessary to estimate distribution losses. The estimates made involved a very small amount of the total kilowatt hours involved, to the extent that the quantities being estimated represented a negligible amount of the total kilowatt hours tabulated.

Q. Suppose you had made no allowance for that distribution loss on those take-offs and those customers, how much would that have affected the transmission loss figure

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Defendant's Exhibit 335-A.

Filed March 3, 1948
R. Cox & Wilson
Clerk

DAKOTA PUBLIC SERVICE COMPANY AND PREDECESSORS
SUMMARY OF GROSS K.W.H. DELIVERED TO N.W.P.S. CO., PRODUCTION COSTS, AND PROFIT - POWER POOL OPERATIONS

Power Plant (1)	Gross K.W.H. Delivered to N.W.P.S.Co. Based on Percent Input to Transmission System and Average Fuel Cost: Percent (2)	K.W.H. (3)	Fuel Costs Average: Mills per K.W.H. (4)	Total Amount (5)	K.W.H. DELIVERED TO N.W.P.S.CO. - LOSS, COSTS, ETC.: Gross K.W.H. Delivered to N.W.P.S. CO. (6)	Percent Loss by Transm. (7)	Incremental Costs per K.W.H. in Mills: Fuel (8)	Misc. (9)	Total (10)	Production Cost Corrected for Transmission Loss: Mills per K.W.H. (11)	Total Amount (12)	Revenue to DPS Co. from KWH Delivered to N.W.P.S.CO. (13)	Profit to DPS Co. on KWH Delivered to N.W.P.S.CO. (14)
January 1, 1945 to October 19, 1945													
Beulah	78.8	6,971,830	2.57	$17,918.00									
Bismarck	17.6	1,557,160	3.73	5,808.00									
Mobridge	3.6	318,510	7.35	2,341.00									
Total or aver.		8,847,500	2.95	26,067.00	8,847,500	23.1	2.95	0.20	3.15	4.10	$36,275.00	$44,237.50	$7,962.50
Year 1944													
Beulah	77.4	8,423,674	2.45	$20,638.00									
Bismarck	18.5	2,013,411	3.63	7,309.00									
Mobridge	4.1	446,215	6.55	2,923.00									
Total or aver.		10,883,300	2.84	30,870.00	10,883,300	23.8	2.84	0.21	3.05	4.00	43,533.00	54,416.50	10,883.50
Year 1943													
Beulah	81.2	9,436,333	2.45	$23,119.00									
Bismarck	16.8	1,952,345	3.63	7,087.00									
Mobridge	2.0	232,422	6.50	1,511.00									
Total or aver.		11,621,100	2.73	31,717.00	11,621,100	23.8	2.73	0.21	2.94	3.86	44,857.00	58,105.50	13,248.50
Year 1942													
Beulah	75.6	9,149,112	2.32	$21,226.00									
Bismarck	22.2	2,686,644	3.22	8,651.00									
Mobridge	2.2	266,244	6.18	1,645.00									
Total or aver.		12,102,000	2.60	31,522.00	12,102,000	24.0	2.60	0.22	2.82	3.71	44,898.00	60,510.00	15,612.00
Year 1941													
Beulah	81.5	9,221,236	2.12	$19,549.00									
Bismarck	16.6	1,878,190	2.91	5,466.00									
Mobridge	1.9	214,974	6.04	1,298.00									
Total or aver.		11,314,400	2.33	26,313.00	11,314,400	20.8	2.33	0.22	2.55	3.22	36,432.00	56,572.00	20,140.00
Year 1940													
Beulah	95.5	6,745,087	2.08	$14,030.00									
Bismarck	2.5	176,573	3.23	570.00									
Mobridge	2.0	141,258	6.18	873.00									
Total or aver.		7,062,918	2.19	15,473.00	7,062,918	23.1	2.19	0.20	2.39	3.11	21,966.00	35,314.59	13,348.59
Year 1939													
Beulah	95.5	6,398,312	2.20	$14,076.00									
Bismarck	2.5	167,495	3.32	556.00									
Mobridge	2.0	133,996	6.34	850.00									
Total or aver.		6,699,803	2.43	16,282.00	6,699,803	23.1	2.43	0.23	2.66	3.46	23,181.00	33,499.02	10,318.02
Year 1938													
Beulah	95.5	5,970,345	2.20	$13,135.00									
Bismarck	2.5	156,292	4.54	710.00									
Mobridge	2.0	125,033	6.50	813.00									
Total or aver.		6,251,670	2.34	14,658.00	6,251,670	23.1	2.34	0.30	2.64	3.43	21,443.00	31,258.35	9,815.35
Year 1937													
Beulah	95.5	5,958,407	2.25	$13,406.00									
Bismarck	2.5	155,979	5.46	852.00									
Mobridge	2.0	124,783	4.90	611.00									
Total or aver.		6,239,169	2.38	14,869.00	6,239,169	23.1	2.38	0.21	2.59	3.37	21,026.00	31,195.85	10,169.85
Year 1936													
Beulah	95.5	4,878,140	2.70	$13,171.00									
Bismarck	2.5	127,700	6.85	875.00									
Mobridge	2.0	102,160	6.18	631.00									
Total or aver.		5,108,000	2.87	14,677.00	5,108,000	23.1	2.87	0.32	3.19	4.15	21,198.00	25,540.00	4,342.00
TOTALS		86,129,860			86,129,860						$314,809.00	$430,649.31	$115,840.31

of 23.1%, which you have testified to here, in that transmission?

A. Had there been no estimate made, in other words, had the distribution losses been estimated at zero, it would have raised the apparent transmission losses by 4/10th of 1% in the year 1944.

Recross-Examination, by Mr. Morrison.

Q. You used yesterday, Mr. Sickel, the figure of 22% line loss? A. Did I?

Q. Didn't you?

A. I think I used the five year figure of 23.1%. That is my recollection.

Q. And in your calculation in arriving at that figure, it was based upon the entire energy in the North Dakota properties? A. In the transmission system?

Q. In the transmission system. A. That is correct.

Q. Now, the line loss in Bismarck, or one of the close stations, that would be small, or comparatively small, wouldn't it? A. Compared to what?

Q. In figures. Would it be one or two per cent in that locality?

A. Probably not quite that small, but it would be smaller than 23.1.

Q. About what would it be? A. 5% perhaps.

Q. Are there other towns, Dickinson, Mobridge, where the same thing would prevail?

A. You mean that would have 5% losses?

Q. Substantially, approximately 5%?

A. Well, the loss would vary in getting power from point to point. The losses would vary with the distance.

Q. Probably go as low as 5% and up higher than that?

A. Depending on a great many other factors, yes.

Q. Then when you finally take all line loss of power delivered to this defendant at Aberdeen, you include those figures with the long transportation of approximately 300 miles, don't you? A. Yes.

Q. So, really, after all, your 23%, whether it be an estimate or more than that, takes the whole picture into account? A. Certainly.

Q. You understand the question we have in this case, if we have one, is the line loss on the power delivered at Aberdeen? A. Yes.

Q. Now, in redirect this morning you said if the energy was not furnished you by the North Dakota company, you could have made it yourself?

A. That is a general statement, yes.

Q. Why didn't you make it?

A. Because it was possible to purchase dump power at five mills, which would be cheaper than it could be produced at Aberdeen.

Q. In other words, I am going to use the word purchased. By the expenditure of approximately two hundred thousand dollars, where you put a new high voltage line, 22,000 to 38,000, and repaired the lines from Ipswich to Bowdle, there was three items in there we enumerated this morning? A. I understand it.

Q. You were able then to purchase, that is, the defendant was able to purchase from the northern company, energy cheaper than they could make it? A. Certainly.

Q. Then when you told the Court it was your opinion it didn't help the company in the south any, you better take that back? A. Certainly not.

Q. There is one other question. In Mr. Royhl's redirect examination, Mr. Sickel, if I heard you correctly this morning, you spoke of the line, the transmission line, before the voltage was raised from 22,000 to 38,000?

A. Yes.

Q. If I understood you correctly you made the statement that off peak, not as I understood it, at the peak, the company in the north could furnish power to the defendant. Is that right? A. Off peak?

Q. Yes, off peak. A. Yes.

Q. So when this two hundred thousand dollars was spent, and this line was improved up there, and the energy was raised to 38,000, on peak then you could furnish power to the defendant? Is that right? yes or no.

A. Not as a practical matter, no.

Q. Didn't you say this morning you could?

A. No, I don't think so.

Q. Couldn't, even when you raised it to 38,000, furnish power to them?

A. There is limitations involved besides the transmission line. Dakota hadn't capacity enough to furnish power to Northwestern after taking care of their own loads on peak.

Q. You said yesterday afternoon, didn't you, that 22,000 volt line, with every part of it working, they could take care of their own business and customers? You made that statement yesterday, didn't you? A. Yes.

Q. Now, with the additional voltage, from 22,000 to 38,000 there must have been some surplus or something above that, wasn't there? A. No.

Q. You didn't present any facts here, as I understand, of anything at any time on these lines that went wrong, did you, in detail? When they had the 22,000 voltage?

A. Will you explain that question, please? You say anything that went wrong on these lines. Are you referring to interruptions on the lines?

Q. I mean interruptions of any kind.

A. No, there wasn't any.

Q. And the company, in that period, made annual reports to North Dakota State Commission, didn't they?

A. I don't know.

Q. You made some of them? A. No.

Q. You haven't filed any? A. I haven't, no.

Q. Have you seen any? A. No.

Q. You know nothing about those reports at all? A. No.

O. C. STOKKE

was called as a witness by the defendant, and having heretofore been sworn, testified as follows:

Direct Examination: by Mr. Royhl.

Q. Will you state your name to the record?

A. O. C. Stokke.

Q. You testified here early in this trial, didn't you?

A. Yes.

Q. I believe you stated that for a number of years you have been an employee of the defendant company and also the interconnected companies? A. Yes.

Q. And when did you say you first started in this employment? A. As superintendent of production?

Q. Yes. A. 1935.

Q. Have you continuously been in that department since 1935? A. Yes.

Q. What is your title now?

A. Superintendent of Production.

Q. What does that mean, briefly?

A. General supervision over power plant operations.

Q. That has to do with the generation of energy?

A. Generation of electric energy.

Q. Now, I assume that after you have generated the energy and got it to the switchboard somewhere, that is where your duty ceases?

A. My responsibility stops at the switchboard.

Q. Since 1935, as such [superintedent], have you had charge or supervision directly over all of the generating units or plants or stations of the interconnected companies? A. Yes, I have.

Q. Which included until 1939 the North Dakota Power & Light Co., the Northern Power & Light Co., on the one hand, and the defendant company on the other hand. Is that right? A. That is right.

Q. And are you intimately familiar with each of those stations and units?

A. Yes, very much acquainted with the structures and equipment of the plants.

Q. I believe you also testified that you were and had been a director of the defendant company? A. Yes, I did.

Q. You are not now? A. Not now.

Q. Were you ever a director of the North Dakota Power & Light Co., or Northern Power & Light Co., or Dakota Public Service Co.? A. No, I never was.

Q. Were you ever an officer, other than director, as you have stated, of either or any of these companies?

A. No, not an officer of either company.

Q. Were you ever a director or officer of the Knife River Coal Mining Co.? A. No sir.

Q. Were you familiar with that company?

A. I was acquainted with the general operations of the mine.

Q. And particularly in connection with the Beulah power station? A. With the mine operations of the mine.

Q. I take it you were also familiar with the situation there at Beulah? A. Oh, yes.

Q. It was a part of the North Dakota company? A. Yes.

Q. How long were you a member of the joint management staff of these interconnected companies?

A. That began back in 1930.

Q. And continued until October 19, 1945? A. Yes.

Q. Were you continuously connected with the companies during that period? A. Yes.

Q. I take it, in your department, and down through the years, there have been work orders which originated in your department? A. Yes.

Q. Now, referring to such work orders in your department that [originaged] in the Dakota companies, meaning the Northern Power & Light Co., the North Dakota Power & Light Co., and Dakota Public Service Co., do you know what the policy and practice was as to the approval of such work orders before construction?

A. Yes, with respect to the power plants.

Q. I mean within your department?

A. Yes, that is right.

Q. What was that policy and practice?

A. The work orders would be made in the field and I had a part in making out the work orders. The work orders which I was interested in or involved in, practically everyone of those work orders, I had part in the preparation of them, and the first action on the work orders was to have them approved by the chief engineer of the plant, and the division manager in the district in which the work orders originated. Then the work order was passed on to the joint office in most cases. They might come in the mail to the mailing department and passed on to the work order department. Then it would come back to me for review and check. After the work order was in form, as I found it should be, and met with my approval, I would sign the

work order. Then the work order was passed on to the accounting department for recheck and entry in the work order department. From there the work order would pass on to Mr. Buckmier, Secretary, for his check and approval. From Mr. Buckmier the work order would be passed on to the treasurer of the company for his information and check. After his approval it would be passed onto the president of the company, Mr. Sanborn, during recent years. The procedure from there on, the work order was sent back to the work order department for a record of these various checks and approvals. The work order department then would pass the work order on to the Chicago office in most cases.

Q. Chicago office of what company?

A. To the Middle West in case it was Northwestern Public Service Co. and to the U. P. U. company's office if it was a work order of Northern Power & Light Co., North Dakota Power & Light Co., or the Dakota Public Service System. After it got to Chicago I am not sure what the procedure was, but when the work order came back approved it had the approval of the top officers of those two companies, and in some cases initialled by the engineering department in Chicago. After it was approved by the Chicago office, either U. P. U. or Middle West, it would be mailed back to the Huron joint office.

Q. Would any work actually be started on the work order except and unless it was so approved?

A. No sir, not until the work order was returned approved.

Q. Were you, down through the years, in some contact with United Public Utilities, or Mr. White, its president?

A. Yes.

Q. Were some of those contacts in Chicago and some here in the field on the companies' property?

A. Yes. Some in Chicago and some in the field.

Q. At those times was the business of your department discussed with representatives of the Chicago corporation?

A. Yes. My conversations in Chicago were generally with the head of the engineering department, representing the two companies, or with Mr. White.

Q. You say you also met Mr. White and representatives of U. P. U. out here in South Dakota and North Dakota?

A. Yes.

Q. How often would that be?

A. The visits out here were generally held in the late spring or early summer. Sometime in May or June. When representatives of the Chicago office, specifically, Mr. Kruesi, Mr. White, Major Buell, quite often some other department heads from either one of the two holding companies would make a trip out here for a week's visit over the property, and the staff from the joint office would meet that group, usually at Mobridge, by car. They would come out to Mobridge as their first stop-off point, where we would join the group and start our inspection trip over the Northern Power & Light Co., North Dakota Power & Light Co., or Dakota Public Service Co. That would be the beginning of the trip.

Q. So far as your portion was concerned, did you handle that portion that had to do with the power plants?

A. Yes.

Q. And on those occasions did you ever talk with Mr. White or the other representatives concerning sales of energy inter-company?

A. Discussions came up on that quite materially on every trip, especially between myself and Mr. White.

Q. And those talks would be on the occasions of those trips? A. Yes.

Q. And during the time of the trips? A. That is right.

Q. Would those talks be largely between you and Mr. White as to those specific matters?

A. Well, invariably we would be together, walking or sitting and talking together and there may be one or two others joining in the discussions.

Q. Can you fix the time, perhaps, of the first conversation that you recall with Mr. White?

A. Those inspection trips, my first recollection of those joint trips was back in 1936, I believe.

Q. And you say perhaps in the spring or early summer of that year?

A. Usually in May or June. Somewhere in there.

Q. Can you recall where on the property such talks likely occurred.

A. The discussions with regard to the transfer of energy usually took place between myself and Mr. White, while we were visiting at the [Buelah] plant, and particularly at the Bismarck plant.

Q. Now, as to your first conversation with Mr. White, what was said by you and he concerning this exchange of energy?

A. Mr. White, year after year, during those visits, seemed to make it a point to stress in his thinking that the Beulah plant was not being loaded as fully as he would like to see it be loaded, and to shift more of that surplus energy down to Northwestern if Northwestern could take it. That was the request that usually came from Mr. White.

Q. Do you recall what you said concerning the taking of energy?

A. Well, as the discussion came up each year, I assured Mr. White that as conditions permitted, outlining certain limitations that developed from time to time, that we would be glad to make every effort to increase the loading of the [Buelah] plant in order to transmit more power down to Northwestern.

Q. In substance, is that about the talks you had on numerous occasions? A. Yes, those general conversations.

Defendant's Exhibit 335 was received in evidence. It is as follows:

Defendant's Exhibit 335.

Dakota Public Service Company and Northwestern Public Service Company.

Summary of Profits and Savings Resulting from Interchange Power for the Years 1936 to Oct. 19, 1945, Inclusive.

Year	Dakota Public Service Company and Predecessors	Northwestern Public Service Company
1936	$ 4,342.00	$ 644.30
1937	10,169.85	1,861.45
1938	9,815.35	2,218.35
1939	10,318.02	2,042.02
1940	13,348.59	2,430.39
1941	20,140.00	4,867.42
1942	15,612.00	5,215.30
1943	13,248.50	7,108.20
1944	10,883.50	4,916.00
January 1, 1945 to October 19, 1945	7,962.50	4,928.00
Total	$115,840.31	$36,231.43

Defendant's Exhibit 335-A was received in evidence. It is as follows:

Defendant's Exhibit 335-B was received in evidence. It is as follows:

Deft's Exh. 335-B

NORTHWESTERN PUBLIC SERVICE COMPANY
Summary of KWH Received from and Delivered to
Dakota Public Service Co. and Predecessors
Showing Costs and Net Savings

Year	KWH Received from D.P.S.Co. (1)	KWH Delivered to D.P.S.Co. (2)	Net KWH Interchanged (3)	Aberdeen Plant Production Costs Applied to KWH Received from D.P.S.Co. Cost per KWH in Mills: Incremental Fuel Costs (4)	Incremental Maintenance and Miscellaneous (5)	Total (6)	Amount (7)	Aberdeen Plant Production Costs Applied to KWH Delivered to D.P.S.Co. Cost per KWH in Mills (8)	Amount (9)	Cost of Net KWH Interchanged Based on Aberdeen Production Costs (10)	Payments to D.P.S.Co. for Net KWH Interchanged at 5 Mills (11)	Net Savings to N.W.P.S.Co (12)
January 1, 1945 to October 19, 1945	8,847,500	1,265,300	7,582,200	5.45	0.20	5.65	$49,988.00	5.65	$7,149.00	$42,839.00	$37,911.00	$4,928.00
1944	10,883,300	1,428,900	9,454,400	5.27	0.25	5.52	60,076.00	5.52	7,888.00	52,188.00	47,272.00	4,916.00
1943	11,621,100	1,319,940	10,301,160	5.44	0.25	5.69	66,124.00	5.69	7,510.00	58,614.00	51,505.80	7,108.20
1942	12,102,000	1,006,460	11,095,540	5.20	0.27	5.47	66,198.00	5.47	5,505.00	60,693.00	55,477.70	5,215.30
1941	11,314,400	1,380,684	9,933,716	5.26	0.23	5.49	62,116.00	5.49	7,580.00	54,536.00	49,668.58	4,867.42
1940	7,062,918	2,000,596	5,062,322	5.25	0.23	5.48	38,709.00	5.48	10,963.00	27,742.00	25,311.61	2,430.39
1939	6,699,803	2,445,208	4,254,595	5.23	0.25	5.48	36,725.00	5.48	13,400.00	23,315.00	21,272.98	2,042.02
1938	6,251,670	2,142,540	4,109,130	5.32	0.22	5.54	34,634.00	5.54	11,870.00	22,764.00	20,545.65	2,218.35
1937	6,239,169	2,590,260	3,648,909	5.30	0.21	5.51	34,378.00	5.51	14,272.00	20,106.00	18,244.55	1,861.45
1936	5,108,000	3,608,460	1,499,540	5.20	0.23	5.43	27,736.00	5.43	19,594.00	8,142.00	7,497.70	644.30
TOTAL	86,129,860	19,188,348	66,941,512				$476,670.00		$105,731.00	$370,939.00	$334,707.57	$36,231.43

NORTHWESTERN PUBLIC SERVICE COMPANY
KWH Received from and Delivered to
Dakota Public Service Co. and Predecessors
Showing Costs and Net Savings

Year	KWH Received from D.P.S.Co. (1)	KWH Delivered to D.P.S.Co. (2)	Net KWH Interchanged (3)	Aberdeen Plant Production Costs Applied to KWH Received from D.P.S.Co. Cost per KWH in Mills: Incremental Fuel Costs (4)	Incremental Maintenance and Miscellaneous (5)	Total (6)	Amount (7)	Aberdeen Plant Production Costs Applied to KWH Delivered to D.P.S.Co. Cost per KWH in Mills (8)	Amount (9)	Cost of Net KWH Interchanged Based on Aberdeen Production Costs (10)	Payments to D.P.S.Co. for Net KWH Interchanged at 5 Mills (11)	Net Savings to N.W.P.S.Co (12)
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1942	12,102,000	1,006,460	11,095,540	5.20	0.27	5.47	66,198.00	5.47	5,505.00	60,693.00	55,477.70	5,215.30
1941	11,314,400	1,380,684	9,933,716	5.26	0.23	5.49	62,116.00	5.49	7,580.00	54,536.00	49,668.58	4,867.42
1940	7,062,918	2,000,596	5,062,322	5.25	0.23	5.48	38,709.00	5.48	10,963.00	27,742.00	25,311.61	2,430.39
1939	6,699,803	2,445,208	4,254,595	5.23	0.25	5.48	36,725.00	5.48	13,400.00	23,315.00	21,272.98	2,042.02
1938	6,251,670	2,142,540	4,109,130	5.32	0.22	5.54	34,634.00	5.54	11,870.00	22,764.00	20,545.65	2,218.35
1937	6,239,169	2,590,260	3,648,909	5.30	0.21	5.51	34,378.00	5.51	14,272.00	20,106.00	18,244.55	1,861.45
1936	5,108,000	3,608,460	1,499,540	5.20	0.23	5.43	27,736.00	5.43	19,594.00	8,142.00	7,497.70	644.30
TOTAL	86,129,860	19,188,348	66,941,512				$476,670.00		$105,731.00	$370,939.00	$334,707.57	$36,231.43

Filed March 3, 1948
Roy L. Marker, Clerk

Q. I now call your attention to exhibits marked as Defendant's Exhibits 335, 335-A and 335-B, and ask you if you prepared those?

A. Yes. I directed preparation of these.

Q. Are they true and correct? A. Yes.

Q. From what did you take the data that is shown on there? Does it come from Exhibits 82 and 55 (R. pp. 546-7 and 376, respectively, supra), here in court? A. Yes.

Q. Do you know Mr. Stokke, whether or not the computations and figures as shown upon Exhibits 335, A and B, are true and correct? A. Yes.

Q. Are they? A. Yes.

By Mr. Fellows:

Q. Mr. Stokke, are part of the figures in this exhibit offered in evidence taken from some compilations or exhibits prepared by Mr. Sickel? A. Yes.

Q. And some of them were also taken from records you had made yourself, in times past, weren't they? Some of these figures?

A. Made from records—I made this up just recently.

Q. Which ones of these figures were taken from the records made by Mr. Sickel, for the purpose of this trial?

A. The per cent column, No. 2, on Exhibit 335-A.

Q. Everyone of these figures that go clear down through the column headed "per cent", were taken from these exhibits Mr. Sickel prepared for the trial and which he [identired] here at the trial, weren't they?

A. You are referring to No. 2?

Q. Yes, No. 2?

A. I was not here all during Mr. Sickel's testimony.

Q. Did you take these from these exhibits Sickel prepared? A. He furnished me these figures.

Q. When did he furnish them to you?

A. Several days ago.

Q. Then you took them with the figures on the exhibits Sickel produced here at the trial, so you know, as a matter of fact, you took them from Sickel's exhibits. Where did you get the figures under "per cent" in the second column?

A. From a tabulation sheet which Mr. Sickel furnished me of these per centage figures for each of these years.

Q. Did you help Sickel prepare the tabulation sheet?

A. No, sir.

Q. You know it is a tabulation sheet he prepared for the purpose of this trial? A. That is right.

Q. Where did you get the figures in the third column?

A. Third column, "kilowatt hours"?

Q. Yes?

A. I got them from the operating report. That is the total for each year.

Q. And those figures from the operating report are figures that you from time to time prepared, aren't they, in your capacity as superintendent of production?

A. No, I didn't prepare those. They were prepared by the accounting department.

Q. Didn't they go from your department into the accounting department?

A. No, not from the production department.

Q. How did these figures get into the accounting department? A. From our division offices.

Q. That is your office, isn't it, as superintendent of production?

A. These figures were not cleared through my office. They are sent to the general office direct from the division office.

Q. Who sends them to the general office?

A. The chief clerk in the division office.

Q. What branch of the Huron office do they come from? Where do they originate before they start making the circuit?

A. The kilowatt hour readings and totals are prepared by the division office. Taken from meter readings obtained on the division.

Q. That is the division office at Huron?

A. No. Aberdeen, Mobridge.

Q. From where are they sent?

A. To the accounting department at the joint office.

Q. In Huron? A. Yes.

Q. Through your office? A. Not through my office.

Q. Where did the figures in the column marked "4", where did they originate?

A. They are from the operating report.

Q. Who made out those operating reports?

A. They are prepared by the accounting department of the joint office.

Q. At Huron? A. At Huron.

Q. What participation do you have in those figures?

A. I had no part in preparing them.

Q. Where did you get those figures to put on these sheets? A. From the operating reports.

Q. Have you those operating reports here that show the [Buelah] cost per mill, as the first figure in column 4, 2.57? Have you something here to show that?

A. I took the operating reports that are over in Exhibit 82.

Q. Have you got a report anywhere of the place from which you can take the figure, 2.57, as cost per kilowatt hour, at [Buelah] station, from January 1, 1937 to October, 1945? A. No.

Q. Where did you get those figures?

A. From the Dakota Public Service operating reports over on that bench.

Q. You found that figure in it?

A. I took the total fuel cost and divided by the net generation to get that unit fuel cost on this report.

Q. So it is not a figure then you took from any record whatever, except you took figures from which you computed this 2.57 mills. Is that right? This is a computation of yours from some record you got? A. That is right.

Q. Now, we get down to the seventh column, the per cent lost by transmission. Where did you get any such figure as 23.1 for the period from January to October 19, 1945?

A. I got those per cent losses by transmission from Mr. Sickel.

Q. And the next figure for the year 1944, transmission losses 22.8. You got that from Sickel? A. Yes.

Q. Every one of them? A. Yes.

Q. The transmission losses for 1942, those are all Sickel figures? A. Yes.

Q. And yet, as foundation for your testimony, you say those figures are correct?

A. Yes, to my knowledge they are correct.

Q. And you took them from Sickel's figures? A. Yes.

By Mr. Royhl:

Q. I show you Defendant's Exhibits 330 and 330-A and ask you if that is one of the records which you used in arriving at your line losses?

A. Yes. The figures that are on this sheet here. I have a carbon copy of those figures.

Q. Now, referring to Exhibit 335-A, Mr. Stokke, and the column on the left of the page which is entitled "Power plant"-and designated with the numeral "1". To what does that refer?

A. That refers to the name of the power plant under its location. Beulah, Bismarck, Mobridge.

Q. And the first group is for the year 1945?

A. For the year January 1, 1945 to October 19, 1945.

Q. Going down on that column I note the years 1944 and 1943, down to 1936. It covers those years, does it?

A. Yes.

Q. Just, generally, what does this exhibit purport to be, this 335-A?

A. If you will refer to the heading to begin with, it is a summary of the gross kilowatt hours delivered to Northwestern, production costs and profit under the power pool operation.

Q. From whom was the delivery made and to whom?

A. Delivered from Dakota Public Service Co. to Northwestern Public Service Co.

Q. When you say Dakota Public Service Co., do you mean, Northern and North Dakota Companies, prior to July 1, 1939? A. Yes.

Q. And thereafter the Dakota Public Service Co.?

A. That is right.

Q. Now, your next column to the right which column is designated "per cent". Under it in parentheses the figure 2. To what does that refer?

A. That refers to the per cent of kilowatt hours to the transmission line from the respective plants outlined through each year.

Q. That is the load that was on the transmission line from which the defendant purchased—it is the per centages of power from those plants. Is that it?

A. That is applying to kilowatt hours received at Aberdeen.

Q. Was some of this delivered at Gettysburg, as well?

A. Between the two, yes.

Q. Now, your third column there which is entitled "KWH" with the figure 3, in parentheses. To what does that refer.

A. First not the total in 1945, for example. 8,847,500 kilowatt hours.

Q. That is from all stations?

A. That is the total. That figure refers to gross kilowatt hours delivered by Dakota Public Service Co. to Northwestern Public Service Co. for that year, or for that period.

Q. Then you break that down according to those per centages, do you?

A. Yes, for each power plant. 78.8 of the 8,847,500 is mostly from 6,971,830 for Beulah. 17.6 for Bismarck applied to 8,847,500 is 1,557,160 kilowatts from Bismarck plant.

Q. And the same is true of the Mobridge computation?

A. Same for Mobridge.

Q. Going to column 4, which is entitled "Fuel Cost Average per KWH" (4) to what does that refer?

A. Let me take the figures one by one. The first one, [Buelah], 2.57, is the average fuel cost in mills per kilowatt hour generated by that plant during that period.

Q. Did you get that from the operating report?

A. From the operating report, yes.

Q. Did I understand you on your cross examination with counsel that you [divided] the generation of that plant by the fuel cost and arrived at your mill cost?

A. Divide the fuel cost by the generation. The next one, 3.73, is average fuel cost on the same basis for the Bismarck plant for the period. 7.35 is average fuel cost per kilowatt hour, net, for the Mobridge plant for the same period.

Q. Then you have a line there in that tabulation that is total of average. Do you mean that for the year?

A. That is average fuel cost—Before I get to that I would like to go to column 5. The total amount of column 5 is arrived at by multiplying first, 6,971,830 kilowatt hours from the [Buelah] plant, by 2.57, fuel cost, will result $17,918.00. The next figure in that column is arrived at by multiplying Bismarck plant kilowatt hours, 1,557,160 delivered to Northwestern by 3.73. The average fuel cost of that station, $5,808.00. The third item in there, column 5, $2,341.00, is arrived at by multiplying 318,510 by 7.35 in column 4. The next computation in preparing this report is to add up total dollars of fuel cost of the three

power plants. That totals $26,067.00. To arrive at the average fuel cost in column 4, or 2.95, [divided] $26,067.00 by the total kilowatt hours, 8,847,500, and the result is 2.95 mills.

Q. That is true of all of the years, as you have explained it?

A. That is the same process for all the way down.

Q. Now, you got your kilowatt hours in column 3 from the operating reports? A. Yes.

Q. Where did you get the total amounts in column 5, by multiplication?

A. By computation as I have just recited to you.

Q. Your column 4, mills per kilowatt hour, you have already explained, I think, you got that by dividing fuel cost from the operating report by the sum total of the kilowatt hours in column 3? A. That is right.

Q. Now, I refer you to the column designated "6", which is kilowatt hours gross delivered to the defendant. That is the same figure that is shown in column 3, is it not? A. The total in column 3.

Q. And you received it from the operating report of the Dakota companies? A. Yes, same source.

Q. Column 7, which is designated "per cent loss by transmission", you say you got that from this Exhibit 330-A. Is that right?

A. The loss by transmission determined by Mr. Sickel in another computation separate from that.

Q. You had a copy of this, didn't you?

A. No. This is transmission losses.

Q. I show you Defendant's Exhibit 331 (R. p. 1695, supra), and ask you if that is where you got your average transmission losses? A. Yes, that is where I got that.

Q. Your next, column 8, is merely the average, total average KWH appearing in column 4, isn't it? A. Yes.

Q. Do you know what the miscellaneous incremental costs were in production of kilowatt hours in this plant, or those plants? A. Yes.

Q. What were they?

A. Those miscellaneous plant costs are—

Q. In amount, what were they?

A. The first column is .2 mills. Next is .21 and .22.

Q. Now, I take it that column 10 is merely an addition of columns 8 and 9. Is that right? A. That is right.

Q. What is column 11?

A. Column 11 is column 10 divided by transmission efficiency to obtain the production cost, subtracted from transmission loss.

Q. Is that a matter of computation?

A. Yes, it is computation to get the results completed.

Q. Is that the result, 3.15 mills created by this 23.1% loss in transmission and adjusted to it?

A. That is right. It is the result of the total cost, 3.15, divided by the transmission efficiency, which is obtained in this way. The 23.1 is per cent figure. Expressed with decimal that would be .231. To obtain the transmission efficiency subtract the .231 from 1,000, and leaves the resultant figure of .769. The 3.15 in column 10 is divided by the transmission efficiency .769, and that gives 4.1 mills as the equivalent production cost expressed in mills after allowing for transmission efficiency or transmission loss.

Q. In other words you increase the incremental cost from 3.15 to 4.10 mills, to compensate for the transmission loss of 23.1%? A. That is right.

Q. Column 12 is merely the multiplication of the figure in column 6 by the figure in column 11, which is the cost, 4.10 mills? A. Yes. 8,847,500 x 4.1 mills.

Q. That amounts to $36,275.00, doesn't it? A. Yes.

Q. I observe that column 13 refers to the revenue to the Dakota company from sales to Northwestern. Is that right? A. Yes.

Q. That is a matter of computation, isn't it? A. Yes.

Q. What unit of cost do you show there in that computation? A. I used the 5 mills per kilowatt hour.

Q. That is the contract price, is it? A. Yes.

Q. And that is again the gross kilowatt hours as shown in column 6? A. Yes.

Q. And that would be $44,237.50, is it? A. Yes.

Q. Now, what do you intend to show by Column 14?

A. Column 14 is headed to show profit to Dakota Public Service Co. on kilowatt hours delivered to Northwestern Public Service Co. for the respective years.

Q. What computation did you make there to arrive at the figure in Column 14?

A. Column 14 is column 13 minus column 12.

Q. In other words, you take the amount of column 13, which is the amount Northwestern paid the Dakota com-

pany, and subtract from it the production cost of those kilowatt hours to the Dakota company, leaving the figure $7,962.50, as the profit under your method of figuring?

A. That is correct.

Q. Is that true of the various other columns shown here?

A. Yes, all of the way down the line.

Q. Now, as you arrived at the figures shown in column 14, did you transfer them in each instance to the summary and recapitulation that appears as Exhibit 335?

A. Yes, that is shown on Exhibit 335.

Q. In the year 1945, is that restricted to the period from January 1 to October 19, of that year? A. Yes.

Q. Now, referring to Defendant's Exhibit 335-B, the left hand column merely refers to the years or portion of years in the case of 1945. Is that right? A. Yes, that is right.

Q. What, generally, is this tabulation?

A. Well, as indicated by the heading, under Northwestern, it shows a summary of the kilowatt hours received from and delivered to Dakota Public Service Co. and predecessors, shows costs and net savings.

Q. Net savings to Northwestern? A. That is right.

Q. And then Exhibit 335-B shows the benefits that accrued on this 5 mill sale to the defendant company. Is that right? A. That is right.

Q. And Exhibit 335-A shows benefits accruing to Dakota Public Service Co., on the sale and exchange of this energy?

A. Yes.

Q. I notice that your column designated by the numeral (1) is kilowatt hours received from the Dakota Public Service Co. for the period shown to the left of that figure in each instance?

A. Yes. Kilowatt hours received from Dakota Public Service Co.

Q. And that is the same figure that appears in Exhibits 335-A, column 3 and 6, isn't it?

A. Yes, that is the same one.

Q. Now, referring to the column designated (2) "Kilowatt hours delivered to Dakota Public Service Co." What do you mean by that?

A. Kilowatt hours delivered by Northwestern to Dakota Public Service Co.

Q. For the period shown to the left of the first column on the left of the page? A. Yes, for those years.

Q. From what source did you get that figure?

A. Those figures are from the operating report.

Q. That is the operating reports of what company?

A. Of Northwestern Public Service Co.

Q. Does it show on the Dakota companies, too?

A. I am sure it does. I am not sure how far back. It goes back to 1936, I believe.

Q. These here are the operating records of the Northwestern Public Service Co. for the period covered by your exhibit there? A. Yes.

Q. Where did you get the figure that is in column 3, "Net KW interchange"?

A. Column 3 is column 1 minus column 2.

Q. That is the net interchange between the two companies? A. Yes.

Q. Where did you get the figure, incremental fuel cost, in column 4?

A. Those incremental fuel costs are computed costs that I made, taken from the tabulation of graph data off of that station, off of that unit, and the Aberdeen station.

Q. They are in the operating reports, too, aren't they?

A. Not these incremental costs.

Mr. Benson: They are not here in the court room?

A. The incremental costs are determined from the average fuel cost by application to the actual cost expressed incrementally, from a load diagram I got of the station generator.

Q. Is that load diagram here in evidence?

A. I have got a graph on that.

Q. Do you know that to be a true and correct figure?

A. Yes.

Q. Is that true of the figure in column 5 as you have explained it heretofore? A. Yes.

Q. Is column 6 the total of column 4 and column 5?

A. Yes.

Q. Where do you get the amount in the column designated No. 7?

A. No. 7 is the [produce] of column 1 x column 6.

Q. What does that represent?

A. The gross kilowatt hours received from Dakota Public Service Co. times incremental total cost shown under column 6.

Q. In other words, that is what it would have cost Northwestern Public Service Co. to have generated 8,847,500 kilowatt hours, is it? A. That is correct.

Q. Which is the amount defendant received from Dakota Public Service Co. that year, or part of year?

A. Are you referring to No. 7, the production costs?

Q. You say that the figure that appears in column 7, is that what it would have cost Northwestern Public Service Co. to have generated 8,847,500 kilowatt hours?

A. Yes, that is correct.

Q. And the figure in No. 8 is the same figure shown in column 6? A. That is right.

Q. What is the figure appearing in column 9?

A. Column 9 is the kilowatt hours shown under column No. 2 times cost per KWH shown under column No. 8. In other words it is 1,365,300 kilowatt hours delivered to Dakota Public Service Co., times total incremental cost per KWH, 5.65, equals the total dollars shown under No. 9.

Q. That represents what it cost the defendant company to generate the kilowatt hours that were transferred to the Dakota Public Service Co. during that period? A. Yes.

Q. What is the computation or figure shown in Column 10?

A. The cost of net kilowatt hours interchanged, based on Aberdeen production cost. No. 10 is kilowatt hours shown in column 3, net kilowatt hours interchanged, 7,582,200 times 5.65 mills, shown under column 6 or column 8. That equals $42,839.00, shown under column 10 for the period of 1945.

Q. That figure represents what it would have cost the Northwestern to have generated in its own stations the net kilowatt hours shown in column 3 of the exhibit?

A. That is correct.

Q. Where did you get the figures in column 11?

A. Column 11 is total dollars payment to Dakota Public Service Co. for the net kilowatt hours interchanged at 5 mills. That is column 3 times 5 mills.

Q. That is what the Northwestern Public Service Co. actually paid to the Dakota company for the net kilowatt hours back and forth between the two companies for that period of time? A. Yes.

Q. What is the computation or figure which is shown in Column 12?

A. Column 12 is column 10 minus column 11.

Q. In 1945 it amounts to $4928.00? A. That is right.

Q. That is what the Northwestern Public Service Co. [benefitted] by buying net kilowatts in column 3, at 5 mills, is it?

A. Yes. It is net savings to Northwestern on net interchange.

Q. Now, the figure in column 12, you have transferred this over to your Exhibit 335, have you, in the summary?

A. Yes.

Q. I take it you had added that up there, benefits accruing to the defendant company and benefits accruing to the Dakota company? A. That is right.

Q. There is an amount shown by that exhibit as [benefitting] the Dakota company for the year 1945 back through 1936, inclusive? A. The total is $115,840.31.

Q. What are the benefits shown accruing to the Northwestern Public Service Co. for that same period of time?

A. The Northwestern savings, $36,231.43.

Defendant's Exhibit 337 was offered in evidence and objected to by plaintiff on the ground it was immaterial to the issues and an attempt to try an issue collateral to the case. The exhibit was received subject to the objection. It consists of the operating reports of Knife River Coal Mining Company covering the years 1936 to October 19, 1945, inclusive, and containing various accounting data, including therein mining costs plus royalties per ton of coal delivered.

Among other information, those reports contain the following data:

	Revenue to Knife River Per Ton Sold to:			
Year	Northwestern	North Dakota	Northern	Dakota
1936	.71	1.34	.67	...
1937	.83	1.13	.94	...
1938	.90	1.09	.95	...
1939	.93	1.08	.95	...
1940	.95	...	...	1.07
1941	.96	...	...	1.04
1942	.89	...	...	1.10
1943	.96	...	...	1.18
1944	.96	...	...	1.18
1945	1.26	...	...	1.27

Q. Do you know of your own knowledge that those are the regularly kept reports of that corporation?

A. Yes, I do.

Q. Are they a part of the business records of that corporation? A. Yes.

Q. Kept in the due course of the business of the corporation? A. Yes.

Q. And as a part of the transaction of that corporation?

A. The accounting records of transactions, yes.

Q. Part of the regular records of the company? A. Yes.

Q. Are they made at the time shown by the instruments?

A. They are made for the years shown on the covering sheets.

Q. And at the time shown?

A. The following month, yes.

Q. Are they in the same condition now as when made?

A. Yes, I am sure they are.

Q. Are those instruments all part of the records and files of that corporation? A. Yes.

Defendant's Exhibit 336 was received in evidence subject to the same objections as made by plaintiff to Exhibit 337. It is as follows:

Defendant's Exhibit 336.

Profit Accruing to Knife River Coal Mining Co. from Coal Sold to Dakota Public Service Co. at the Beulah Plant to Produce K. W. H. Interchanged Years 1936–October 19, 1945, Inclusive.

Year	K. W. H. Delivered by Beulah Plant to NWPS Co.	Tons of Coal Based on— 3.7 lbs. per KWH	Delivered Cost per Ton	Mining Cost Plus Royalties per Ton Delivered	Net Profit per Ton Delivered	Amount of Profit
1936	4,878,140	9,025	$1.43	$0.86	$0.57	$ 5,144.00
1937	5,958,407	11,023	1.24	0.74	0.50	5,512.00
1938	5,970,345	11,045	1.21	0.78	0.43	4,749.00
1939	6,398,312	11,837	1.25	0.76	0.49	5,800.00
1940	6,745,087	12,478	1.20	0.74	0.46	5,740.00
1941	9,221,236	17,059	1.17	0.76	0.41	6,994.00
1942	9,149,112	16,925	1.25	0.78	0.47	7,955.00
1943	9,436,333	17,457	1.31	1.06	0.25	4,364.00
1944	8,423,674	15,584	1.32	1.09	0.23	3,584.00
1945 (to Oct. 19)	6,971,830	12,898	1.40	1.10	0.30	3,869.00
Total						$53,711.00

Q. I show you instrument marked Defendant's Exhibit 336, and ask you if you prepared that?

A. Yes, I prepared that.

Q. From what source did you get the data that is shown on Defendant's Exhibit 336?

A. To answer that I will have to take it up by columns.

Q. Very well.

A. The first column is the year for which the data is shown. The KWH delivered by Beulah plant to Northwestern, that I obtained from figures shown on a previous exhibit, 335-A, for the Beulah plant shown in each year

under column No. 3. The next column, "Tons of coal," based on 3.7 pounds per kilowatt hour generated, I obtained the 3.7 pounds per kilowatt hour generated by a spot check through the operating reports of the Dakota Public Service Co. and the predecessor companies, for the power plant at Beulah. I used the 3.7 pounds for this period on down through the report. The figures shown under that column are the kilowatt hours shown under the first column times 3.7 which gives the pounds divided by 2000 pounds, and gives the resultant tonnage by years.

Q. That is a matter of computation, then, largely?

A. That is right.

Q. Where did you get the information shown in the column headed "delivery cost per ton"?

A. I got those figures from the operating report of Dakota Public Service Co.

Q. They are here in court? A. Yes.

Q. Where did you get the figures shown mining cost plus royalties per ton delivered?

A. I got those figures from the Knife River Coal Mining Co.

Q. Exhibit 337? A. That is right.

Q. Where did you get the computation in the column designated "net profit per ton delivered"? That is a matter of computation?

A. That is a matter of computation. Delivered cost per ton less total mining cost equals net profit per ton.

Q. And the figure appearing in the right hand column of Exhibit 336 is a mere matter of computation? A. Yes.

Cross Examination: by Mr. Benson.

Q. Now, you have testified that the work order on the property of the Dakota companies went to the Chicago office of U. P. U., and that the work orders of Northwestern Public Service Co. went to Middle West Service Co. Is that right? A. Yes.

Q. Do you know that of your own knowledge? A. Yes.

Q. You know that was always the case?

A. To my knowledge it was.

Q. I show you Defendant's Exhibit 82-21 (R. p. 655, supra). Do you see the number on that? A. Yes.

Q. That is a work order of the Dakota Public Service Co. is it not? A. That is right.

Q. Do you know anything about the set-up in Mr. White's office in Chicago? How many people he had working there? A. No, I am not sure.

Q. Ever been in there? A. Oh, yes, several times.

Q. Do you know Mr. Edward Vennard, of Middle West?

A. Yes.

Q. Do you recognize his signature?

A. I am sure I would.

Q. Look at Exhibit 82-21. You see down in the right hand corner, "approved Middle West Service Co." That is Mr. Vennard's signature under that? A. That is right.

Q. And the date is April 18, 1940? A. That is right.

Q. Is this stamp on here Middle West Service Co. stamp? "Legend & Analysis Dept."?

A. I could not say about that.

Q. You can't tell about that?

A. I have seen that stamp on some work orders.

Q. That came from Middle West Service Co.?

A. On some work orders.

Q. On your own work orders that came back from Middle West you have seen that stamp? A. That is right.

Q. On the bottom of this 82-21, can you tell whether Sam White placed his initials on there?

A. Yes, that is Mr. White's initials.

Q. And opposite that is 4-20, isn't it? A. Yes.

Q. Meaning April 20? A. Yes.

Q. And this stamp we are talking about as recorded, April 15, 1940, by the analysis department?

A. That is right.

Q. I call your attention to Defendant's Exhibit 82-20, (R. p. 651, supra). That is a Dakota Public Service Co. work order, isn't it? A. Yes, it is.

Q. That is to build a line from Bowdle to Ipswich, isn't it?

A. They are both outside my department. I am just answering my opinion.

Q. But you answered to all on direct examination about work orders, didn't you?

A. No. Under the production department. I specifically said that is under production department.

Q. You think the work orders in your department were handled differently from the usual procedure, do you?

A. I would not know as to that.

Q. I call your attention to 82-20. That is the same stamp as affixed to Exhibit 82-21, the red stamp, Received April 15, 1940. Analysis Department. Is that your department? Do you know? Do you know whether that is Middle West or your own department?

A. I am sure that is not our department.

Q. You don't think it is Northwestern? A. No, I don't.

Q. You see approval of Middle West Service Co., 8-20-40?

A. Yes.

Q. See O. K., Sam White's initials, 4-23? A. Yes.

Q. Now, will you refer to your copy of your Defendant's Exhibit 335-A. Do you have it before you?

A. Yes, I have it here.

Q. Now, there are above the column 8, 9 and 10, Incremental Cost Per KWH in mills. Will you explain what you mean by the phrase and term "Incremental Costs"? Will you refer to your Exhibit 335-A (R. p. 1755, supra), and to the phraseology above the columns 8, 9 and 10, and the words "Incremental Costs" and tell us what you mean by that phraseology?

A. Incremental costs are the charges in total costs that are incurred by each in a unit of output. In other words it is the output cost.

Q. What you mean to say is, to see if I understand you, if you produced some additional kilowatt hours, you figure in coal under this exhibit in column 8, and charge those kilowatt hours cost in pounds of coal reduced to mills per kilowatt hour. Is that what you did?

A. That is the final. The fuel cost, incremental fuel costs are determined from the steam and weather load on the turbine, which varies pursuant to loads. In the low average cost.

Q. I am not an engineer and I don't understand that. I want you to go back to column 4 of this exhibit. Under fuel cost average. You say there, 2.95? A. That is right.

Q. That is the average fuel cost per kilowatt hour of what kilowatt hours produced during that period?

A. With the average fuel at those stations through that period.

Q. You mean by that, the figure 2.95, you have taken for Beulah, Bismarck and Mobridge in each instance the total number of kilowatt hours produced, the total number pro-

duced during that year, or in that whole period shown on the exhibit from January 1, 1945 to October 19, 1945?

A. To obtain the average fuel costs—

Q. You get a figure shown there of 2.57 mills?

A. Under Beulah, yes.

Q. You take all of the kilowatt hours produced from Beulah during all of that time? A. That is right.

Q. And divided it into the cost of coal for the whole period? A. Yes. For the Beulah plant, that is right.

Q. So that is not in that column 4 an incremental fuel cost but an average fuel cost?

A. Under fuel, that is average.

Q. That is the average fuel cost? A. Yes.

Q. So when you get over to column 8, 9 and 10, under column 8, and you put down in there incremental fuel cost, 2.95, you mean that was average fuel cost for each KWH produced by those three plants during the period indicated on the exhibit, and not incremental fuel cost?

A. That is the average fuel cost in column 8.

Q. Now, under column 9, which you have entitled "Miscellaneous", what figures do you use to get that .20 figure?

A. .20 figure shown on there for the particular year is my computation and estimate of the incremental maintenance and miscellaneous cost.

Q. You say that is your computation or estimate. Do you have your working papers here?

A. For all of these figures, no.

Q. Do you have your working papers from which you produced this .20? A. No, I don't have those here with me.

Q. Are they in this city?

A. No, not these figures here.

Q. They are not here in the city at all? A. No sir.

Q. Where did you do this work?

A. I prepared these incremental costs, I started on a tabulation of this kind way last fall sometime.

Q. From what figures were you working way last fall?

A. I was working—using the estimates of maintenance costs, miscellaneous costs, and then checked it with furnace maintenance and other incidentals from the operating reports, that I [check] here a couple of weeks ago.

Q. I asked you what records you were working from way last fall? You did not have the records of the Dakota Public Service Co. last fall, did you? A. No.

Q. What did you have?

A. I had pencil figures of my own taken from the operating reports.

Q. Some memo that you had kept yourself?

A. Yes, all of the years.

Q. And can you tell us now each item of cost that went into this figure of .20, miscellaneous, under column No. 9? Can you tell us? A. Yes.

Q. Will you give us those in detail, please?

A. I can tell you what they applied to.

Q. Just give us the items?

A. I don't have the dollars and cents.

Q. Just each item?

A. Principally furnace maintenance was the major item, and chemicals and some incidentals.

Q. What are the items that went into incidentals?

A. Station supplies and expense.

Q. What kind of supplies?

A. That would be packing, telephone calls, numerous incidental expenses in the plant.

Q. Any others?

A. Those are the major items. Furnace, chemicals, incidentals.

Q. Then I take it there is not in this figure .20, any supervision or engineering? A. No.

Q. There is no boiler repair? A. No, sir.

Q. There is no generator repair? A. No.

Q. There is no electrical labor? A. No, sir.

Q. There is no miscellaneous station labor? A. No, sir.

Q. There is no lubricants? A. No, sir.

Q. There is no expense of coal handling, ash handling?

A. Yes, that is in the fuel cost.

Q. Now, in the maintenance, there is no maintenance except furnace maintenance?

A. Furnace maintenance is a major item in certain years. It is a factor in every year. And there were other maintenance charges. Very little.

Q. I show you Dakota Public Service Co. operating report for the year 1945, under maintenance. Will you look at that total? Do you still say that furnace maintenance is a major item? A. Is the principal item.

Q. Principal item?

A. The principal portion of that was used in that incremental maintenance cost.

Q. You mean the greatest portion of the item, furnace maintenance, went into your incremental cost? A. Yes.

Q. That is all you put in, out of the whole maintenance account was something for furnace maintenance? That is all you put into your figures?

A. There were other items that went in for the particular years. As maintenance cost went up and down, year after year, this proportion was changed some to keep in line with the operation or total maintenance cost.

Q. What I have asked you is that the only item of maintenance carried on the regular accounting records of the Dakota Public Service Co., in its operating reports, which you put into your Exhibit 335-A, was a portion of the item called furnaces and boilers? A part of that item?

A. That is right. That is the primary item of ineremental maintenance costs.

Q. In other words, on that particlar page, you are talking about the item, furnaces and boilers, in toto, as an item of the total operating expense for the period shown on that sheet under maintenance?

A. That is all stations there. That is what it is on that particular sheet. Yes.

Q. Now, you are not an accountant? A. No, sir.

Q. These so-called incremental costs on your Defendant's Exhibit 335-A don't represent any return on any investment in facilities for making the energy you are talking about? A. No, they do not.

Q. They don't represent any expense such as depreciation, taxes or insurance? A. No, sir.

Q. It is just the items you have talked about in your prior explanation? A. That is right.

Q. Did you conceive the form of this exhibit yourself?

A. Yes, I did.

Q. You set it all up yourself? A. Yes, I did.

Q. Didn't have any help from anybody?

A. I had help from an accountant in the company to run off the machines and tabulate this.

Q. Did you confer with any consulting engineer?

A. No, sir. I initiated this.

Q. You didn't talk to any consulting engineer as to the validity of it? A. No, sir.

Q. You didn't talk to any consulting engineer or Mr. Royhl?

A. I talked to friends about it, but not as to the validity of it, no.

Q. I would like to ask, Mr. Stokke, this question. There is, in your figures in Defendant's Exhibit 335-A, no reflection of any of the costs or the investment in a new boiler or any of the costs of operation of the new boiler in [Buelah]. Is that correct? A. There is no reference.

Q. I said reflection, not reference.

A. Not that particular boiler or any other boiler.

Q. You just took the coal costs and furnace maintenance costs? A. By stations.

Q. You, I think yesterday, or when you first went on the stand at the beginning of the case, did you say something about being a member of the staff at the Huron office? Did you say you were a member of the joint management staff? A. Yes.

Q. Do you remember the kind of a check you got? Was it drawn by the Northwestern Public Service Co. on a bank? A. The payroll check, you mean?

Q. Yes. A. Yes, I believe it was.

Q. Did you hear Mr. Sickel state that his exhibit pie or chart, 330, did not mean that 78.8% of the power that the northern companies sent to Northwestern came from [Buelah]? A. I haven't seen that chart.

Q. Did you hear Mr. [Sickel's] on the stand when he so testified? A. I heard his testimony.

Q. Didn't he say that that chart was not intended to say that 78.8% of the power that went to Northwestern came from [Buelah]?

A. I don't recall his statement to that effect.

Q. If you will refer to your Exhibit 335-A (R. p. 1755, supra). Will you look at the figures under column 2, under the word "per cent". In working out your averages you assumed that of the power that went to the Northwestern from the northern companies 78.8% in the year 1945, came from [Buelah]? A. No. I didn't assume that.

Q. Where did you get [78.8%] opposite the name [Buelah]? A. Mr. Sickel furnished me those per centages.

Q. Let's get that straight. You show 8,847,500 KWH went from the northern companies to the Northwestern in

the period from January 1, 1945 to October 19, 1945, do you not? A. Yes, that is right.

Q. Do I understand you to say that Mr. Sickel told you 6,971,830 KWH during that period came from [Buelah]?

A. He did not give me those figures that you recited. I computed these figures.

Q. You computed the figures using the per centages he gave you? A. That is right.

Q. What did he tell you those per centages represented?

A. He told me that those per centages represented the per cent of kilowatt hours of the total that came from [Buelah]. 78.8% of the total that was delivered came from [Buelah].

Q. Now, then, did Mr. Sickel give you everyone of these per centages we find in that column marked "per cent" or No. 2? A. Yes, he did.

Q. Did he tell you that where you have a per [centages] for Bismarck, that that was the per centage of power that was delivered to Northwestern which originated at Bismarck? A. That is right.

Q. And he gave you the same statement opposite Mobridge, the per centage represented the per centage of power delivered to Northwestern which originated at Mobridge? A. That is right.

Q. Did you hear Mr. Sickel's testimony the Bismarck unit, generating unit, went in in 1940? Did you hear that?

A. Yes.

Q. You knew that of your own knowledge? A. Yes.

Q. That was 4000 KW generating unit? A. Yes.

Q. You are the man who made up these so-called annual supplements to the interchange capacity payment contract year by year, are you not?

A. Supplements Exhibits B.

Q. Sometimes it is only one and sometimes three, depending on your practice during the years, but you are the man that made the supplements?

A. No. The committee members determined those figures.

Q. Weren't you a member of the committee?

A. I was one of the committee.

Q. And the other man was a man who was a production man in the plant, in one of the plants?

A. For what year are you speaking?

Q. Isn't that true of every year? Let's take the year for 1941. Who was the other member that year, other than yourself? A. Mr. Chesire.

Q. He worked in the Bismarck plant?

A. He was chief engineer, Bismarck plant.

Q. You did [supervision] his operation of the plant, didn't you? As production engineer you supervised Chesire's operation of the plant, did you not?

A. I had general supervision of all power plants.

Q. Not only his but all of the rest?

A. All of them, yes.

Q. Did you see these charts that were prepared by Mr. Sickel, showing what he said was the deficiency of the northern systems in generating capacity over a considerable period of time? You saw those?

A. I saw the chart laying on the table. I haven't examined it.

Q. Did you hear his testimony? A. No.

Q. You recall that after the Bismarck unit went in, instead of giving that unit credit for 4000 KW capacity, it only got 3000 capacity in these annual statements which you used to fix up demands? Is that correct?

A. Your statement is not correct.

Q. You increased the capacity only 3000 from 2250 after putting in a 4000 KW unit? You increased the capacity to only 5250 KW? A. For certain reasons the committee did.

Q. I just wanted to find out about this 4000 which was deducted. When you only give credit for 3000 he deducts 4000. That is what I wanted to straighten out. Now, yesterday, in your exhibit 335-A, under the items that you added to get the cost of coal per kilowatt hour, you made a statement that nowhere in Exhibit 335-A was there any reflection of any expenditures or any capital charges or fixed charges on the new boiler at [Buelay]. That is correct, isn't it? A. No fixed charges, yes.

Q. You didn't in any way take into consideration the investment in the Bismarck boilers in 1938 in preparing your Exhibits 335-A? A. No, I did not.

Q. Nor the new generating capacity installed in 1940, you didn't take that into consideration in preparing 335-A. That is correct, isn't it?

A. With respect to the cost, you mean, here?

Q. The cost or expense of operation, outside of coal and some boiler washing?

A. All I took into consideration is what is shown on this particular sheet.

Q. I was only trying to find out what this uncertain column of miscellaneous meant, and there is nothing in there for this additional investment at Bismarck, is there?

A. That is right.

Q. When you were preparing that exhibit had you heard Mr. White's testimony read at page 647 of his deposition, with reference to what that new turbine, completed, cost, namely $341,979.00? Had you heard his testimony?

A. No, I had not.

Q. Were you there at the time, in charge of these properties when that new turbine went in? A. Oh, yes.

Q. And you were watching expenses and costs?

A. You bet.

Q. You knew what they were? A. Yes, I did.

Q. Were you in court yesterday when Mr. Morrison was asking some questions of Mr. Sickel about changing some lines on the southern end of the North Dakota company properties, where he mentioned the entire cost of changing those lines and building substation as being, in round figures, $227,000? A. I heard the testimony.

Q. All I wanted to find out, Mr. Stokke, is, there is nowhere in 335, 335-A or 335-B, any reflection of any portion of the cost or the expense of operating those lines Mr. Morrison mentioned? A. No, there is not.

Q. Now, if the Dakota companies sold energy to Northwestern at what you call incremental cost, entitled fuel, miscellaneous, and then the total which you show on 335-A, and were credited for line loss which you got from Mr. Sickel— A. That part of the question, yes.

Q. Now, look at 335-A, you show in the column "total", 3.15? A. That is right.

Q. And in column 7, line loss, 4.10. Is that correct?

A. Yes.

Q. You call that incremental cost plus line loss?

A. Total incremental cost plus line loss.

Q. Now, if the Dakota groups sold to Northwestern at incremental cost plus line loss, it rasied the average cost per kilowatt hour to the Dakota companies, didn't it?

Mr. Royhl: Objected to as argumentative. Not proper cross examination.

The Court: I don't know as it is argumentative. He is asking this man's opinion as to the effect of certain figures, and I think he is entitled to an answer. Received subject to objection. A. I don't understand.

Q. In these figures, I will use round figures, but they come essentially from Exhibit 82-10 (R. p. 597, supra). Take the year 1941. The production of the Dakota companies that year was in round figures, 60 million kilowatt hours, wasn't it? Now, will you look at the 1941 figure in the lower portion of 82-10, opposite the year 1941? There is a figure there, total production of Dakota groups, 60 million KWH? A. That is right.

Q. Let's say for ease, so you will understand what I am talking about, the figure 60 million. You take a piece of paper and put these down. Put down 60 million. In order to avoid a lot of odd figures instead of taking Mr. Helmick's exact figure as to average production cost. Let's take 5 mills, which is below that. Multiply the 60 million by 5 mills, and you get $300,000.00, don't you?

A. That is right.

Q. Now, in that year, 82-10, Plaintiff's Exhibit shows 11 million plus sold to Northwestern by the North Dakota companies. Do you see that figure? A. 11 million, yes.

Q. Use 11 million for round figures. Your fuel cost for that year, you said was, plus miscellaneous, was 2.55, or 2½ mills as the cost. Multiply your 11 million—

A. I don't know where you get that figure.

Q. I am looking at 335-A, column 10, 2.55. A. Yes.

Q. Will you multiply 11 million by 2½ mills? You get $27,500.00, don't you? A. 28,000.00.

Q. Alright. If you deduct 28,000 from 300,000, you have $272,000.00. And if you divide that by the remaining kilowatt hours, which was left out of our production that year, namely 49 million, that leaves the cost to us at 5½ mills, doesn't it?

Mr. Royhl: Objected to as incompetent, irrelevant and immaterial, argumentative, uncertain.

The Court: Received subject to objection.

A. The figures we are using here—

Q. Produce that result? A. Produce that result.

Q. Did you understand the question I asked you before? If the Dakota groups sold energy to Northwestern at their incremental cost, it raised the average per KWH cost to the Dakota companies on the remaining KWH which they used [themsevles]? A. No sir.

Mr. Royhl: Same objection.

The Court: Same ruling.

Q. Now, then, will you refer to your Exhibit 335-B, (R. p. 1757 supra). Just a minute. I take it from your answer that you don't agree with my compilation?

A. With your thinking.

Q. Now, will you refer to your 335-B. Will you look at the column 4, which you call incremental fuel cost. Is that average fuel cost for all of the KW produced during the period from January 1, 1945 to October 19, 1945?

A. What particular fuel costs are your referring to?

Q. Look at your Exhibit 335-B? A. I have it.

Q. That is Aberdeen, isn't it? A. Yes.

Q. Now, look at column 4. What figure do you divide by the cost of coal to get 5.45?

A. I did not use that formula.

Q. That is what we want to know. How do you arrive at 5.45?

A. That was determined from performance graphs and data of the unit in Aberdeen plant at that load condition.

Q. You are talking about what unit?

A. The main [unite] in the Aberdeen plant.

Q. That still does not answer the question. What was the main unit? A. 5000 rated kilowatt turbine.

Q. 5000 KW turbine at Aberdeen? A. That is right.

Q. Now tell us how you got the figure of 5.45?

A. I determined that incremental fuel cost from the actual steam consumption rate of that unit, with this turbo generator backed down to take these kilowatts that was delivered in there from the Dakota Public Service Co. and northern companies.

Q. Where are the figures you used? Where are your working figures? A. There was notes of that.

Q. Where are they? A. At Huron.

Q. Where are the original records of the company from which you started to work out this figure, 5.45?

A. They are in here, in my ratings. Rating data.

Q. They have not been in court at any time in this proceeding? A. Oh, no.

Q. And that is the way you got all of the figures in this column 4, on Exhibit 335-B, is it?

A. By my computations of the load of that machine at different load conditions.

Q. Did you follow the same formula you have described as to the figure, 5.45?

A. Down the column for all of the year?

Q. Yes. A. Yes.

Q. Now, do you know what fuel cost at Aberdeen you started with? A. Yes, for each of these years.

Q. What fuel cost per KWH did you start with for the year 1945?

A. Well, I applied the fuel cost per ton and per pound for these computations for the load graphs of that turbine, using the steam consumption to begin with, per kilowatt hour.

Q. What was the figure of fuel you started with, in mills or cents, or whatever it was?

A. I don't have those figures here with me, but I used the actual fuel cost. Cost of coal. Cost of fuel.

Q. You mean by that that is the average per KWH cost in coal for that station, per year?

A. No, I do not mean that.

Q. You have examined these Federal Power Commission No. 1 reports, that are in evidence, showing average fuel cost of the Aberdeen plant, haven't you?

A. I don't recall. I haven't examined them here.

Q. Never examined them. In preparing to testify in this case you did not pay any attention to them? A. Oh, no.

Q. I show you Defendant's Exhibits 274 and 274-A (R. pp. 1281 and 1283, respectively, supra). Do you see that letter to Mr. White, 274, with your signature at the bottom, isn't it? A. I see the letter.

Q. That is your signature? A. Yes.

Q. You say, "The figures in green pencil are coincident 15 minute demand taken at actual times on the integrating meters at various locations throughout the system." I

Defendant's Exhibit 338-A was received in evidence. It is as follows:



wonder if that is not an error. Can you find the original load diagram for the year 1938 in Exhibit 53? This graph which I take out of Plaintiff's Exhibit 53, or this load diagram, that is the same as the one attached to Defendant's Exhibit 274, isn't it? A. Yes.

Q. What I want to get straight in my own mind, is every figure in green on this taken from a meter?

A. Well, I will have to answer that by explanation.

Q. That is what we want to find out?

A. There were meter readings taken. For example, let's check here. There were meter readings taken on each line out of Bismarck night and day; meter readings taken at Mobridge night and day; meter readings taken at Ellendale, night and day; Aberdeen night and day. The green figures at the towns in the graphs are integrated meter readings for those particular towns where we have meters, and meter of power delivered to these respective towns. What goes out on the transmission line is metered in total, and we distribute that total over these areas on the basis of the known demands in these various areas.

Q. What do you mean by known demand?

A. The electrical superintendents take those readings several times a year and they are furnished to the load dispatcher.

Q. So where they are shown in green on the high lines of distribution means they are the results of computations? They are not taken off of the meters?

A. At these particular places in the section of the line they are not. They are allocated.

Q. Now, when you brought in these reports of the Knife River Coal Mining Co. you didn't bring in any of the reports that show years where there were losses to that company, do you?

Q. Did you bring any reports for the years 1942 and 1945? A. The operating reports of Knife River?

Q. You brought in one financial statement for one year which showed a profit that year. I want to know if you have in court the financial statements for the years 1942 and 1945? A. For Knife River?

Q. Yes? A. No, I haven't.

Mr. Royhl: The defendant states to the record that at no time did this witness put in evidence, either as part of

STUDY OF KWH. INPUT INTO DAKOTA PUB. SERVICE CO. AND ITS PREDECESSOR COMPANIES SYSTEM, KWH. DELIVERED ON DAKOTA SYSTEM, KWH. DELIVERED TO N.W.P.S.CO. AND KWH. UNACCOUNTED AND SHOWING RATIO OF EACH TO TOTAL INPUT .

Year	Net Kwh. Input into Dakota System	Kwh. Delivered and Accounted for on Dakota System	Kwh. Delivered to N.W.P.S.Co.	Unaccounted Kwh. on Dakota System	Kwh. in Percent of Total Input: Kwh. Del. N.D. System	Kwh. Del. N.W.P.S. Co.	% Unaccounted for
1930	25,984,812	17,923,026	1,353,095	6,708,691	68.98	5.20	25.82
1931	30,679,675	18,828,187	3,586,309	8,265,179	61.37	11.69	26.94
32	31,358,539	18,807,829	4,491,000	8,059,710	59.98	14.32	25.70
33	32,440,713	18,738,636	5,790,700	7,911,377	57.76	17.85	24.39
34	34,636,514	21,751,864	4,879,020	7,995,630	62.82	14.09	23.09
35	40,700,527	25,599,874	5,876,400	9,224,253	62.90	14.44	22.66
1936	43,064,907	28,996,306	5,108,000	8,960,601	67.33	11.86	20.81
37	46,765,009	30,486,205	6,239,169	10,039,625	65.19	13.34	21.47
38	47,624,005	31,234,189	6,251,670	10,138,146	65.58	13.13	21.29
39	50,923,106	33,259,989	6,699,803	10,963,314	65.31	13.16	21.53
40	54,193,193	35,489,350	7,062,918	11,640,925	65.49	13.03	21.48
1941	62,274,195	37,735,232	11,314,400	13,224,563	60.59	18.17	21.24
42	64,088,610	38,371,734	12,102,000	13,614,876	59.87	18.18	21.25
43	64,675,800	38,421,746	11,621,100	14,632,954	59.41	17.97	22.62
44	66,622,553	41,042,764	10,883,300	14,696,489	61.61	16.33	22.06
/45	56,180,321	34,871,572	8,887,500	12,421,249	62.07	15.82	22.11

/Thru Oct.19

Defendant's Exhibit 338-A.

Filed March 4, 1948
Roy D. Marker
Clerk

Dykstra 4, 33 1-B
307

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the Exhibit 337, or otherwise, any financial report of the Knife River Coal Mining Co.

Redirect Examination: by Mr. Royhl.

Q. Concerning your Exhibit 274, that was showed to you with the green figures and inquired about by counsel. Did you discuss that with Mr. White so that he knew the detail of the diagram, etc.?

A. I discussed those load diagrams with him every year.

Q. With Mr. White? A. With Mr. White.

Q. You explained the figures and the nature of the diagram? A. Yes, that is right.

Q. Counsel has asked you concerning a boiler, I think, and a generator. Where was the boiler?

A. The boiler at Beulah and the turbo generator at Bismarck were two of the items.

Q. Were those instrumentalities taken into consideration by the operating committee during the years following the installation? A. Oh, yes.

Q. They are incorporated in the so-called Exhibit B?

A. They are considered in the report.

Q. Something was asked concerning energy and the percentage figures for Beulah, Bismarck and Mobridge. You did not attempt to identify any specific energy, did you?

A. No.

Q. That is, what you have stated is, that on the transmission line 78% was from Beulah and the other percentages from Bismarck and Mobridge?

A. Of the total that came into Aberdeen, yes.

Q. Onto the transmission line? A. Yes, that is right.

Q. Counsel asked you concerning the rating of the boiler that was installed in 1940. When was the boiler installed that was inquired about? A. At Beulah, in 1937.

Q. When was the generating equipment installed at Bismarck?

A. It was completed in 1940, September, I believe.

Q. Counsel asked you whether or not that was a rated generator of 4000?

A. That was the rating on that turbo generator.

Q. What differentials did the committee make after the installation of that generator in the generating capacity for the station as Bismarck?

A. The committee checked into the ratings on the boilers

in the plant, their steam generating capacity and the steam requirements of the three units in the Bismarck plant, the three turbo generators in the Bismarck plant. We found there was sufficient steam capacity to operate the 1250 unit, No. 2, and the 4000 unit, No. 3, with the steam available in the plant. The No. 1 unit, non-condensing turbine generator, could not be operated along with the other two because there was insufficient steam in the place.

Q. And the installation of the 4000 generator would increase the capacity of the station only 3000?

A. The net result was 3000, yes.

Q. And that was because of insufficient steam?

A. To carry all three units. Yes, that is right.

A. P. LEARNED, being called as a witness by the defendant, and being sworn, testified as follows:

Direct Examination: by Mr. Royhl.

Q. Will you state your name to the record?

A. A. P. Learned.

Q. What is your age? A. 59.

Q. Where do you reside? A. Kansas City, Mo.

Q. What is your occupation?

A. I am a consulting engineer with the firm of Black & Veatch, Kansas City, Mo.

Q. How long have you been with that firm?

A. Since September, 1910, except for about eleven months spent in the United States army in 1918 and 1919.

Q. What is the nature of the work that is handled by this firm of Black & Veatch?

A. Our work covers the design of water, sewer and electrical power systems. Design and derivation work for water; sewage disposal work; installation of power plants. We also handle a great deal of appraisal and rate investigations, and special reports for financial interests and municipalities investigating utilities serving them. Also other special problems and special work, such as some of the special problems now undertaken by the United States government in connection with some of its defense projects.

Q. Are you a member of the firm of Black & Veatch?

Defendant's Exhibit 338-B was received in evidence. It is as follows:

Defendant's Exhibit 338-B.

Summary of Input Into Dakota Public Service Company System and Its Predecessor Companies.

Year	Net Generation on N. P. & L. Co. System (1)	Net Generation on N. D. P. & L. Co. System (2)	Total Generation on Combined System (3)	Received from N. W. P. S. Co. (4)	Total Input in Combined System (5)=Col. 3+4
1930	3,282,959	22,422,553	25,705,512	279,300	25,984,812
1931	2,349,768	27,228,147	29,577,915	1,101,760	30,679,675
32	1,582,873	28,050,786	29,633,659	1,724,880	31,358,539
33	1,226,393	29,630,180	30,856,573	1,584,140	32,440,713
34	2,205,562	30,474,912	32,680,474	1,946,040	34,626,514
35	3,725,338	34,772,029	38,497,367	2,203,160	40,700,527
1936	4,691,944	34,764,503	39,456,447	3,608,460	43,064,907
37	4,635,606	39,539,143	44,174,749	2,590,260	46,765,009
38	4,030,585	41,450,880	45,481,465	2,142,540	47,624,005
39			48,477,898	2,445,208	50,923,106
40			52,192,597	2,000,596	54,193,193
1941			60,893,511	1,380,684	62,274,195
42			63,082,150	1,006,460	64,088,610
43			63,355,860	1,319,940	64,675,800
44			65,193,653	1,428,900	66,622,553
45 (Thru Oct. 19)			54,915,021	1,265,300	56,180,321

Q. Did you prepare the graph, Defendant's Exhibits 338? A. I did.

Q. And the tabulations attached to that graph, which have been marked Exhibit 338-A and 338-B? A. Yes.

Q. Have you made a study of the in-put and deliveries from the Dakota Public Service Co. and predecessors, from 1930 to October, 1945? A. I have.

Q. Is it in exhibit form? A. Yes.

Q. Do you refer to the graph, Exhibit 338, and the tabulations attached thereto, as 338-A and B? A. I do.

Q. What is the source of the data used in these exhibits 338, 338-A and B?

A. No sir.

Q. How many members of the firm are there?

A. Partnership, Mr. Black and Mr. Veatch.

Q. How many employees?

A. At the present time something over 300.

Q. Are they largely engineers? A. Yes.

Q. Are you a registered professional engineer? A. Yes.

Q. If so, where, what state?

A. In Colorado, Kansas, Missouri, Nebraska.

Q. Did you have a university education and did you obtain a degree? A. Yes.

Q. What university and what degree?

A. I attended the University of Kansas and received in 1910 Degree of B. S. in civil engineering. Professional degrees in civil engineering in 1930.

Q. Was that with the same school? A. Yes.

Q. Are you a member of any national professional society?

A. American Society of Civil Engineers; New England Water Works Association; American Water Works Association; American Association of Public Works, and the national professional society, Sigma Psi; ke beta ke.

Q. What has been your work since graduation?

A. My work has included routine work as a field man, then a draftsman, and later a designer. Chief office engineer. Then representative in the field securing new business, letting contracts, supervising resident engineers. My work since 1930 has been largely confined to the study of special problems, more particularly relating to appraisals and rate analysis of public utilities.

Q. Does that include construction and appraisal and design of electrical utilities, etc.?

A. I may have overlooked the fact I acted also as resident engineer. In the early days my work did include resident engineer on water, sewer and electric light work.

Q. You mentioned appraisal work and rate studies and special reports. What are some of the special assignments you have directed for Black & Veatch in this line of work?

A. I have handled for the firm of Black & Veatch the appraisal of industrial plants, including the Pioneer Motor Corporation; Dayton Wright Airplane plant. The General

Vehicle Plant in Long Island City in 1915 for the Aircraft Production Board.

Q. Of the United States?

A. Of the United States government, yes. Other industrial plants that included Turbo Oil Co., Eldorado Oil Co., and part of what is now Sun Ray Oil Co. Also the utilities and structures of the Jay Harper Ordnance Works. My experience of water works appraisal work has covered work at Richmond and Thurston, Ky.; Bartlesville, Oklahoma; Jefferson City, Mo.; Hutchinson, Mo.; Wichita, Kas. In cost appraisal it has covered the system at Monroe, Michigan, and system of gas companies in Dallas, in Mexico, Texas, Oklahoma, Arkansas. My electrical work has included the rate analysis as well as appraisals. The appraisals and rate analysis covered Garden City, Kas.; Wellington, Kas.; Lincoln, Nebraska; Cleveland, Ohio; Cincinnati, Ohio. And straight appraisal work has covered such properties as Dakota Electric Co., Tampa Electric Co., Tampa, Fla., Houston Light & Power Co., Houston, Texas, and a number of others. I have also handled special reports of the St. Louis, Mo. Electric Utilities, for the information of the bankers and a special study of the Commonwealth Edison Co. of Chicago for the Public Utilities Committee of the council of the city of Chicago. In addition to that I acted as principal assistant to Mr. Black in the appraisal for the Corporation Commission of Kansas of the Cities Service Co., in their systems in five states, and as his principal assistant in connection with the appraisal of the East Ohio Gas Co. in Ohio and West Virginia. I believe that covers the major projects.

Q. Have you appeared in courts or regulatory commissions? If so, state some of those appearances.

A. I have appeared before the Corporation Commission of Kansas; the Public Utility Commission of Ohio; the Public Utility Commission of West Virginia; before the Commission in Missouri; before the United States Court in Ft. Worth, Texas, and before the Minnesota Warehouse Commission, on street railway matter at Minneapolis.

Defendant's Exhibit 338 was received in evidence. It is as follows:

A. The source of this information is the operating reports for the Northern Power & Light Co. and the North Dakota Power & Light Co. for the period from 1930 to 1938, inclusive. And the Federal Power Commission Form No. 1 for the period from 1939 to and through October 19, 1945.

Q. And those are the basis for these exhibits, are they?

A. Yes.

Q. Turn to the second page of that exhibit which I think has been marked 338-B. I will ask you what that is?

A. That is the summary of the in-put into the Dakota Public Service system, and its predecessor companies.

Q. For the years shown in that tabulation?

A. For the years 1930 through October 19, 1945.

Q. When you say in-put, what do you mean?

A. I mean the net generation introduced into the system plus the purchased power introduced into the system. It gives the total in-put into the system for the purpose of transmission and distribution.

Q. That covers both sales from the transmission and to the system customers?

A. Oh, yes. The total in-put has to include both.

Q. Now, column 1 and column 2, they show only 1938. Why is that?

A. That is because the Northern Power & Light Co., shown in column 1, and North Dakota Power & Light Co., shown in column 2, became one system in, I think, July 1, 1939, and the annual report was carried as a combined report for 1938, and therefore the total generation for the combined system is shown in column 3 and covers what had previously been the contributions by the separate companies, now one company or one generation.

Q. What is column 3, of this [exhibits] 338-B?

A. Column 3 is the deliveries of energy into the North Dakota systems, by the Northwestern Public Service Co. for the respective years.

Q. I am speaking of column 3?

A. Column 3 is total generation of the Dakota Public Service Co. system and its predecessor companies systems.

Q. It shows both the generation of Northern and North Dakota up until 1938? A. Yes.

Q. Merely an addition of 1 and 2? A. That is correct.

Q. After 1938 it is the generation of the successor company, the Dakota Public Service Co.? A. That is correct.

Q. What is column 4?

A. Column 4 is the energy received from the Northwestern Public Service Co.

Q. That is the energy sent up to the Dakota companies by the Northwestern? A. That is correct.

Q. For the years shown in the study? A. Yes.

Q. What is column 5?

A. Column 5 is the total in-put into the combined system, or the sum of columns 3 and 4, for the respective years, 1930 through October 19, 1945.

Q. Will you now turn to the sheet marked 338-A, and tell us what the net kilowatt in-put into the Dakota system is, and where derived?

A. The net kilowatt in-put into the Dakota systems is simply the sum totals as are shown in column 5, Exhibit 338-B.

Q. Referring again to 338-A, what is the column headed "KWH delivered and accounted for on the Dakota System"?

A. That is the total of the kilowatt hours delivered on the Dakota system, which was sold or used by the company, or free energy. In other words, it is the amount of energy which was accounted for in deliveries of the Dakota system itself.

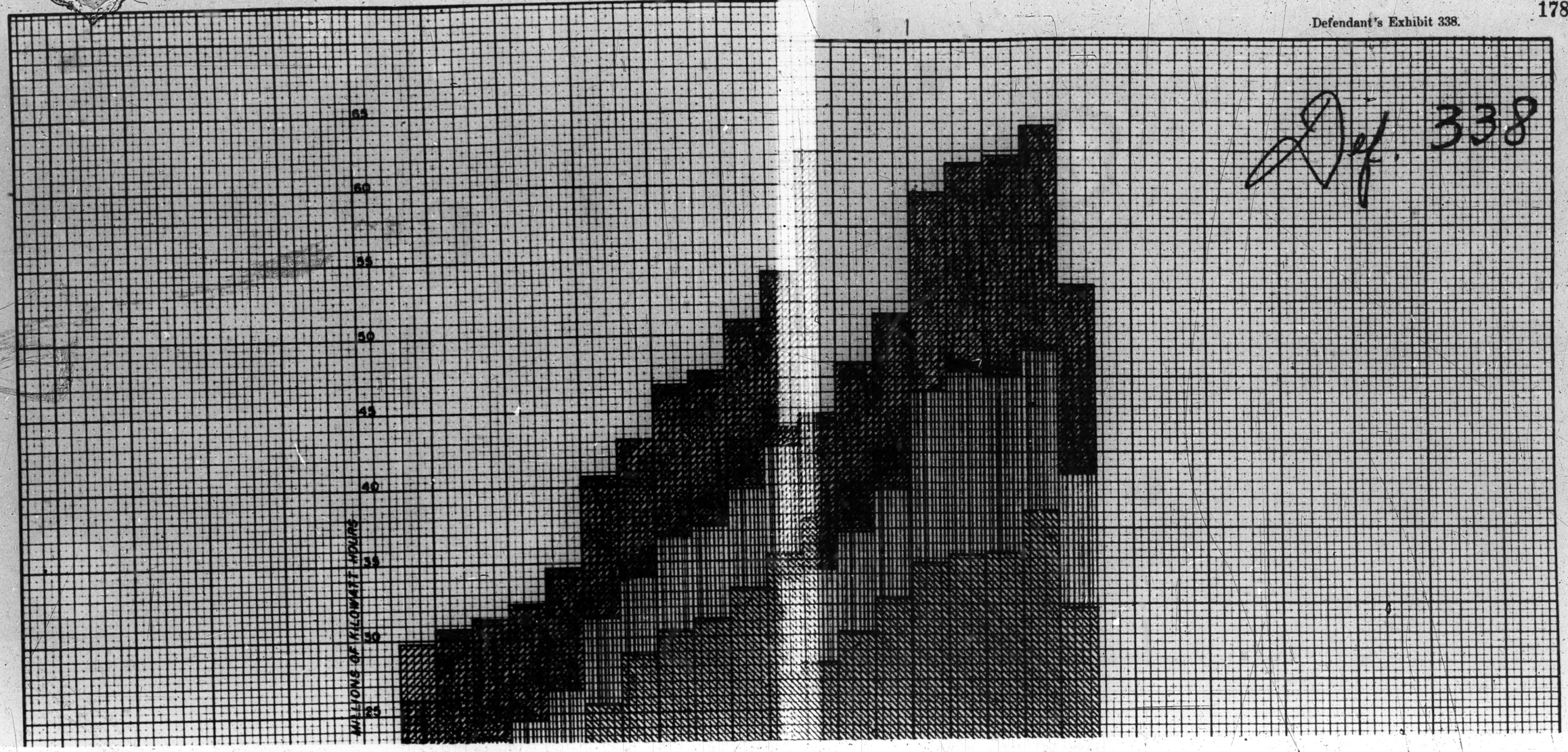
Q. The next column is headed "Kilowatts delivered to Northwestern". What is that?

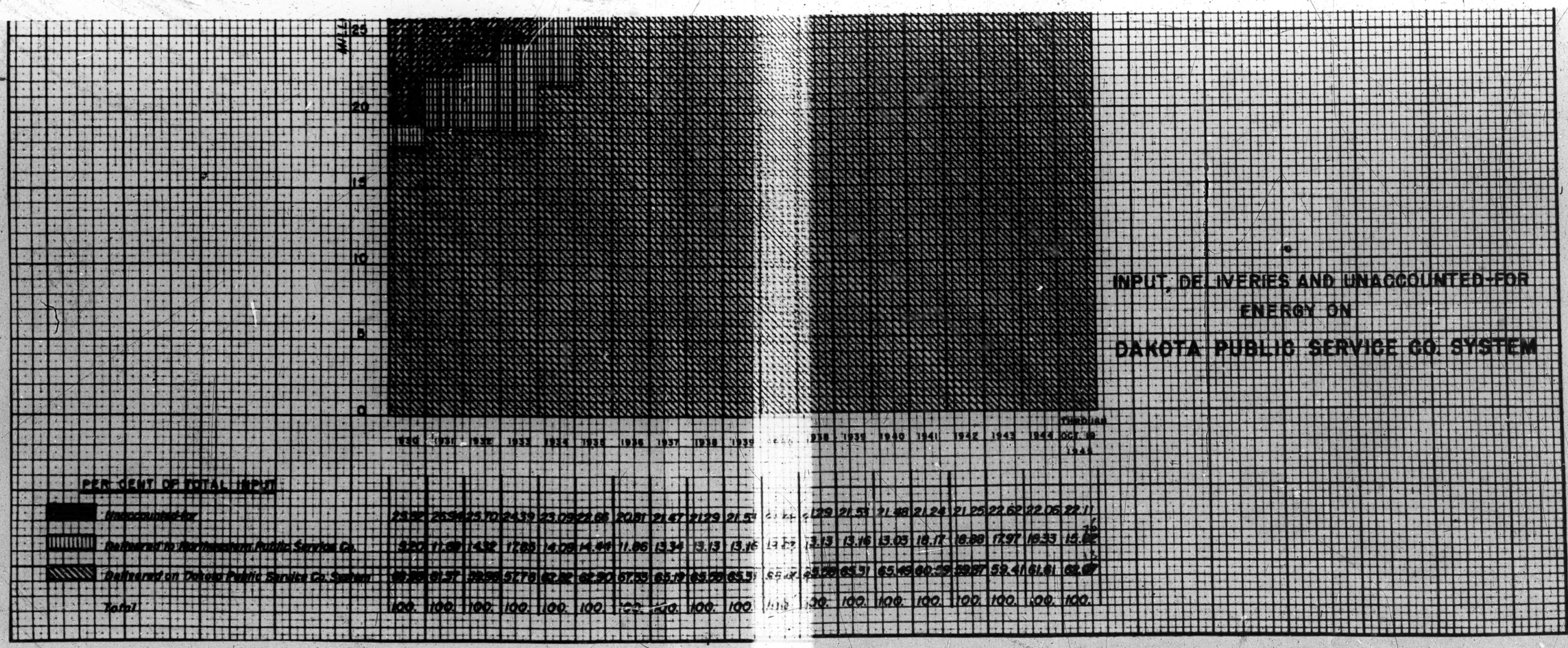
A. That is the gross deliveries to Northwestern which were delivered either through the Aberdeen or Gettysburg bus.

Q. In the next column "Unaccounted for", what do you mean by that?

A. That is the energy which is unaccounted for by deliveries on the system. Namely, it is the difference between the net KWH in-put, the kilowatt hour in-put, less the deliveries on its own system which are accounted for, and its deliveries to Northwestern. This is energy which is not recovered and is lost. It is commonly known as loss in transmission or distribution.

Def. 338


MILLIONS OF KILOWATT HOURS
65
60
55
50
45
40
35
30
25


MILLIONS OF KILOWATT HOURS
25
20
15
10
5
0
1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 THROUGH OCT. 1945
INPUT, DELIVERIES AND UNACCOUNTED-FOR ENERGY ON DAKOTA PUBLIC SERVICE CO. SYSTEM
PER CENT OF TOTAL INPUT
Unaccounted for 23.92 20.58 25.70 24.39 23.09 22.68 20.81 21.47 21.29 21.52 21.79 21.53 21.48 21.24 21.25 22.62 22.06 22.11
Delivered to Northwestern Public Service Co. 3.20 11.69 14.32 17.89 14.08 14.66 11.86 13.34 13.13 13.16 13.13 13.16 13.05 16.17 16.88 17.97 19.33 16.82
Delivered on Dakota Public Service Co. System 72.88 67.73 59.98 57.72 62.82 62.70 67.33 65.19 65.58 65.32 65.08 65.31 65.47 62.59 60.87 59.41 58.61 61.07
Total 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100. 100.

Q. That is merely your computation from columns 1, 2, and 3? A. Yes.

Q. What is intended in the next column to the right?

A. The next column to the right is one of three per centage columns. I have expressed the kilowatt hours delivered and accounted for on the Dakota system, the kilowatt hours delivered to Northwestern, and the unaccounted for kilowatt hours on the Dakota system as a percent of the total in-put. In the first column headed "KWH delivered to ND System" I show the per centage of the total in-put by years that those deliveries were of the total in-put. In the next column headed "Kilowatt Hours delivered Northwestern" I show in per centage the total in-put of deliveries to that company. And in the last column to the right of the page, the unaccounted for is expressed as a per cent of the total in-put for the respective years. The sum of the per centage of the three columns makes 100% of the total in-put.

Q. What is the range in per cent on deliveries to the Dakota system, varied total, from 1930 to October 19, 1945?

A. They vary from 57 to 76.

Q. Are these Exhibits 338, 338-A and 338-B, true and correct reflections of the records and files that you have mentioned? A. Yes.

Q. And insofar as computations are made thereon, are those computations true and correct? A. Yes.

Q. Generally speaking, and referring to Defendant's Exhibit 338, what is the legend at the bottom?

A. In-put, deliveries and unaccounted for energy of Dakota Public Service Co.

Q. In per centages for the years shown? A. Yes.

Q. Are those per centages taken from the tabulations, 338-A and 338-B? A. Yes.

By Mr. Fellows:

Q. From what record did you take the figures in the first column of 338-A?

A. They come—if you will turn to page 338-B. I explained in connection with 338-B those figures come from the operating reports through 1938, and from the Federal

Power Commission reports from 1939 through October 19, 1945.

Q. You took those, yourself, direct from those reports, did you? A. Yes.

Q. Was that likewise true of the figures in column 2? A. Yes.

Q. And all of the columns up to the last three columns on 338-A? A. Yes.

Q. And the last three columns are your computations from those figures? A. Yes.

By Mr. Royhl:

Q. Counsel asked you whether or not the last three columns were your computations on 338-A. I think you stated yes? A. Yes.

Q. How about the column to the left of those three, which I think would be the column entitled "Unaccounted for KW of the Dakota system"?

A. That comes from the record.

Q. Is that a matter of record, or is that a matter of computation from the other three columns?

A. It is a matter of record.

Q. What is the range in per centage of deliveries to Northwestern? A. It varies from 5.2% to 18.18%.

Q. Of what?

A. Of the total in-put into the system for the respective years.

Q. What is the range in per centages of the unaccounted for energy?

A. It varies from 20.81% to 26.94%, of the total in-put into the system for the respective years.

Q. Referring to the graph, Exhibit 338. Is this data the same as shown on the typewritten tabulation, 338-A and B?

A. Yes, this is merely visual portrayal of the same information.

Q. What does the red portion represent on 338?

A. The unaccounted for energy.

Q. Does the yellow show the deliveries to Northwestern?

A. Yes.

Q. What does the blue refer to?

A. The deliveries on the Dakota Public Service Co.'s own system.

Q. Is the line at the top of the red figures the total in-put into the Dakota system? A. Yes.

Q. That is, then, referring to the year 1945, that would be some 56 million?

A. Yes. That is but a part of the year. Up to October 19, 1945.

Q. Now, the figures that appear to the left of the colored section, what do those refer to?

A. They refer to millions of kilowatt hours.

Q. And if you extend that to the right, through the graph, it indicates the amount, does it? A. Yes.

Q. Am I correct in the statement that the blue shows deliveries on [Dakot's] own system in 1930, of approximately 17 million? A. Yes.

Q. That is, that is what they sold to their customers or used on the system?

A. Yes. That was sales, company use and free energy if there was any.

Q. What is the unaccounted for in per centage of total in-put in 1930 and in 1945?

A. It is 25.82% of total in-put into the system in 1930 and 22.11% through October 19, 1945.

Q. 1944, that is a full year. Will you indicate as to that year?

A. The unaccounted for energy in 1944 was 22.06%, of the total in-put into the system that year.

Q. Did that decrease as you go back through the years to 1936? A. Yes.

Q. What was it in 1936? A. 20.81% of the total in-put.

Q. In the graphs there, do the kilowatt hours unaccounted for include both transmission and distribution losses? A. Yes.

Q. Did you hear Mr. Sickel testify? A. Yes.

Q. Did you hear Mr. Sickel say that his determination of transmission losses for the years he used were in excess of the losses you show percentagewise for the year 1941 through 1945? A. Yes.

Q. How can that be?

A. A certain amount of energy is delivered direct into

the distribution system and the losses on the distribution system are lost before they are on the transmission system.

Q. Can you estimate the approximate relative losses?

A. I did. I made a study of that in order to sort of test out the results which Mr. Sickel had as to transmission losses.

Q. Have you an opinion on the accuracy of Mr. Sickel's results on losses? A. Yes.

Q. Did you form an opinion of Mr. Sickel's results on losses from your independent studies of the records you have mentioned? A. Yes.

Q. And do you know whether or not the result shown by Mr. Sickel in his analysis of losses is right or wrong?

A. Yes.

Q. Have you stated the method you used to analyze Mr. Sickel's results? A. No sir.

Q. What method did you use?

A. I took the gross unaccounted for energy which I found for the respective years on the Dakota system. I deducted from that the amount of energy shown in Mr. Sickel's exhibit and that gave me the unaccounted for energy which I attribute to distribution. I have in my exhibit the kilowatt hours delivered and accounted for on the Dakota Public Service Co.'s own system. I added that delivery to the unaccounted for, which I arrived at by the deduction of Mr. Sickel's transmission unaccounted for from my graphs, which gave me the total introduced into the distribution system. I then divided the unaccounted for in the distribution system by the gross introduced into the distribution system, and found the distribution losses to be in 1941, 10.07%; in 1942, 6.5%, in 1943—

Mr. Fellows: That is not responsive. We move to strike it out.

The Court: It may go out.

Q. Will you state the results you obtained from the method you have just narrated?

A. The distribution losses in per cent of total in-put into the distribution system in 1941 were 10.07%; in 1942,

6.5%; in 1943, 8.57%; in 1944, 8.03%; and in the period up to October 19, 1945, 10.16%. This latter figure is possibly slightly off because, as I have written it I have the complete unaccounted for for the entire period through October 19, 1945, and Mr. Sickel's per cent did not include the last nineteen days, so the 10.16 may be slightly high on that account.

Q. You include 19 more days in 1945 than Mr. Sickel did? A. I did in my gross unaccounted for.

Mr. Benson: Will you tell us, Mr. Royhl, what he said this percentage ranging from 10 to something? They were what?

Mr. Royhl: On distribution, on the system's own distribution, the North Dakota companies.

Mr. Benson: The distribution system or Dakota companies' property?

The Witness: Yes.

Q. Now, do you know, Mr. Learned, whether or not these results that you have recited, losses on distribution on the Dakota companies' own system, whether or not they are true and correct? A. Yes.

Q. Are they?

By Mr. Fellows:

Q. How do you know [they]?

A. I would like to explain that because I tested their reasonableness—

Q. Let me get at it a different way, to save a speech from you. When you say you know they are accurate you are testifying from information you received from Sickel's and Sickel's reports? A. Yes.

Mr. Fellows: We object to the question as calling for hearsay; not the best [eividence]; the witness is incompetent; the evidence is incompetent; no proper foundation laid.

The Court: Sustained.

By Mr. Royhl:

Q. Do you know whether or not losses are different on distributions by the system to its own customers, from the [lossed] upon the transmission lines? A. Usually, yes.

Q. What is the fact concerning that?

Mr. Fellows: Just a minute. You got this same information from the same source as you did that which I inquired about a [minutes] ago?

The Witness: No.

Mr. Fellows: Where did you get this information?

The Witness: My general knowledge of distribution losses and transmission losses.

Mr. Fellows: Where?

The Witness: As my many studies [or] properties.

Mr. Fellows: On systems all over the country except this system?

The Witness: Yes.

Mr. Fellows: Objected to as incompetent; no proper foundation laid.

The Court: I think that objection is well taken. We are not interested in anything but what the losses on this system are. The losses on this system may be a great deal more than they are on some other system. I think the objection is well taken. Sustained.

By Mr. Royhl:

Q. Did your study include a study of losses upon the distribution on these systems? A. Only by this deduction.

Mr. Fellows: From Sickel's?

The Witness: Yes.

Q. Do you know whether or not a varying of loads effects losses upon transmission lines, that is, in relation to loads upon transmission lines? A. Yes.

Q. What is the fact concerning that?

A. In a specific line of specific size, if a larger amount of energy, that is, if the rate of delivery is higher the losses will be greater. That is, if you were to send energy over the line at the rate of 100 kilowatt hours per hour, the losses would be greater if you sent 200 kilowatt hours over the same line.

Q. In other words, if deliveries are being made to the defendant company by the Dakota companies during off peak times, would the loss be as great as it would be if those deliveries were attempted in on peak times?

A. Probably they would be less in off peak than they would be in on peak.

Q. You have referred in answer to one of counsel's questions to a so-called study made by Mr. Sickel. Do you refer to Defendant's Exhibits 331 and 331-A (R. pp. 1695 and 1697 supra)? A. Yes.

Q. Now, with respect to Exhibit 331, I observe that there is a five year period average loss on transmission of 23.1%. Does this graph of yours, Defendant's Exhibit 338, show any average for a five year period? A. No, sir.

Q. I observe that the Exhibit 331, this Sickel study, shows loss for the year 1945 of 23.1. You say that only is to October 1 of that year?

A. I think that is right. Just let me refer to the exhibit. It is to October 1 of that year, yes.

Q. And your study to and including October 19th?

A. Yes.

Q. What does your study show of the 1945 loss?

A. Mine is 22.11% because mine is all losses on the system as expressed in per cent of the total in-put into the system.

Q. Is that true, comparatively, of the other years shown in the Sickel study and in your study, 338?

A. Yes.

Q. Now, let me briefly refer to your own Exhibit 338 again before we leave it. The graph which is colored in blue shows by years which are designated at the bottom of the blue, the energy that was delivered on the Dakota system? A. Yes.

Q. You mean that was actually sold and accounted for? A. Yes.

Q. I observe on the legend at the bottom of [Defendant's] Exhibit 338, certain percentages which are extended below your tabulation of years. Have you stated to what that refers? A. Yes.

Q. You have already stated concerning that, have you? A. Yes.

Q. Referring again, did any part of that data, was any part of that data in those exhibits taken from the Sickel set-up? A. No sir.

Q. Now, in the electric utilities business, what is meant by a power pool?

A. A power pool is an arrangement of operations between one or more systems by which the power generating system facilities are pooled and operated as a single system, getting the benefits of the installed capacity for the various members of the pool. This operation results in a saving over-all in the necessity of the amount of generating equipment required and in a saving in operation costs.

Q. Will you explain in what way there is a savings in generation equipment?

A. If the companies are to be separated it is necessary in order to have a firm system within itself that there be sufficient excess or spare capacity that the peak load could be carried if the largest generating unit of the particular system were out of commission, or shut down. When you join together one or more systems the system is considered firm if there is sufficient excess or spare capacity so that the peak of the combined systems could be met if the single largest unit in the group of properties were out of commission.

Q. Have you made a study and are you familiar with the interchange capacity contracts which are exhibits to

and attached to Plaintiff's Complaint as Exhibits C, E and F? A. Yes sir.

Q. Have you made a study of the operation of the interchange capacity contracts as involved in this litigation? A. Yes.

Defendant's Exhibit 339 was received in evidence. It is as follows:

Def. E. 339

TABULATION OF OPERATION OF INTERCHANGE CAPACITY CONTRACTS (POOLING OF GENERATING FACILITIES) DAKOTA PUBLIC SERVICE COMPANY AND NORTHWESTERN PUBLIC SERVICE COMPANY

	1938	1939	Jan. 1 to Aug. 31 1940	Sept. 1 to Dec. 31 1940	1941	1942	1943	1944	Thru Oct.19 1945
(1) Company Generating Capacity in Kilowatts									
Dakota Public Service Co.			10,955	13,955	13,955	13,955	13,955	13,955	13,955
Northwestern Public Service Co.	19,485	19,310	19,310	19,310	20,290	20,290	20,290	21,790	20,940
North Dakota Power & Light Co.	9,120	9,130							
Northern Power & Light Co.	1,850	1,775							
Total	30,455	30,265	30,265	33,265	34,245	34,245	34,245	35,745	34,895
(2) Company System Maximum Demand in Kilowatts (Interconnected System Maximum Demand)									
Dakota Public Service Co.			11,451	11,451	11,930	12,850	11,680	11,770	13,230
Northwestern Public Service Co.	13,915	15,150	16,269	16,269	16,681	15,990	14,240	14,260	16,180
North Dakota Power & Light Co.	7,140	7,225							
Northern Power & Light Co.	2,800	3,189							
Total	23,855	25,564	27,720	27,720	28,611	28,840	25,920	26,030	29,410
(3) Company Reserve Capacity in Kilowatts									
Dakota Public Service Co.			- 496	2,504	2,025	1,105	2,275	2,185	725
Northwestern Public Service Co.	5,570	4,160	3,041	3,041	3,609	4,300	6,050	7,530	4,760
North Dakota Power & Light Co.	1,980	1,965							
Northern Power & Light Co.	- 950	- 1,414							
Total	6,600	4,701	2,545	5,545	5,634	5,405	8,325	9,715	5,485
(4) Company System Maximum Demand in Percent of Total Maximum Demand									
Dakota Public Service Co.			41.310	41.310	41.697	44.556	45.062	45.217	44.985
Northwestern Public Service Co.	58.331	59.263	58.690	58.690	58.303	55.444	54.938	54.783	55.015
North Dakota Power & Light Co.	29.931	28.263							
Northern Power & Light Co.	11.738	12.474							
Total	100.000	100.000	100.000	100.000	100.000	100.000	100.000	100.000	100.000
(5) Comparison of Allocated Portion of Total Generating Capacity and Installed Capacity of Respective Companies									
Dakota Public Service Co.									
Allocated Capacity			12,503	13,742	14,279	15,258	15,431	16,163	15,697
Installed Capacity			10,955	13,955	13,955	13,955	13,955	13,955	13,955
Deficiency of Reserve Capacity			1,548		324	1,303	1,476	2,208	1,742
Excess of Reserve Capacity				213					
Northwestern Public Service Co.									
Allocated Capacity	17,765	17,936	17,762	19,523	19,966	18,987	18,814	19,582	19,198
Installed Capacity	19,485	19,310	19,310	19,310					
Deficiency of Reserve Capacity				213					
Excess of Reserve Capacity	1,720	1,374	1,548		324	1,303	1,476	2,208	1,742

NOTE:
LOWER HALF THIS PAGE NEXT FRAME

Defendant's Exhibits 340 and 341 were received in evidence. They constitute the Annual Supplements to the 1938 Interchange Capacity Agreement and are also known as the Exhibits "B", "C" and "D" respectively. They set forth the same type of information for the calendar years 1938 and 1939 as that contained in the Annual Supplements included in Plaintiff's Exhibit 31 (R. p. 301 supra).

Q. What has been the source of that study?

A. The principal source of study was the supplement, I think known as Exhibit D, filed by the operating committee of the joint companies, forming the basis for the interchange capacity charges for the several years during the operation of the contract. That has been the principal source. Some of the data on it has reference to load diagrams.

Q. Is the paper marked Defendant's Exhibit 339 that study that you made? A. Yes.

Q. Have you completed your statement as to what this study is predicated upon, or the source of it? A. Yes.

Q. Is your [studay], Defendant's Exhibit 339, taken from those exhibits that you hold in your hand?

A. A considerable part of it is, yes.

Q. What isn't taken from those exhibits, does that constitute computations by yourself? A. Yes.

Q. Does this Exhibit 339 reflect a true and accurate computation of those figures? A. Yes.

Q. And tabulation of those figures? A. Yes.

Q. Now, referring to Exhibit 339; will you [explaint] the column across the top of the page with the numeral (1)?

A. (1) is the company generating capacity in kilowatts for the Dakota Public Service Co. and Northwestern, or North Dakota Power & Light and Northern Power & Light, for the respective terms in which the supplement to the interchange capacity contract as determined by the operating committee applied. All these figures under each column are the total in kilowatt hours as established by that committee in its contracts, used in connection with the determination of the deficiency or excess of the reserve

capacity of the respective companies. These data are shown for the respective years in the exhibits listed. Each of these yearly reports by the operating committee have their sheets numbered by a letter designation, such as "B", for a number of the later years, and for some of the prior years there was B1, B2, B3, B4, C and D. The information in this portion (1) occurs on different sheets at different years. For instance, 1938, the data can be found on B4. 1939, two readings in 1940 and 1941, on Page D. And the readings for 1942, 1943, 1944 and 1945, on sheet B of those exhibits or contracts.

Q. Subdivision (1) for the years shown at the top of the page refer to the several generating capacities of the interconnecting companies? A. It does.

Q. What does the word "Total" and the figures to the right thereof, refer to?

A. The total of the generating capacity in kilowatts of the interconnected companies.

Q. Of the combined systems? A. Yes.

Q. Now, referring to (2). Will you explain that?

A. (2) is company system maximum demand in kilowatts of the interconnected system at the time of the coincidental system peak, and is taken from these several exhibits in the report of the committee on operations and is given for the four companies involved through the period 1938 to 1945.

Q. Does that show the demand of the several companies in the combined system as of the years shown?

A. The peaks were determined in the prior years and applied to the year at the head of the column.

Q. That was under the contract? A. Yes.

Q. And those reflect the prior year's demand? A. Yes.

Q. I notice in the years 1938 and 1939 you show the North Dakota Power & Light Co. and Northern Power & Light Co., and those demands are items by themselves?

A. Yes.

Q. Including, of course, the defendant company? A. Yes.

Q. What does the word "Total" following that refer to?

A. That refers to the total of the several company system maximum demands.

Q. That then constituted for the year shown the maximum demand in kilowatts of the combined system?

A. Yes, the coincidental peak.

Q. Now, the subdivision there that is indicated at (3) on the left for the years shown. What do they refer to?

A. That refers to the company's reserve capacity in kilowatts, and reserve capacity is the difference between the generating capacity in kilowatts and the company system maximum demand for the respective companies.

Q. Now, to clarify that and applying it to the Northwestern, that company's generating capacity in subdivision (1) is 19,485? A. Yes.

Q. And you deduct from that the figure shown in subdivision (2) and the company system maximum demand for the year, Northwestern, 13,915? A. Yes.

Q. In deducting that figure, No. 2 from No. 1, do you get the result shown in subdivision (3), 5570? A. Yes.

Q. And that reflects what?

A. The company's reserve capacity in kilowatts.

Q. Is the same thing true of the other companies specifically named in subdivisions 1, 2 and 3? A. Yes.

Q. What is meant by the word "Total" and the figures opposite the word "Total" in subdivision (3)?

A. It is the total reserve capacity of the interconnected companies.

Q. What is meant by subdivision (4)?

A. (4) is a calculation which I made and is simply the companies system demand expressed as a per cent of the interconnected demand. That is, in (2), each item in (2) for instance, under the column 1938, 13,915, divided by the total in (2) 23,855, and that gives the results in (4) 58.331.

Q. Then the defendant company's system demand in per cent for the year 1938 was 58.331%?

A. Of the total coincidental system demand.

Q. And that is true of the other companies? A. Yes.

Q. I observe that as applied to Northern Power & Light Co., they had a minus 950 in subdivision (3). What does that indicate?

A. That means a shortage of capacity to meet their own demand.

Q. That is, they actually had larger demand at coincidental peak than what they had capacity for? A. Yes.

Q. Their demand exceeded their capacity by 950 KWH?

A. Yes.

Q. And that appears also in the column for 1939 in the amount of 1414? A. Yes.

Q. And that is arrived at in the same way? A. Yes.

Q. What is set forth and expressed by the column (5)?

A. That is a comparison of the allocated portion of the total generating capacity and the installed capacity of the respective companies which gives the net results by which one can determine the deficiency or excess of reserve capacity of each particular company.

Q. For the years shown at the top of the page? A. Yes.

Q. Now, as applied to Northwestern Public Service Co., the defendant, what does that show for the year 1938?

A. In 1938 that shows 1720. If I might explain that, that differs 20 kilowatts with the calculation carried on the operating committee's report, and that results from a carrying out of percentage in my calculation in (4) to a greater length in percentage, and it shifts the 20 kilowatts. That part is changed from what shows in these exhibits here.

Q. You show it 20 KW more?

A. I show it more by these added—

Q. Applying it then, they collected only for 1700 and according to your figures they should have collected for 1720?

A. Carried out apparently as far as was carried through the rest of the years, yes.

Q. I notice that you determined there in subdivision (5) that the defendant company had an excess or reserve capacity of 1720? A. Yes.

Q. At that time the combined system included this defendant and also the North Dakota Power & Light Co. and Northern Power & Light Co.? A. Yes.

Q. What was the capacity of North Dakota Power & Light Co. as shown by this tabulation?

A. My tabulation shows an excess or reserve capacity of 5. However, the exhibit shows it as the same. There being no reserve capacity.

Q. Shows a balance? A. Yes.

Q. In other words, the North Dakota Power & Light Co. for the year 1938 would have no money coming and would owe no money? A. Yes.

Q. Under the operating committee's report? A. Yes.

Q. Now, applying it to Northern Power & Light Co. for the year 1938, what is shown by this Exhibit 339?

A. It shows in 1938 a deficiency of Northern Power & Light Co. of 1725, which, as I stated before, was due wholly to the difference in percentage dropping point. Came out 1700 in the committee's report.

Q. Then, under that, the Northern Power & Light paid to the defendant for 1700 deficiency of reserve capacity under the combined system? A. Yes.

Q. Do you show on this list the date of maximum demand for the combined systems?

A. Yes. That is shown under (7), as recorded by the committee having this determination in charge.

Q. The operating committee? A. Yes.

Q. What is meant by this sub-division (6)?

A. (6) is a development resulting from the contract of 1941.

Q. That is Exhibit F under the complaint?

A. Yes, I believe that is the correct number. In that contract it provided that the reserve capacity that a company could have or be charged for in case of deficiency, that its total could not exceed one fourth of the peak load. That was operative in 1943 and 1944. If you will note under (5) the results, if that clause had not been in effect, would have increased the amount chargeable to Dakota Public Service Co. in 1943 from 645 to 1476, and in 1944, from 757 to 2208.

Q. That is, if it had not been for this 25% limitation which appears in the 1941 contract, the Dakota company would have paid for 1476 in 1943 instead of 645? A. Yes.

Q. And in the year 1944 would have paid for 2208 KW instead of 757? A. Yes.

Q. Now, going back again to sub-division (5) I notice under Northern Power & Light Co. you have an allocated capacity of 3575. Where do you get that figure, for 1938?

A. That is my calculating, taking the per centage shown in (4).

Q. 11.738 for Northern Power & Light Co.?

A. Yes. Multiplying it by 30455, or the gross capacity of the system.

Q. That figure is shown as the total in sub-division (1) of the generating capacity? A. That is correct.

Q. And that 11.738%, 30755 is designated as allocated capacity?

A. That is by my calculation. That is the one that differs with the one that the committee filed, which is 3550 due to extended per centages.

Q. And the installed capacity as 1850, that is the same figure that appears in sub-division (1) opposite Northern Power & Light? A. Yes. Its own generating capacity.

Q. Its own generating capacity on its own system?

A. Yes.

Q. Now, sub-division (8). Just state generally what that refers to?

A. Sub-division (8) shows annual charges or amount paid for deficiency of reserve capacity at $13.20 per year per kilowatt of reserve capacity, and as stated before, in the case of 1938, 1700 times $13.20, gives us $22,440. I want to call your attention to the column 1939 under (8). I have Northern Power & Light Co. and North Dakota Power & Light Co. $8263.20, which is the figure called for in D of the exhibit, but those companies were merged in that year, and this is the total had it gone through the entire year. Therefore, payments were probably cut off at that time, after it shows on the exhibit.

Q. Then, as I understand it, going back to the year 1939, as shown by sub-division (5), Northern Power & Light Co. had a deficiency of capacity of 2000 KW?

A. Yes.

Q. And both of the other systems, the defendant and the North Dakota Power & Light Co. had an excess of reserve capacity, did they? A. Yes.

Q. And as a result thereof did the Northern Power & Light Co. pay to the North Dakota Power & Light Co. $8263.20?

A. Had they been separate companies through the year that would have been the result. However, they were merged, I think July 1 of that year, consequently I think that was discontinued.

Q. And you separated that according to computations?

A. This $8263.20 would have been the result had it lasted the entire year as separate companies.

Q. And the Northern Power & Light Co. under that computation paid the defendant, $18,136.80? A. Yes.

Q. After 1939 you then show the Dakota companies as a merged company, the Dakota Public Service Co.?

A. Yes.

Q. Referring to the paragraph, sub-division (9). To what do you refer there?

A. That is use of reserve capacity at the time of the coincident peak, Dakota Public Service Co. That simply shows the in-put into the Dakota Public Service Co., and what was flowing from them into the Northwestern in case of a minus amount at the time of the coincidental peak demand of the system.

Q. Will you explain that more fully?

A. Take the last year, through October 19, 1945. You will note, under 5, the Dakota Public Service Co. 1742, an underlined figure.

Q. That is, they had a deficiency of reserve capacity of 1742?

A. Yes, that is, on which they were billed. It happens at the time of the peak demand that they drew 1922 kilowatts from this company. The same, by the way, wherever you see a figure in any column which is underlined as a deficiency, that is the figure that was used in scheduling the amounts of payments for the periods shown. Now, in 1944 they only had to pay for 25% of their peak load based on deficiency, or rather, they didn't have an excess capacity in excess of 25% of their peak load, and in order to have that, they paid for 757, and this shows at the time of the coincident peak load of that year, they drew 1510. Now, in that connection you note that the peak governing in 1944 was the peak of 1943 and, of course, when this occurred they were re-establishing a basis for the subsequent year's contract. It shows how these estimates of power were established by the individual companies. In the case of 1943 they paid for 645, and at the time of the coincident peak they didn't [used] but 70. In the case of 1942 they paid on the basis of 1303, and they were deriving power sold on the basis of 150 kilowatts at that time. In the case of 1941, the Dakota Public Service Co. paid for 324, and at the time of the coincident peak demand they received 320. In the case of 1940, the Northwestern Public Service Co. was paying on the basis of 213 at the end of that year, and they furnished the

Comparison of Allocated Portion of Total Generating Capacity and Installed Capacity of Respective Companies (Cont'd)

North Dakota Power & Light Co.		
Allocated Capacity	9,115	8,554
Installed Capacity	9,120	9,180
Deficiency of Reserve Capacity		
Excess of Reserve Capacity	5	626
Northern Power & Light Co.		
Allocated Capacity	3,575	3,775
Installed Capacity	1,850	1,775
Deficiency of Reserve Capacity	1,725	2,000
Excess of Reserve Capacity		

(6) 25% of Company System Maximum Demand in Kilowatts and Deficiency in Reserve Capacity in Kilowatts

Dakota Public Service Co.(25% of Peak)	2,930	2,943
Dakota Public Service Co. Deficiency	645	757

(7) Company System Maximum Demand

Date / Time	Dec.21-1937 5:30 to 6PM	Dec.20-1938 5:30 to 6PM	Dec.19-1939 5:30 to 6PM	Dec.19-1939 5:30 to 6PM	Dec.18-1940 5:30 to 6PM	Dec.15-1941 5-6 PM	Jan.7-1942 6-7 PM	Dec.22,1943 6-7 PM	Dec.21-1944 6-7 PM

(8) Amount Paid for Deficiency of Reserve Capacity at $13.20 per year per Kilowatt

D.P.S.Co. to N.W. P.S. Co.			12,685.20		4,276.80	17,199.60	8,514.00	9,992.40	22,984.40
N.W.P.S.Co. to D.P.S. Co.				2,811.60					
N.P.&L.Co. to N.D.P&L.Co.		8,263.20							
N.P.&L.Co. to N.W.P.S. Co.	$ 22,440.00*	18,136.80							

(9) Use of Reserve Capacity at the time of Coincident Peak Demand in Kilowatts

Dakota Public Service Co.	745	320	150	70	1,510	1,922	

Note:

(3) Company Reserve Capacity in Kilowatts is equal to (1) Company Generating Capacity in Kilowatts less (2) Company System Maximum Demand.
(4) Company System Demand in Percent of Total Maximum Demand is Total for each Company in (2) divided by total of (2).
(5) Allocated Capacity is the result of multiplying percent in (4) by total in (1).
(6) This is 25% of total for Dakota peak and deficiency is determined by deducting from such amount the Dakota reserve capacity shown in (3).
(8) The amount shown is determined by multiplying underlined kilowatts in (5) and (6) by $13.20 per year or portion thereof represented by period covered.
(9) Shows use of Reserve Capacity by Dakota Public Service at time of System Coincident Peak.

* Amount calculated on basis of 1700 kw @ $13.20.

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Dakota Public Service Co. 745 on peak. This is just a representation of the purpose of the excess capacity contract. In other words, once a year—

Mr. Fellows: Just what question is before you?

Q. Will you explain that as to its application to the power pool relationship between these companies?

A. This excess capacity was determined by the operating committee once a year at the time of the coincident peak of the prior year to be applied to the following year. Any excess capacity, you put the excess that is indicated that each of the companies have at the time of the coincident peak of one or more systems into a pot, as we might say. Then we determine how much each of the companies have to carry their proportionate part. In other words, the excess capacity is then prorated as to the need of the company, and the campany under these contracts is expected to carry his ratio of the maximum peak of the excess capacity. For instance, if one company had 2000 kilowatt peak, and another one had 1000, and another one 1000, so there was three altogether, then the one having 2000 peak would carry 50% and the excess capacity would be charged against it, and each of the others would carry 25%. It doesn't mean that either one of the companies can draw on that excess capacity.

Mr. Fellows: I object to that. He is asking him to explain something from this document.

Mr. Benson: You are asking him about power pools, generally? Are you asking him to interpret the contract, or just talk about power pools generally?

Mr. Royhl: I am asking him to talk about the application to this Exhibit 339.

Mr. Fellows: Of what?

Mr. Royhl: Power pools.

Mr. Fellows: All over?

Mr. Royhl: This power pool.

Mr. Fellows: That is the reason I make the objection, it is not responsive at all.

The Court: I think it was explanation of the exhibit that has been introduced here. I think the objection is well taken.

Q. Have you explained as to how the Dakota Public Service Co. deficiency was arrived at for the year 1943 and 1944? A. Yes.

Q. I note that for the year 1940, you have two columns. Is that correct? A. Yes.

Q. And as applied to the column, September 1 to December 31, 1940, there is a minus 213, or a deficiency of reserve capacity for the defendant company? A. Yes.

Q. Where do you show what amount was paid by the defendant company for that deficiency or reserve capacity? A. Down under (8). $2811.60.

Q. Did I ask you if line 7 indicated the date of the coincident combined system peak?

A. If you didn't, I can say it does.

Q. Do you know, under the practice of electric utilities industry, the reasonable rate or charge per kilowatt of capacity, under the power pool contract? A. Yes.

Q. What is the reasonable rate or charge?

Mr. Fellows: We make the same objection.

The Court: If he knows he can answer.

A. My experience is that the charge on the one most like this with which I have had experience is the same charge as this.

Mr. Fellows: We move to strike the answer for all of the reasons given in the objection.

The Court: Sustained.

Q. Will you give it in dollars and cents.

Mr. Fellows: Same objection.

The Court: Overruled.

A. $13.20.

Mr. Fellows: We move to strike the answer for the purpose of objection.

The Court: It may go out for the purpose of objection.

By Mr. Fellows:

Q. What particular power pool were you referring to when you made your answer? A. Commonwealth Edison.

Mr. Fellows: We move to strike the answer for all of the reasons given in the objection; immaterial; no proper foundation laid.

The Court: It may go out.

By Mr. Royhl:

Q. Do you know how the KW value is computed or based under the contract involved in this litigation?

A. Yes.

Q. Have you prepared and made a study of the kilowatt values of the generating capacities in the combined system of these companies?

A. I have of the Northwestern Public Service Co.

Q. That is the defendant company? A. Yes.

Q. And do you know what those values are? A. Yes.

Q. Mr. Learned, from your knowledge, education and experience, do you know what a fair charge for reserve capacity in this territory during the years 1938 to 1945, inclusive, was? A. Yes.

Q. What was that charge?

By Mr. Fellows:

Q. Did you make an [installations] of the kind which you impute to the question Mr. Royhl just asked you, during any of the period embraced in the question, in the territory in which you assume he is asking about?

A. No, I think not. Not in South Dakota.

Q. Do you know what territory he is referring to in the question? A. I think I do.

Q. Do you know the conditions under which the installations were made which you assume are included in the question?

A. I have seen the results of the installations. I have been in a number of plants.

Q. For what period of time are you attempting to answer the question? A. For a period from 1935 on.

Q. Do you know what kind of installations, specifically, he is asking about?

A. I take it he is asking about installation of the character on this property.

Q. Have you ever seen the installation on this property?

A. Yes.

Q. Did you ever see the installations you assume he is asking about in the questions to you?

A. I was not there when they were installed. I have seen the plants in operation.

The Court: They are not asking about the cost of the installation. That is not the way I understood the question. Read the question.

Q. (Read) "Mr. Learned, from your knowledge, education and experience, do you know what a fair charge for reserve capacity in this territory during the years 1936 to 1945, inclusive, was? A. Yes.

"Q. What was that charge?"

The Court: It is a charge for reserve capacity.

Mr. Fellows: We object to that as no foundation.

The Court: He has testified that he knows.

By Mr. Fellows:

Q. How do you know? A. My business is studying rates.

Q. I am not asking your business of studying rates elsewhere. I said, how do you know in relation to this particular property?

A. Because properties of certain size have certain costs installed, and they do not vary a tremendous amount from section to section in a range of territory.

Q. Do they vary with conditions?

A. Somewhat. Some elements do. But the installation of a power plant of a certain size will run in certain range per KW.

Q. You are basing your testimony on the general knowledge you have had from experience in other places?

A. On my general knowledge over-all, together with my having visited these plants, some of them, the larger ones, and my engineering experience in appraisal and valuation and rate work.

Q. You can look at a plant and tell what it cost, can you?

A. I can't to the exact dollar. I don't know just what

I will find on appraisal. In [appraisale] we go out and study each one, but they have a general zone of cost.

A. At least $13.20.

Q. Per kilowatt? A. Per kilowatt for excess capacity.

Q. Is that per year? A. Yes.

Q. Did you hear Mr. Helmick's testimony for the plaintiff? A. Yes.

Q. To the effect that in his opinion, that the interchange capacity contracts had no value to the Dakota Public Service Co. and its predecessor companies? Did you hear that testimony? A. Yes.

Q. Do you have an opinion with respect to the value of the interconnection facilities contract between these companies and to the Dakota Public Service Co.? A. Yes.

Q. And its predecessor companies? A. Yes.

Q. What is that opinion?

A. I think it does have value to both companies.

Q. It is of actual benefit, is it? A. Yes.

Q. What is the difference in the expression KW, and the further expression KWH, or kilowatt hours?

A. KW, when it describes capacity, represents amount. In other words, KW is the rate, and the kilowatt hour is the rate delivered over the time. Kilowatt hour, to be technical, is a thousand watts in an hour. KWH is a quantity of energy.

Q. And KW is more particularly a capacity of development? A. Yes.

Q. Do you know, Mr. Learned, the usual and ordinary charge made for fixed charges of rentals in connection with interconnection facilities? A. Yes.

Q. Do you know that for the years 1936 to 1945, inclusive? A. Yes.

Q. What is a reasonable charge or rental for interconnection facilities, for the years 1936 to 1945, in the territory of North and South Dakota and adjacent territory?

A. 12% on investment plus operating expense.

Q. And what per centage for operating expense, approximately?

A. That may amount to possibly one or one and a half. Not to exceed that. I think one per cent.

Cross Examination, by Mr. Fellows.

Q. Will you refer to Exhibit 339, your tabulation? Have you that there? A. Yes.

Q. Referring to the 9th item, use of reserve capacity. Do you have that? A. Yes.

Q. I noticed in your direct examination that you testified to items 1940 to 1945, inclusive, did you not? A. Yes.

Q. And you failed to testify to the items of 1938, 1939 and 1940. Is that right? A. That is correct.

Q. Tell me this. On your tabulation, Exhibit 339, under that paragraph (9) you were explaining, isn't it a fact that in the years 1938, 1939 and 1940, the Northern Power & Light and the North Dakota Power & Light, paid to Northwestern, a total of $53,262.00, made up of the items of $22,440.00 for 1938, $18,136.80 for 1939, and $12,685.20, for the year 1940? A. Yes.

Q. And took no kilowatts during those years or any of those years on the peak?

A. I do not know that, or I would have put the figures in.

Q. You didn't even try to ascertain that, did you?

A. Yes, I did.

Q. Why didn't you ascertain that?

A. I could not find any data.

Q. They furnished you the books and records of the company for that purpose?

A. Yes, but as I understand the 1922 and 1510 were from some load diagrams, and I could not find any such information on load diagrams prior to that time.

Q. Those figures were taken for those three items, wasn't they? A. Yes.

Q. When did you start to work on this case?

A. I was in Huron the week of November 18, 1946. I think I arrived in Mitchell and went up to Huron the 19th of November, 1946.

Q. Is that the first contact you had with the case?

A. Yes.

Q. Were you sent there by your employer, Black & Veatch? A. Yes.

Q. At the time they sent you up here had they shown you the pleadings in the action? A. No, sir.

Q. Did they tell you what you were coming up here to prove or disprove?

A. No, sir. Mr. Sanborn came to our office and I had a conversation with him and he said he would like to have me call first on the attorney in Chicago, who advised me they wanted to know what the facts were.

Q. Mr. Sanborn first contacted you in Kansas City?

A. He contacted Mr. Black and Mr. Black called me in to meet with Mr. Sanborn.

Q. He is president of the defendant company? A. Yes.

Q. He had you go see the lawyers in Chicago? A. Yes.

Q. Did they show you the pleadings?

A. I don't recall at the time that they did.

Q. Did they tell you what they wanted to prove or disprove in this case?

A. No, sir. We don't do business in that way.

Q. Did they tell you what they wanted you for at all?

A. They said they wanted to find out what our idea was, whether there was a reason for the case.

Q. Your idea of what? A. Engineering facts.

Q. Did they tell you what they wanted you to find out an idea about?

A. They told me, generally, what the case was, I believe in district court here at that time. But when I got to Huron I think I had opportunity to read those pleadings.

Q. When you talked to Sanborn in Kansas City and when you talked to the lawyers in Chicago, they didn't tell you what the case was about, even?

A. Only in a general way.

Q. Did they tell you what the claims of the plaintiff were and what the defenses of the defendant were alleged to be?

A. I don't recall that there was anything said about the defense. As I recall it, they told us the general problem, they were being sued for about half a million dollars by a company which had purchased a property they had prior operated under joint management and which, at one time, when they first took over, was owned, I think, by a common owner who had requested them to take it over and operate it. We were approached and certainly asked to find out what we thought the facts showed.

Q. Did they tell you what they wanted you to do out here?

A. Yes. Find out facts from an engineering standpoint and give them an idea of what it meant.

Q. Had you ever worked for the defendant company before?

A. I think only once. I believe our firm made an appraisal of the Columbus, Nebraska system, when it was condemned by the Public Power Districts in Nebraska, around 1938, or somewhere in that neighborhood.

Q. That is the only work you know of your company or yourself having done for the defendant? A. Yes.

Q. Have you put in your time since November 19th on this job? A. Oh, my, no.

Q. Have you been an expert witness for utility companies before this time? A. Yes.

Q. Many times?

A. I don't know what would be considered many. I have probably testified once, possibly some years twice, some years not at all.

Q. Over this period from 1910?

A. I haven't done much testifying—I think the first testifying was about 1927 or 1928. Then I have testified a number of times since.

Q. From these different places you have worked, from Florida to Minnesota? A. Yes.

Q. You are the man Black & Veatch send out as an expert witness, are you?

A. I used to work largely as an assistant to Mr. Black, and in recent years he hasn't been going out and doing testifying, and I have taken over in a number of cases.

Q. You are the man out of over 300 employees in the office who they sent out as an expert witness?

A. No, we have others.

Q. How many others?

A. Mr. Veatch goes out. Some of the electrical men have gone out at different times, if it is a very technical problem sometimes the electrical men will go out. If it is a matter of this character generally I do the testifying.

Q. This is an electrical job? A. Certainly.

Q. Do you know why they didn't send an electrical man out?

A. Because they asked me to come, I suspect, because my work for the last fifteen or sixteen years has had to do with rates, appraisals, investigations and opinions of a general nature in utility operations, and revenues, returns,

rate structures analyses, and consequently I expect I had probably had more experience and was better fitted.

Q. You had testified oftener than the others. Is that it?

A. I wouldn't say that.

Q. What is the fact?

A. I just don't know whether they have testified more than I have or not, some of them.

Q. In addition to having been in Huron have you been over any other part of the defendant's system at all?

A. I went to the Mitchell plant. I was up to Aberdeen. I drove up to Barnard. I drove out to Ipswich along the line, and then I cut across down to Gettysburg and towards Highmore. Between Gettysburg, however, and Ipswich, I did not follow the transmission line because it was not close to the traveled road.

Q. Did you go up into North Dakota? A. No.

Q. Have you been over any part of the plaintiff's system or the system of its predecessors in North Dakota?

A. Not over the system as a property, no, sir.

Q. Ever inspect any part of their system? A. No.

Q. You worked from the figures and the information that the defendant's officers and regularly employed engineers and their attorneys gave you to build up a result?

A. Oh, no. I went to solid data. The Federal Power Commission reports are sworn to and are now regarded in the industry as probably the most reliable source of information as one gets into a company. I used that sort of information and I also went to the defendant and I got some collected information that brought some of the information carried in Federal Power Commission data into a little more convenient form for review. So I was able to satisfy myself on the problem.

Q. Mr. Expert, you testified this morning that the major portion of the figures you had on one of your exhibits were figures furnished you by Mr. Sickel, didn't you?

A. That was just some figures that are in evidence here and which I didn't realize; and they only had to do with one deduction I made, and it had nothing to do with the exhibits I put in. The exhibits I put in come from source data which I think are unimpeachable.

Q. You haven't any interest in this case, have you?

A. No, sir.

Q. With the exception of getting paid for your services?

A. We will be paid irrespective of the results and at the same rate, whether we win or lose.

Q. Did these attorneys and officers of the company give you information to work on as you went along and looked over the various contracts?

A. No. I was surprised at how much they asked me for information.

Q. Did they tell you about dual officers and directors entering into contracts?

A. I knew that was one of the pleadings. I had a copy of the pleadings.

Q. Did they tell you the fact of the control by the defendant of the load dispatchers?

Mr. Royhl: Objected to as assuming facts not in evidence; not proper cross examination.

The Court: This man comes here as an expert. Within reasonable limitations the objection will be overruled.

Q. Did they tell you about that? A. Yes.

Q. That the defendant kept control of the load dispatchers? A. That is just common—

Q. I asked you if they told you?

A. No, they would not tell me that sort of thing because I would not believe it.

Q. You would not have believed it? You would have thought it was outrageous? In the utility business you would have thought that was an outrage, for the defendant to keep control of the load dispatcher where they were operating two separate systems under joint control?

Mr. Royhl: Objected to as improper cross examination.

The Court: Overruled.

Q. You would have thought that was an outrageous thing for them to do, wouldn't you?

A. I don't understand what you mean by control?

Q. This is joint management.

A. Joint management can be bad or good.

Q. You would have thought that was an outrageous thing for them to do for the defendant to have control of the load dispatchers under the situation you have here?

Mr. Royhl: Objected to as immaterial; not proper cross-examination.

The Court: Overruled.

A. If you take that hypothesis that it was under control and was controlled to the disadvantage of one company to the other, I would go along with you.

Q. Answer the question. You said a minute ago you would not have believed them if they had told you, that the defendant kept control of the load dispatcher, didn't you? A. Yes. I haven't seen any evidence of that here.

Q. Were you in court here during the course of this trial? A. Yes.

Q. Did you hear a letter in which Mr. Strike wrote to North Dakota Power Commission that the defendant kept control of the load dispatchers?

Mr. Royhl: Objected to as not a proper statement of record; not proper cross-examination.

The Court: Arguing whether it is or not, doesn't get us anywhere.

Q. Did you hear a letter read?

A. As a recall I heard it read.

Q. As you went along and developed your case in order to testify you would ask various officers and attorneys for facts and figures, would you?

A. I largely took them from the record.

Q. Did you ask them for any at all?

A. I asked them where to find data.

Q. They furnished you figures from time to time?

A. I verified them.

Q. They furnished you figures from time to time, did they? A. Yes, at my request.

Q. And you accepted those figures whole-heartedly, without any question?

A. No. Those figures that I had were largely furnished me when I was in Huron on the first trip and I verified them, checked a large portion of them from the records which were kept there in order to be satisfied that I could use them.

Q. Alright. You said largely. What about the balance of them?

A. It is possible that some I didn't use at all were those that I did not check. They furnished them but I didn't bother to check them because I would not be using them.

Q. Some of the figures you used were not matters of record, but were estimates. Isn't that a fact?

A. Not many that I have used.

Q. How about the figures that were used where there were no meters to show the current, that was not metered. What did you use there? The things they told you?

A. I haven't used that kind of stuff. I have used data which is in the operating reports and in the Federal Power Commission reports and in the zone records by three representatives of the operating committee reports. That is the kind of information I have used.

Q. You figured the transmission loss?

A. I didn't figure the transmission loss. I figured the over-all—I didn't even figure that—I took the over-all unaccounted for energy, from the reports.

Q. You got all of that from reports? A. Yes.

Q. Didn't you use any figures in any of your testimony here that came from calculations?

A. I simply used basic figures and made calculations from them.

Q. Didn't you use any figures that came from calculations of yours in this testimony you have given here?

A. I did some which I understood was stricken, and it was information that is on exhibit here. I didn't realize it at the time I explained it to you.

Q. I thought you said you used Federal Power Commission reports that are sworn to? A. Yes.

Q. Will you come down and look at these Federal Power Commission reports and show me where they are sworn to?

A. That is my understanding, they are sworn to. They have been on jobs where I have been. These may not be the copy that went to the Federal Power Commission.

Q. You don't find this sworn to, do you?

A. That is pencil copy. The other is a carbon copy and shows a place for a notary public, so I expect the copy that went to Federal Power Commission was sworn to.

Q. You testified you worked with Federal Power Commission reports that were sworn to, didn't you?

A. I said I used them because they are sworn to.

Q. Didn't you testify you used Federal Power Commission reports that were sworn to?

A. I think they were sworn to.

Q. You used these that are in evidence here? A. Yes.

Q. And they are not sworn to?

A. They are not sworn to there.

Q. You didn't go down to Washington and use any that are sworn to, down there? A. No.

Redirect Examination, by Mr. Royhl.

Q. Did you use the Federal Power Commission reports the plaintiff put in evidence in this case? A. Yes.

Q. You have mentioned that when you first came to Huron there was a case in the state court. You didn't mean this court, did you? A. District court.

Q. You meant the state court up there in Beadle County?

A. Yes.

Q. I am not just clear. You were inquired about certain payments made in 1938 and 1939 by the Dakota companies. Those payments were made by Northern Power & Light Co.? A. In 1938 and 1939?

Q. Yes. A. Yes.

Q. And I think also he inquired about part of the 1940. Was that made by North Dakota Power & Light or Northern Power & Light Co.?

A. That was probably by Northern Power & Light, or Dakota Public Service Co., which one was the merger of the two after the middle of the year.

Q. That was the merger after July 1, 1939? A. Yes.

Q. And your Exhibit 339 shows the separation prior to the merger, does it not? A. For which year is that?

Q. 1939.

A. 1939 shows the total amount paid that year, both before and after. It is listed as under Northern Power & Light Co., but it is the total amount received by the Northwestern Public Service Co. that year from the Northern Power & Light Co. and the successor.

G. R. McARTHUR

was called as a witness by the defendant, and being duly sworn, testified as follows:

Direct Examination, by Mr. Woods.

Q. Will you state your name, please?

A. G. R. McArthur.

Q. Your age? A. 55 next April.

Q. Place of residence? A. Huron, South Dakota.

Q. Business or occupation?

A. Vice president of the Northwestern Public Service Co.

Q. Have you been in the electric utility business for some years? A. Since April 1, 1930.

Q. Where has your place of residence been during all of that time? A. At Huron, South Dakota.

Q. Are you an engineer? A. No, sir.

Q. You had, I presume, some preliminary training before you went into business, education and experience?

A. I went through grade school, high school and college.

Q. You came to Huron in what year?

A. I came out to Huron, South Dakota in 1923.

Q. Did you have a position there at Huron at that time?

A. Yes.

Q. What was that business?

A. I came out to Huron to join the faculty of Huron College, as Professor of Economics, Business Administration.

Q. After being there for a time did you then join the offices of the utilities there at Huron? A. Yes, in 1930.

Q. Who made that arrangement with you?

A. Mr. Parker, who was then president of the Northwestern Public Service Co., North Dakota Power & Light Co., and Northern Power & Light Co.

Q. Did he have any talk with you about your employment, the nature of your work, at the time you went to work? A. Yes, we had a conversation.

Q. Just tell in a general [——] the nature of your work, and what your employment was to be?

A. Mr. Parker explained to me that in my employment that I was working for the Northwestern Public Service Co., North Dakota Power & Light Co. and Northern Power

& Light Co. My responsibility was to be those in connection with employee problems, employee relations, and in connection with customer service problems. General field of that which is known as public relations. I came to the organization with a fresh viewpoint—

Q. Did you have during your early years of your employment with those companies, customer difficulties in the area north of Bowdle, South Dakota? A. Yes.

Q. Do you know about when that first came to your attention?

A. I went to Eureka, South Dakota, which is north of Bowdle, along, as I recall it, in the late winter or early spring of 1932, and spent probably the better part of three months in working in that district headquarters at that time.

Q. Was that on account of trouble in the area? A. Yes.

Q. What was the character of the trouble?

A. Customer complaints as to service.

Q. Due to what?

A. Outages, voltage conditions, service levels.

Q. You say you stayed there some three months?

A. The majority of that period, yes.

Q. Were you at other towns or cities in that territory along about those years? A. Yes.

Q. In similar work? A. Yes.

Q. Will you name some of them?

A. I spent some time in Wishek, which was north of Eureka in that area. I spent some time in and out of Ashley, and some time at Napoleon.

Q. Will you tell the Court whether or not that was an area where the business was of value and desirable from the point of view of the companies?

A. The city of Eureka and city of Wishek were two of the largest towns in the area. In fact, two of the largest towns in the stretch of service area extending south from Steele to Bowdle. The towns of Napoleon and Ashley and adjacent thereto were likewise substantial towns as of that area.

Q. Do you have a classification of towns in the business as "B" towns?

A. We had the classification at that time of "B" towns. Subsequently we had "A", "B" and "C" towns.

Q. Did that indicate a town that had a good market for your product?

A. They represented classification of towns largely on volume of business and relationship in size, yes.

Q. Did you name the town of Ashley and Napoleon as towns in which there was trouble in those years, prior to 1936? A. Yes.

Q. What was the nature of that trouble?

A. Problems related to customer service, outages.

Q. Was that your job, to go out and try to straighten those things out?

A. My job was to make investigation of the situation that existed. Visit with the customers. Know what the facts were that related thereto. Bring the report back to the staff that would deal with it from there on out.

Q. At some time in the course of your work there for those companies, did you become acquainted with Mr. Sam White, of Chicago? A. I did.

Q. Can you tell the Court about when?

A. I think my contacts with Mr. Sam White probably began as early as 1932 or thereabouts.

Q. Do you know what occurred to bring him into the picture about that time?

A. Mr. Sam White was appointed receiver of the United Public Utilities Co., of which this property was a subsidiary, and the occasion for my meeting him was a visit to the property, as I recall it.

Q. You say this company was a subsidiary. I wish you would explain what you mean?

A. You are speaking as of the area of Northern Power & Light Co. I am thinking in terms of this particular service area, about Wishek, Eureka, Napoleon, Ashley, in the area of what was Northern Power & Light Co.

Q. And that is what you mean then? A. That is right.

Q. After Mr. White was receiver of the United Public Utilities Co., what was your understanding of the position that he occupied with respect to these companies or the parent company? A. Well, he was receiver—

Q. I said after he was receiver.

A. After they came out of receivership?

Q. That is right.

A. Then he was president of the survivor or successor

company, after the merger of the United Public Utilities Co. He was president thereof.

Q. Was that known as United Public Utilities Corporation? A. Yes.

Q. Who was the chief executive or administrative officer of that corporation, United Public Utilities Corporation?

A. Mr. Sam White.

Q. Did you have occasion to deal with him at varying intervals after termination of the receivership? A. Yes.

Q. Can you fix the date when he became president of United Public Utilities Corporation?

A. Not with any exactitude of date. As I recall, it was 1934 or 1935. 1935, I think.

Q. Can you tell the Court about how often you would see him in the course of each year?

A. In the early years, back in 1932, '33, '34, I probably saw Mr. White out there at least once in the spring, in May. I would see him again in the fall, perhaps in the month of September. And I saw him, perhaps, as often as two or three or four times in between.

Q. Did you continue to see him at frequent intervals until the Dakota Public Service property was separated from the Northwestern Public Service property? A. Yes.

Q. Now, did you, subsequent to your beginning with the company, come to have some offices or positions with these companies? A. Yes.

Q. Do you know when you first became an officer or director?

A. I first became a director of Northwestern Public Service Co. in January, I think, of 1935. I became an officer of Northwestern Public Service Co. in July, 1937, I believe. I became a director of North Dakota Power & Light Co. and Northern Power & Light Co. and Knife River Coal Mining Co. in August, I believe, 1937. I became vice president of those latter three companies, I think, at the same time, same date.

Q. Did you continue to hold those offices and directorships up to the [——] that the Dakota Public Service Co. was separated from Northwestern Public Service Co., in October, 1945? A. Yes.

Q. Now, over the years, was your work and were your

duties with the companies, changed from the duties and work that you described here a little while ago? A. Yes.

Q. What became the nature of your work?

A. Naturally, as I acquired experience in the organization and in the business, I was able to take on more responsibility, and the work became more and more of a supervisory and administrative nature. I became in due time, relatively soon, an assistant to Mr. C. J. Strike, who was general manager, and worked with him as his assistant through a number of years. Then, with progression and development or responsibility, I continued with public relations work and customer and employee relations problems, and likewise the field of activity spread out in more general operations as would naturally come, working in relationship as assistant to the general manager.

Q. Did you come to know the relationships with Samuel W. White, and the method of working with him and the office routine with respect to him? A. Yes.

Q. What means of obtaining information as to the operations of the United Public Utilities Corporation did he have, to you?

A. He had before him reports of various types that he would ask for, operating reports and things of that kind. He had communications and reports on specific problems as they came up from time to time. He had information that he got by direct inquiry and in personal visits. He kept in close contact with the operations of the property.

Q. I think there was some testimony he used the long distance telephone frequently in his contacts with you. Do you recall about that?

A. I don't recall as to the testimony, but as to the fact he did use it, yes.

Q. That is, did he? A. Yes, he did use the telephone.

Q. He invariably visited the property once a year?

A. Without exception once a year. I would say he visited more frequently than once a year.

Q. On those occasions when he visited the property did he go all over it? A. Yes.

Q. Did you upon occasion go over the property with him? A. Yes.

Q. Do you know whether you did every time he came out, or not?

A. No. I doubt if I went with him every time that he came out.

Q. Can you state what proportion of the time that he visited the properties from 1935 to 1945 you did go with him?

A. From 1935 to 1945 I would doubt that I missed a trip with him.

Q. You think you went with him every time?

A. I think I went with him every time from 1935 on. I may have missed one but I don't recall at the moment.

Q. Then did you visit every town, or every principal town in which the company had business or generation plants? How extensive were those visits?

A. Invariably we visited all of the division offices on the property that he was interested in and the major facility that was in process of construction or consideration incident to that particular kind. We would travel along the highways adjacent to the transmission lines, we would visit power plants and visit the mine.

Q. Did he note the condition of properties and discuss that on those trips? A. Yes.

Q. State whether or not he was an inquiring person and a fellow who made his investigation in a thorough way?

A. Yes.

Q. I think you have stated that he got reports regularly, that is, copies of reports that were made in the offices of the joint management went to him? A. Yes.

Q. Was there any rule about that?

A. Yes, there was a rule.

Q. State what it was?

A. That he should have all of the information that was available to him in reports. He was asking for those reports.

Q. And did he get them? A. He did.

Q. With respect to expenditures, or of amounts. Could anybody or could the executive officers at that time expend any amount that they saw fit, without his approval, or was there a rule he was to be advised and give his approval of expenditures of certain amounts?

A. I think I understand. There was a rule or understanding on his part, that those of us connected with the joint management agreement, as to expenditures relating to his property.

Q. State what it was?

A. I think it may have changed from time to time, but as I recall it, amounts in excess of $100.00 were referred to him, provided they were not a part of the regular budget of expenditures adopted each year, which he had opportunity to approve or go over as a budget, and if they were in the budget, my recollection is that he permitted expenditures up to $500.00, if covered in the budget he had previously approved and knew about.

Q. Is it fair to say he kept in close touch with the operations of those subsidiaries in South Dakota at all times?

A. Not only fair to say. It is a fact.

Q. Do you know whether Mr. White went over the road from Bowdle to Wishek along where the new transmission line was built? I think completed about 1936, at or about the time that it was being built?

A. Yes. He was in that territory on that spring trip and in inspection of those facilities at various points along the line. As a matter of fact I was with him on that trip.

Q. There is some testimony here with regard to relationships of these companies with Middle West Service Co. Were you familiar with that?

A. With the testimony or the relationship?

Q. Relationship. A. Yes.

Q. Did they furnish service for these United Public Utilities subsidiaries?

A. Middle West Service Co. was under contract to these companies.

Q. What character of service did they furnish?

A. Advisory, consulting service in a variety of fields. Engineering.

They were advising mostly with reference to advertising; with reference to public relations and on franchise procedures; accounting procedures; income taxes; tax work; merchandising.

Q. Now, then, with respect to any cases where there was a diversity of opinion between the subsidiaries of the United Public Utilities Corporation on the one hand, and Northwestern Public Service Co., can you tell the Court what happened in such cases, as to how they were handled? During the period of time from 1937 to October 19, 1945?

A. Whenever there were questions involving diversity

of interest in that period between 1937 and 1945, those questions were put squarely up to the owners of those respective companies for decision and handling.

Q. Mr. McArthur, you have testified that you were an employee of these companies from 1930 to 1945. Is that right? A. That is right.

Q. So you were there in all of the year 1936? A. Yes.

Q. Did you obtain any knowledge of the 1936 contract between these companies? That is the contract with respect to rates and charges? A. Yes.

Q. You learned about that? A. Yes.

Q. Were you an officer or director of any of these companies at that time?

A. I was director of Northwestern in 1936.

Q. Prior to the execution of that contract had a man named Lakin paid a visit to the property? A. Yes.

Q. Where did you first come in contact with Mr. Lakin?

A. Mr. Lakin was in attendance at Minneapolis at a meeting of the division managers. Our managerial conference was held in June of that year, for the assistance of division managers of the three companies.

Q. Did you learn the purpose of his visit? A. Yes.

Q. Do you know whether or not plans and arrangements were made for him to visit the property? A. Yes.

Q. What do you know about that?

A. Mr. Lakin came out to Minneapolis and attended the joint managerial conference we had, and then came out to the property, coming out to Aberdeen in company with Mr. Strike. We called a car from the joint office after he came back out to meet them at Aberdeen and they went out over the property. Mr. Lakin came back into Huron, to the joint office headquarters there after he had completed his trip, and spent some time there in the joint office. I visited with him in the joint office on his return. Then he left and went back east.

Q. Did you have occasion to see Mr. Samuel W. White after that? A. Yes.

Q. And before the contract was finally signed? A. Yes.

Q. Do you know what those occasions were, if there was more than one?

A. Yes. There was at least one I recall very definitely, and I am sure there were other occasions in between that

mid-summer and the managers' meeting at which I talked to Mr. White.

Q. I believe that is the year in which there were directors' [meeting] about April, and later in October, with respect to that contract. Do you recall about that?

A. I recall meeting in the spring and fall, yes.

Q. Can you state in a general way, whether or not the action, or part of the action, at the fall meeting was by reason of action taken at the April meeting? A. Yes, I can.

Q. To clear up, for counsel. Were you a director of Northwestern Public Service Co. in 1936?

A. I was director of Northwestern Public Service Co., in 1936.

Q. You were not of the northern companies at that time?

A. I was not of the northern companies in 1936.

Q. Do you recall the occasion of any connection of Mr. White with that action? A. I do.

Q. You may state what action was taken by Mr. White in connection with it.

A. After the action was taken by the directors of Northwestern Public Service Co. in the spring of 1936, drafting the interchange agreement, Mr. White objected in part to that agreement and [desire] revisions in some respect in it, and on the basis of that objection on his part, there was changes made to conform to the thought that he had in mind and his desires in connection therewith, and in the fall of 1936, the board of directors of Northwestern rescinded the action taken in the spring and approved the contract as it has been—

Q. Now, then, I don't believe you signed the 1936 contract as an officer of any company? A. I did not.

Q. Did you regard it as fair?

Mr. Fellows: Objected to as immaterial; calling for opinion and conclusion.

The Court: Sustained.

Q. You were a member of the board of directors of Northwestern Public Service Co. at that time?

Mr. Fellows: Objected to as repetition.

The Court: He has already answered that.

Mr. Woods: We offer to prove by this witness that he regarded this contract as fair and had that state of mind at the time that the minutes of the directors of Northwestern were made, approving the contract as entered into.

Mr. Fellows: Object to the offer for the reasons contained in the objection to the question.

The Court: Sustained.

Q. Now, do you recall some change or revision in the contractual relationship between these companies in about the year 1938? A. Yes.

Q. Do you recall whether or not you signed that contract? A. I did sign for Northern Power & Light Co.

Q. Prior to the time that you signed that contract had you been in touch with Mr. Samuel White, president of the United Public Utilities Corporation, and had you discussed that matter with him? A. I had.

Q. Can you tell the Court now whether it was once or more than once?

A. There was several occasions upon which I visited with him.

Q. Did you know at the time that you signed the contract whether or not it had his approval or consent?

A. Yes. I would not have signed the contract without his approval.

Q. I infer from that that it did have his approval and consent? A. It did.

Q. Do you recall a revision or some change in that contractural situation between Northwestern and the northern companies in the year 1939? A. Yes.

Q. Do you know the occasion for that change? A. I do.

Q. What was it?

A. That revision or change came about by reason of the merger of the two northern companies, Northern Power & Light Co. and North Dakota Power & Light Co., into what is known as its successor company, the Dakota Public Service Co.

Q. You may state if you know who worked that out?

A. The detail and technical work on that was worked out with me, Mr. C. L. Sandstedt, Mr. Karl Goldsmith, of Pierre. Mr. Scheetz of Philadelphia representing—

There were others besides those three.

Q. You may name the others?

A. Mr. White, himself, was a party to that adjustment of the contract, and representatives of the Middle West Corporation.

Q. You are referring to the contracts dated July 1, 1939, now, are you?

A. I don't recall the exact date of the contract, but I do recall the contract revision was made as of 1939, written in the language of Dakota Public Service Co. and Northwestern Public Service Co. as against the previous contracts written in the language of three companies.

Q. Now, then, with respect to those contracts of 1939, and the 1938 contracts, was there any formal approvals of those by directors' meeting, so far as you know?

Mr. Benson: We will admit there is no minutes in the minutes books with respect to any contract except the interconnection contract of 1936.

Q. Now, with respect to the 1941 contract, did you have knowledge of the execution of such a contract? A. Yes.

Q. Can you state what events led up to that?

A. Yes, I can.

Q. Calling your attention to the document which is in evidence as Exhibit 258 (R. p. 1230 supra), purporting to be a letter dated November 18, 1942, signed, A. B. Sanborn, addressed to Mr. S. W. White, I will ask you if you saw that letter at or about the time of the date noted in it?

A. I did.

Q. With respect to the 1941 contract, did you have a meeting, a joint meeting, at Detroit Lakes, Minnesota, prior to the execution of that contract? A. Yes.

Q. What kind of a meeting was it?

A. That was a meeting of the managers of the system, what we called our managerial conference. Mr. White was in attendance.

Q. Do you recall whether or not some work was done upon that contract, 1941 contract, at that meeting?

A. Yes, there was.

Q. And by whom?

A. There was controversy on that contract between Mr. White and members of the joint management staff, and

particularly as between Mr. White on the one hand and C. L. Sandstedt and Carl Goldsmith on the other hand.

Q. Was it subsequent to that time that the contract was placed in final form and signed? A. Yes.

Q. Prior to the time that the 1941 contract was signed, had there been some change in the financial and business situation of the companies that were being operated under that joint management, which were reflected in the contract itself? A. There were.

Q. Did Northwestern Public Service Co. at that time have some funds which had been obtained from the sale of properties in Nebraska? A. It did.

Q. Did the interconnected system at that time have need of capacity? A. It did.

Q. That is, generating capacity? A. It did.

Q. And in the negotiations that led up to the execution of the 1941 contract, do you know whether there was discussion of the building of capacity at Aberdeen for the interconnected system? A. I do.

Q. Was there? A. Yes.

Q. Do you recall about the signing of the supplemental contract in 1943, which has been discussed and mentioned as the 1943 supplement here? A. I do.

Q. And referring to that Exhibit 258, which I handed you awhile ago, I think you said you saw that at or about the date it bears? A. Yes.

Q. Subsequent to the writing of that letter, do you know of negotiations between Mr. White and others in the two organizations with respect to that supplement? A. Yes.

Q. What knowledge do you have of that? Just state.

A. Well, I had conversations directly with Mr. White, and at times when those arrangements were under discussion.

Q. You mean you discussed it with him? A. Yes.

Q. Do you know whether he approved of the 1943 supplement before it was signed or put into effect? A. Yes.

Q. And did he? A. He did.

Q. Do you know whether or not Mr. Samuel W. White took any interest or exercised any control in or over the dividend policy of the northern companies during the time that you were an employee of those companies?

A. Yes.

Q. You may state to what extent?

A. He kept track and had knowledge of funds and earnings that were available and discussed with the management staff of the companies that he was interested in any recommendations or suggestion that they made to him, and those things were cleared as between the officers or management of the companies he was interested in, and his office, and himself, personally.

Q. With respect to the operation of the fiscal affiairs of that joint management. Mr. Stokke was asked yesterday whether he was paid by Northwestern check, whether he received salary that way. I want to ask you if you know whether or not the joint management had any separate bank account for the payment of salaries of the joint management? A. No, not as between the three companies.

Q. As a matter of fact or practice how were those salaries paid?

A. Paid by Northwestern under the terms and conditions of the joint management contract.

Mr. Fellows: Move to strike the last part of the answer as not responsive.

The Court: It may go out, the last part.

Q. After payment of those salaries by Northwestern, as you have stated, was anything done to adjust the expense as between the companies, if you know?

A. I do know, and the answer is yes.

Q. You may state what was done in that regard?

A. There was an allocation or distribution of the expenses on the gross revenue percentage basis as between the companies.

Q. Did you in the course of your employment, either as an officer or director, have any intent to do anything or permit anything which would cause or permit Northwestern Public Service Co. to overreach or defraud Northern Power & Light Co., North Dakota Power & Light Co., or Dakota Public Service Co.? A. I did not.

Q. Did you, during your employment, ever see or observe any act or [ommission] designed to cause or permit overreaching by Northwestern of the other companies named?

A. I did not.

Q. Now, with respect to the rates and charges for capacity, energy, interconnection, and the basis or allocation of payment of joint management expense, did you or did you not regard those things, that is, those rates and charges, as fair and just at all times during the [court] of your employment there?

A. I sincerely believe them to be fair and just.

Q. Now, there has been some evidence here with respect to the control of the load dispatchers upon the interconnected system. Do you know what the control of those load dispatchers was? A. I do.

Q. Will you tell the Court what their instructions were or what the policy to be followed by them was?

By Mr. Fellows:

Q. That was not in your department at all?

A. As an executive officer of the company I would have knowledge or supervision.

Q. Did you have anything to do with the direction and control of the load dispatchers?

A. As an executive officer, shaping of policy, yes.

Q. Answer the question. Did you control or direct the activities of the load dispatchers?

A. As of the control, no. As of the shaping of policy, yes.

By Mr. Woods:

Q. You may state. A. The policy—

Mr. Fellows: We object to any evidence of policy in answer to that question, as not binding upon the plaintiff and as incompetent.

The Court: I think that objection is well taken.

Mr. Woods: I think the question calls for instructions and policy in regard to the handling of it. That is what I want to call for. Is the objection to the question in that form sustained?

The Court: Yes.

Q. Do you know what rule the load dispatchers were required to follow? A. Yes.

Q. Do you know what investigations were made by Montana-Dakota, plaintiff in this suit, during the year 1945, prior to the purchase of the stock and securities of the Dakota Public Service Co.?

A. Yes, I know investigations were made.

Q. Do you know whether investigations were made by accountants named Arthur Young & Co.? A. I do.

Cross Examination, by Mr. Benson.

Q. Mr. McArthur, did you say you were public relations man with Northwestern Public Service Co.?

A. I said I had charge of public relations, customer relations and employee relations.

Q. Did you have charge of the advertising campaign in the fall of 1941, when you were trying to get a new franchise at Aberdeen? A. I did.

Q. You prepared the advertising or saw the advertising that was used?

A. I did not necessarily prepare all of it, but I think I saw all of it.

Q. You approved it all before it was published?

A. I think so.

Q. On September 9, 1941, didn't you approve an ad in the Aberdeen paper, and which you thereafter paid for and which was published, stating that you solicited the votes of the voters of Aberdeen and asked them to vote because of the benefits which would accrue to Aberdeen, including (1) a million dollar expansion and construction program at the Aberdeen power plant of the Northwestern Public Service Co., (2) more jobs for Aberdeen people during construction and in its operation after construction; (5) a dependable supply of electric power for the next twenty years; (3) more income taxes for the schools and various city departments; (4) a substantial increase of freight and coal which, in turn, means steadier work for railroad men in Aberdeen?

Mr. Woods: Objected to as incompetent, irrelevant and immaterial; [nor] proper cross examination; not gone into on direct.

The Court: It will be received subject to objection.

A. May I see the ad?

Q. You did approve that ad, didn't you?

A. I think I approved an ad that contained in substance the material there.

A. P. LEARNED,

being recalled by the defendant, and having heretofore been sworn, testified as follows:

Direct Examination, by Mr. Royhl.

Q. I overlooked asking you on your direct examination some matters. Now, based upon your experience with rates and contracts concerning rates, in electric utilities and with electric utilities generally, to which you have previously testified, do you have an opinion as to whether or not the incremental cost of production is a [propr] cost basis upon which to establish a rate at which surplus energy produced by the seller is sold to the purchaser? Do you have an opinion? A. Yes.

Q. What is your opinion?

A. The incremental cost is a proper basis for the establishment of a rate for surplus energy.

Q. Have you examined the contracts involved in this case providing a rate of 5 mills per kilowatt hour for energy sold to the defendant by the plaintiff's predecessors, and which are Exhibits B, D, and F to the complaint, and have you examined the provisions of those contracts relating to surplus energy and the sale thereof? A. Yes.

Q. And have you examined Defendant's Exhibits 335 and 335-A received in evidence (R. pp. 1754 and 1755, supra)?

A. Yes.

Q. In considering the provisions of those contracts relating to surplus energy and the sale, and also the figures set forth in Defendant's Exhibits 335 and 335-A, do you have an opinion as to whether or not the 5 mills per kilowatt hour for energy so sold to the defendant by plaintiff's predecessors, during the period from January 1, 1936 to October 19, 1945, both inclusive, was a fair, just and reasonable rate for the sale of such energy? A. Yes.

Q. What is your opinion?
A. It is a satisfactory rate for the sale of surplus power.
Q. And in your opinion is that fair, just and reasonable?
A. Yes.

Cross Examination, by Mr. Benson.

Q. Mr. Learned, you say you have spent a good portion of your life in the utility business of various kinds, sewerage disposal, electricity, and everything else in the public utility business? A. Yes.

Q. If one company makes a capital investment to serve another company, they don't sell on incremental cost basis?

A. They probably don't sell firm power on incremental basis, but they would surplus power.

O. C. STOKKE,

being recalled by the defendant, and having heretofore been sworn, testified as follows:

Direct Examination, by Mr. Woods.

Q. Mr. Stokke, there seems to be some ambiguity in the record as it is set with respect to Plaintiff's Exhibits 31 and 35, and Defendant's Exhibits 340 and 341, which I hand you, and which I am told are called supplements to the interchange capacity contracts. They are also known here as Exhibit B's to the contract? A. Yes, they are.

Q. I want to ask you from what source were those exhibits which I have handed to you prepared at the time they were made up by the committee? To whom that work was delegated?

A. The operating committee prepared the information for these exhibits.

Q. From what source?

A. The company generating capacities on Exhibit B were prepared by the operating committee. The generating capacities for the respective companies.

Q. From what?

A. From our determination of the generating capacities of the respective stations for the respective companies.

The company system maximum demand were determined by the operating committee from special readings taken at the direction of the operating committee, special readings obtained from all power plants of the power pool companies. The thirty minute peak, coincident peak period demands, were obtained from the special thirty minute readings obtained from the various generating stations and from the readings obtained at the points of interconnection between the two parties, operating companies.

Q. And were they prepared from the load diagrams?

A. No.

WILLIAM M. DUNN was called as a witness by the defendant, and being duly sworn, testified as follows:

Direct Examination: by Mr. Woods.

Q. Please state your name? A. William M. Dunn.

Q. Age? A. 51.

Q. Place of residence? A. Huron, South Dakota.

Q. What is your business or occupation?

A. Treasurer, Northwestern Public Service Co., at the present time.

Q. How long have you been connected with the Northwestern Public Service Co., or the Northwestern and its associated companies, Northern Power & Light, North Dakota Power & Light and Dakota Public Service Co.?

A. Since January, 1933.

Q. In what capacity did you first go with them?

A. As travelling auditor.

Q. Was that as a member, then, of the joint management staff? A. It was.

Q. How long did you continue in that capacity?

A. Until the fall of 1936.

Q. Then what happened?

A. In 1936 I was made assistant secretary and assistant treasurer of the three electric companies and the Knife River Coal Mining Co., and still continued somewhat the duties of travelling auditor. Later in 1936 I was transferred to Columbus, Nebraska, as division manager of the Columbus, Nebraska, division.

Q. Where did you go from Columbus?

A. Yankton, South Dakota.

Q. In what capacity?

A. As division manager of the Yankton division.

Q. How long did you continue there?

A. Until the summer of 1944.

Q. Where did you go then?

A. I went to Huron, South Dakota.

Q. In what capacity?

A. As treasurer of Northwestern Public Service Co., Dakota Public Service Co. and Knife River Coal Mining Co., and a member of the board of directors of the companies.

Q. In 1934 did you have occasion to be up in the territory in North Dakota, in the vicinity of Wishek and at Wishek? A. I did.

Q. What was the occasion for your going there?

A. To make an audit of the finances of the city of Wishek.

Q. What I am getting at is whether there was trouble there so far as the power company supplying power was concerned? A. There was.

Q. Of what character?

A. The number of interruptions of service they were receiving at that time.

Q. Do you know whether or not there was agitation for municipal plants in that area at that time? A. Yes.

Q. Was there? A. There was.

Q. Now, in the course of your work for the several companies you have mentioned here, I want to ask whether your work was the same for all of the companies?

A. It was.

Q. Did you, in the course of your work for these companies were you guilty of any partiality in your work in favor of one company as against another?

A. I showed no partiality.

Q. Was that true with respect to the operations of the company and the personnel involved? A. It was true.

Q. Did you observe any partiality on the part of other officers in the course of your employment, as between these companies? A. I did not observe any.

Q. Did you have occasion to observe and do you know the attitude of the management of these companies with

respect to matters and instances where there was diversity of interest between the Northwestern on the one hand, and the northern companies on the other, and how those matters were handled in such cases? A. Yes.

Q. You may state?

A. In all matters affecting the interest of the several companies, when under discussion, they were referred to the officers of the parent company for settlement or negotiations.

Q. Have you ever met Samuel W. White? A. I have.

Q. Do you know when you first met him?

A. I believe in 1934.

Q. Did you know who he was? A. I did.

Q. Who was he at that time?

A. He was president of United Public Utilities Corporation.

Q. Did he continue to hold that office during all of the time that you were associated with him in business?

A. He did.

Q. Will you tell the Court how he kept in touch with the operations of the companies and the joint management staff at Huron?

A. Mr. White received the complete file of operating and financial reports. He received letters made by the joint staff. He kept in contact with the joint staff by telephone. And he visited personally with members of the staff who had occasion to be in Chicago. He attended the annual manager's meetings and he made at least one inspection trip all over the property.

Q. Then, I take it, you saw him frequently after you became a director of his companies. A. I did.

Q. Did he have any way of knowing about what funds were on hand with the treasurer of the companies?

A. He did.

Q. How did he get that information?

A. By receiving monthly financial statements, operating reports, communications from our office.

Q. You furnished those to him? A. I did.

Q. Did he advise or recommend with respect to the investment of surplus funds of those companies? A. He did.

Q. Do you know whether or not he had or exercised any control over work orders of those companies?

A. He did exercise authority over work orders.

Q. In what respect?

A. Work orders up to a certain amount, not included in the budget, were required to receive his approval before the expense were incurred. Work orders of a larger amount, included in the budget, over and above a larger amount included in the budget, were required to receive his approval before the expense was incurred.

Q. I take it budgets were made periodically? A. Yes.

Q. Was he furnished copies of those? A. Oh, yes.

Q. In all instances? A. I believe he was in all instances.

Q. Who determined the dividend policy of the company? A. Mr. White.

Q. Did he have anything to do with the deposit of surplus funds or handling the investment of surplus funds?

A. He did.

Q. Did he direct that? A. He did.

Q. Were his instructions followed in all instances?

A. They were.

Q. Can you tell the Court any specific instances after you became treasurer and director of these companies in which a controversial matter was referred to the officers of the parent companies? A. I can.

Q. What one?

A. Renegotiation of a coal contract between Knife River and Northwestern.

Q. Can you tell the Court who worked that out?

A. That was worked out by Mr. White and Mr. Purchas of the Middle West Service Co.

Q. About when? A. That was in the winter of 1944-1945.

Q. Mr. Dunn, prior to your becoming associated with these companies did you ever hold any public office?

A. I did.

Q. What?

A. County Auditor of Yankton County, and State Auditor of South Dakota.

Q. During what period of time?

A. State Auditor, 1929 to 1932. County Auditor from 1925 to 1929.

Q. Do you know, Mr. Dunn, whether or not the plaintiff, Montana-Dakota, prior to October 19, 1945, made investigations of the Northwestern Public Service Co. and Dakota Public Service Co. and their records? A. Yes.

Q. And also other properties? Not only their records but over the properties? Or is your knowledge confined to investigations or records at Huron?

A. I don't recall of knowledge of their being out on the property. I am referring to examination of records at Huron.

Q. Do you know whether they had agents in there for that purpose? A. I do.

Q. Over how long a period of time?

A. For a number of months.

Q. Can you tell the Court who those agents were?

A. Representatives of Arthur Young & Co. Day & Zimmerman. Montana-Dakota attorney. I believe his name to be Higgins, representing the legal staff of Montana-Dakota. Some of their auditors and other employees.

Q. Was Mr. Elvig among those? A. He was.

Q. Day & Zimmerman, Inc., metioned by you, is that an engineering concern?

Mr. Morrison: Objected to as immaterial, and for all of the reasons stated in the objection to the other question.

The Court: Sustained.

Q. Do you know whether or not it was the general rule to obtain the consent of Mr. Samuel W. White prior to the transfer of any so-called key personnel from one property to another?

Mr. Morrison: Objected to as immaterial.

The Court: We will take an answer,

A. Yes.

Q. Was it?

Mr. Morrison: Objected to as immaterial.

The Court: Received subject to objection.

A. It was the rule.

Q. Do you know whether or not Northwestern Public Service Co. furnished the office equipment and automotive equipment for the joint management staff without charge during all of this time? A. Yes.

Q. And did they?

Mr. Morrison: Objected to as immaterial.

The Court: Received subject to objection.

A. They did.

Q. Now, Mr. Dunn, as a common officer and director of the Northwestern Public Service Co. and the Dakota Public Service Co., did you ever take or cause or permit to be taken by the defendant, Northwestern Public Service Co., fraudulently, unreasonably, unfairly, unlawfully or without consideration anything whatever—

Mr. Fellows: Just a minute. We object to that. There is no claim Mr. Dunn ever took anything. Covering the same question he was inquiring about some time ago. We don't claim Bill Dunn took a dime or did anything.

Mr. Royhl: They allege in the complaint that this man as a common officer and director caused to be taken or permitted to be taken, wrongfully and unlawfully—

Mr. Fellows: Unlawfully as directors and officers.

The Court: The witness may answer subject to objection.

A. I did not.

Q. Did you ever intend that the Northwestern Public Service Co. should take or cause to be taken from the Dakota Public Service Co., anything wrongfully or unlawfully whatever? A. I did not.

A. B. SANBORN, being called as a witness by the defendant, and being first sworn, testified as follows:

Direct Examination: by Mr. Woods.

Q. Please state your name? A. A. B. Sanborn.
Q. Your age? A. 56.
Q. Place of residence? A. Huron, South Dakota.
Q. Business or occupation?
A. I am president of Northwestern Public Service Co.
Q. How long have you held that position?
A. Since July 1, 1938.

Q. From that date, until some time in 1945, did you have some position with North Dakota Power & Light Co., Northern Power & Light Co., Knife River Coal Mining Co., and later, Dakota Public Service Co.?

A. I was president and director of all of the companies you mentioned. I should add also that I was director of Northwestern since July 1, 1930.

Q. Your connection with the so-called northern companies and the coal mine terminated when, if you know?

A. My connection with the coal mine terminated a little indefinitely. My connection with the northern companies terminated at the conclusion of the sale to Montana-Dakota on October 19, 1945. My connection as officer and director of the mine until sometime in February, 1946. We continued to manage for Montana-Dakota, the northern property.

Q. I would like to ascertain a little bit about your education and background. After getting out of high school what education did you have?

A. I entered the Naval Academy in 1908 and graduated in 1912. I was commissioned as ensign in the United States navy in 1912. I resigned my commission as lieutenant commander, temporary, in 1920.

Q. I take it you continued in the navy from the time of your graduation from United States Naval Academy for ten years, through the first world war?

A. A little over eight years. I resigned in 1920.

Q. Did you get any degree from the naval academy or did they give any degree at that time?

A. No, they didn't give degrees in the naval academy at that time.

Q. What character of education did they give or provide? A. Predominantly and almo[illegible] wholly engineering.

Q. After leaving the navy, what business did you [engaged] in?

A. I came directly into the utility business in British Columbia, Canada, and stayed in British Columbia, Canada, for eighteen years, until July 1, 1938, when I came down to South Dakota to this job.

Q. What character of work did you do in the utility business in Canada?

A. I went with the Department of Columbian when that

company was a dream in the promoter's eye. During the time I was there they built two electro-hydro plants, and one steam plant, and built a load up to 1 million kilowatt hours a year. Then I came to South Dakota on this job I am in now.

Q. Now, with regard to your coming to the South Dakota companies, how did you first contact in that regard?

A. Mr. Kruesi asked me to come in and see him in Chicago, through a friend of mine in Ashland, Wisconsin, my home at that time. My father and mother's home, it was. I met Mr. Kruesi in Chicago at his office, talked to him for a few minutes, not over ten or fifteen or twenty, and he suggested I go in and see Mr. White.

Q. Was that the same building?

A. That was in the same building.

Q. What did you learn about the character of this operation at that time or about that time?

A. I was told definitely that this operation was one of a combined operation of three utilities that were owned by two separate corporate entities, and that I had to be extremely careful in my operation out here not to lean towards one company or another and to continue a fair relationship at all times. I was told by Mr. White and Mr. Kruesi that there was a possibility that the time might come that I would have to defend my actions on these properties and I should not let the finger of blame point at me.

Q. About how long was it after you visited with them that you came to the property and took up residence in Huron?

A. About three or four months, as I remember. I know I had an opportunity to drive through South Dakota on my way back to British Columbia. I spent some time back there. I think my first contact with Mr. Kruesi and Mr. White was sometime early in the spring or late in the winter of 1938.

Q. When you came to actively take up that job, did you learn anything about a contract between the companies in the process of negotiation? A. Yes.

Q. What did you learn about that?

A. I learned that for some months Mr. Strike and Mr. Sandstedt had been talking to Mr. White and Mr. Kruesi

and to the members of the service company staff, and that Mr. Scheetz had prepared a contract for the interchange of energy capacity and line rental between the three companies involved.

Q. What, if anything, did you do about that?

A. I reviewed the studies and the negotiations and inasmuch as Mr. Sandstedt had been in the negotiations since the start, I instructed him to continue the negotiations and do what he could to see that all parties were properly served and the contract come to a satisfactory answer.

Q. Now, do you know whether or not contracts were completed in 1938?

A. I do. As I remember it, they were completed late in the fall or early winter of 1938.

Q. Did you sign such contracts?

A. I signed for Northwestern after I had been assured that the contract was satisfactory to Mr. White, acting for United Public Utilities Corporation, and Mr. Kruesi, acting for the owners of Northwestern.

Q. Did you, as president of these companies, know about the revision of those contracts in 1939? A. Yes.

Q. Do you know who worked that out? A. Yes.

Q. Who?

A. The essential terms of the revision were worked out between the attorneys of United Public Utilities Corporation and attorney for the joint management staff of the joint companies. I am referring to Mr. Carl Goldsmith, of Pierre, and Mr. Scheetz, acting as officer for Mr. White. The reason for that was—

Q. What was the occasion for that revision?

A. It was occasioned by the merger of Northern Power & Light Co. and North Dakota Power & Light Co. and the change of name of the surviving corporation to Dakota Public Service Co.

Q. Now, I want to ask you a few general questions about how Mr. White kept in touch with United Public Utilities Corporation subsidiaries in North Dakota and somewhat in South Dakota. How did he maintain that contact?

A. In every way and by every avenue that was open to him.

Q. Will you name some of them?

A. Reports, as has been testified before, were sent to him. Financial reports, operating reports, special studies, bank reports. In addition to that, Mr. White always made one trip to the property and went over a portion of the property on that trip as much as time would allow. He always attended our management [meeting], which were held once a year. I don't believe there was any officer of the company that went into Chicago that didn't confer with Mr. White and visit with Mr. White, on the operations of the company. I know in my case I was in Chicago five or six times a year. Other officers, I know, were in there, perhaps not quite as much, but at least three or four times a year. I assume his direct [contract] with the officers of the joint staff was at least ten or twelve times a year in addition to his visits to the property and his attendance at the managers meetings.

Q. As I understand, his visits to the property came usually in May, and the managers meetings usually were in the fall?

A. That is correct as far as the time I was on the property. Prior to that, I believe, some times the managers meetings were held in the spring and Mr. White visited us sometime later.

Q. Now, with regard to the transfer of key employees during the time you were on the property there, was that done without Mr. White's knowledge and consent?

A. It was not.

Q. In the matter of differences between the companies, those cases where there was a diversity of interest, how were such matters handled while you were on the property?

A. It was in each case, in every case, the matter was passed up to the owners of the two properties. I refer particularly to the contract under litigation here. I refer also to the contract between Knife River Coal Mining Co. and Northwestern Public Service Co. for coal. I refer to such matters as transfer of key personnel. As I see it, the only job I had was to determine in my own mind when such a conflict did exist.

Q. Do you know who determined the dividend policies of those companies?

A. Mr. White, in conference, of course, with the execu-

tive officers and treasurer of the companies in which he was interested.

Q. Mr. Dunn has testified he kept in touch with the financial affairs of the companies. Did you observe whether or not that was true?

A. I can remember on several occasions getting telegrams from Mr. White in regard to investment of corporation's funds in U. S. securities.

Q. Did you heed those telegrams? A. Quickly.

Q. In every instance? A. In every instance.

Q. And I think you have seen something of the fact about transfer of funds to eastern banks. Did he exercise control over such matters?

A. Mr. White was very much interested in where our funds were. He took over the receivership at the time when some banks were closing and he was very careful as to how the funds were handled.

Q. Did I ask you whether you signed the 1939 contracts?

A. No, I don't believe you have asked me when I signed any contract.

Q. I think you said you signed the 1938 contract as president of Northwestern. With respect to the 1939 contract, did you sign that? A. I did.

Q. Do you know whether or not it had the approval of Mr. White, as president of United Public Utilities Corporation, prior to signing it? A. I know it did.

Q. And was that true of both the 1939 contracts?

A. That was true of both of them.

Q. What was the next change in the contractual relations between Northwestern and other company or companies? A. The 1941 contract.

Q. Will you tell the Court what events led up to that change in that contractual relationship?

A. The reason the 1941 contract, the conditions of the 1941 contract became necessary, was that it became evident the interconnected system required additional capacity. An examination was made by engineers to determine at what point the capacity should be placed. Aberdeen was picked and it met the approval of Mr. White. At that time it so happened that Northwestern had funds available, that were made available through the sale of properties in Nebraska, and for that reason, with the approval

of Mr. White, an investment which was thought at that time to be about $750,000.00, was determined upon at Aberdeen. The contract was inadequate as it stood to take care of the permanent investment of that amount of money, and it was thought, for the proper protection of Northwestern a longer term contract was necessary. For that reason, the 1941 contract was changed to ten year contract, without cancellation provided.

Q. Who worked that contract out?

A. That contract was worked out primarily by Mr. White and Mr. Kruesi. Mr. White acting for United Public Utilities Corporation and Mr. Kruesi acting for the owners of Northwestern Public Service Co., and by the office of Mr. Scheetz, and I believe that the office, also, of the engineering staff of Middle West engineering service, who was under contract to both U. P. U. subsidiaries and Northwestern.

Q. Did you sign that contract also?

A. I did. There were other matters that came up. Of course, in our net return for the entire term, Mr. White directed amortization of the interconnecting facilities.

Q. Do you know whether or not that contract had the approval of Mr. White, prior to signing it? A. I do.

Q. Did it? A. It did.

Q. You made mention of the watch he kept of the financial affairs of the North Dakota subsidiaries. Were there instances when the joint management desired money for improvements when Mr. White did not agree to such appropriations? A. There were.

Q. Can you state some of those instances? A. I can.

Q. Will you do so?

A. For the last four years prior to the sale of the property to Montana-Dakota there was a question of an additional Diesel [enginer] in the Dickinson plant to take care of that area load properly, and also to bolster up the capacity of the North Dakota system. Mr. White felt he had made a considerable investment in the Beulah boiler and a considerable investment in the Bismarck turbine and boiler, and that was as far as he could go at that time. In that length of time there had been talk of connecting the line from Kildare to Dickinson, so as to help along the Kildare-Beulah line. We were never able to obtain money to do that. In addition to that, there was a line west of

Mobridge out to Lemmon that required changing and we got a portion of that done, but not the whole of it. In addition to that there was a very weak 22 KV line from Wishek and from Hoven and Merango into Ellendale that we hoped to rebuild but we could not get money in the time we had to do it. Many of those items were in the [budger] the year Montana-Dakota acquired the property.

Q. I want to ask you this, whether or not you know if Northwestern had carrying charges on the inter-connection facilities that existed between it and the Dakota Public Service Co.?

A. Northwestern carried its half of the investment, its half of the amount set up in the contract, which amounted to Northwestern to about 151 thousand dollars.

Q. Were the Bowdle and Wishek line, and Bowdle and Ipswich line, interconnection facilities?

A. My interpretation is they were not.

Q. Do you know of the policy or requirement that work orders for the United Public Utilities Corporation subsidiaries had to have the approval of Mr. White over certain amounts? A. Yes.

Q. And that was the rule, was it? A. That was the rule.

Q. Did Northwestern Public Service Co. furnish the office equipment and automotive equipment for the joint management staff without any charge to United Public Utilities subsidiaries?

A. There was no charge whatever on office equipment. There was no charge in interest in money invested in automotive equipment.

Q. I don't know whether I have covered the proposition, that is, whether or not the members of the board of directors of United Public Utilities Corporation were ever out or ever went over the properties while you were there?

A. Only two members of the board at the time I was there. One was Mr. White, who went over the properties every year, and on one occasion Mr. Lakin came along. Mr. Lakin was also at that time a member of the board of United Public Utilities Corporation.

Q. There has been some question raised about the time of delivery of the minute books, stock books, and resignations of the officers and directors of Dakota Public Service Co. Do you know when that was?

A. Some time in October, 1945.

Q. And at whose direction was delivery of those things made?

A. I was directed by Mr. White to deliver the material that he specified to the office of Faegre & Benson, in Minneapolis.

Q. The office of the attorneys for the plaintiff in this suit? A. One of the many.

Q. Did you do that? A. I did.

Q. Some time in October, 1945?

A. That is right, as far as my recollection goes, some time in October.

Q. Do you know what the rule or policy with respect to the load dispatchers was? A. I do.

Q. During the period of time you were president of these companies? A. I do.

Q. Was that in writing? A. I believe it was not.

Q. You may state what the policy or rule with respect to handling of these loads was.

A. The load dispatchers were instructed to utilize the lowest cost producers on the system, regardless of ownership of those producers, to the utmost. When the lowest cost producer was loaded to go down the line and load up the next lower cost producer.

Q. So far as you know, was that policy followed regularly?

A. It was followed—It was not always followed far enough to the satisfaction of Mr. White.

Q. Do you mean by that that he made some criticism?

A. Mr. White criticized us for some load we were carrying in the Aberdeen plant when the Beulah plant was not fully loaded.

Q. Now, during the time you were an officer and director of Northwestern Public Service Co., Northern Power & Light Co., North Dakota Power & Light Co. and Dakota Public Service Co., did you ever intend to cause or permit Northwestern Public Service Co. to overreach or defraud the others named in any respect? A. I did not.

Q. Do you regard the several contracts between the companies named, with respect to rates and charges and allocation of expense, including those rates, as fair and just? A. I do.

Q. Did you at the time they were made? A. I did.

Q. Did you ever as an officer or director of the compa-

nies I have just mentioned, intentionally cause or permit the Northwestern Public Service Co. to take or charge anything against the other companies without consideration, unjustly, unreasonably, unlawfully, or fraudulently?

A. I did not.

Q. Mr. Sanborn, I neglected to ask you about the events leading up to the execution of the so-called 1943 supplement to the interconnection contract. Calling your [attentiont] to this photostatic copy marked Defendant's Exhibit 258, did you write the original of that? A. I did.

Q. Is that your signature on it? A. That is.

Q. On or about what date?

A. November 18, 1942 was the date of the letter.

Q. Was that transmitted to Samuel White about that time? A. It was.

Q. Subsequent to the writing of that letter was something done with the existing interchange contract of the company?

A. Yes. Mr. White, as I suggested in the letter, got in touch with Mr. Kruesi and they say that Northwestern was unable, as contemplated—

Q. Calling your attention to the language in that letter, to the effect Northwestern Public Service Co. would not be able to build the capacity which it had contemplated, what event had created that situation?

A. The war and W. P. B.

Q. Was it, as a result of that, impossible for Northwestern Public Service Co. to obtain the generator it had contemplated? A. It was.

Q. After that you wrote that letter? A. That is right.

Q. Who worked out the details of that 1943 supplement which you say was worked out subsequent to that letter?

A. At Mr. White's invitation the first draft was worked out in the Huron office and sent to Mr. Goldsmith for his comments and then sent to Mr. White. He tried to work out a supplement and was unable to do so and he sent it along to his legal officer and that draft came back into Huron, and to our suggestion, some of them were made and send back to Chicago. Mr. White and Mr. Kruesi got together with Mr. Stevenson, legal officer, Middle West, and a draft of the supplement as finally completed was completed in the Chicago office.

Q. Did you sign it? A. I did.

Q. Prior to the signing of it, do you know whether or not it had the approval of Mr. Samuel White, president, United Public Utilities Corporation? A. I do.

Q. Did it? A. It did.

Q. Did you regard the provisions of the 1943 supplement as fair so far as they affected the Dakota Public Service Co.? A. I did.

Q. There was some testimony this morning with regard to the negotiation of a new coal contract between Northwestern Public Service Co. and the Knife River Coal Mining Co., and I want to ask you what events led up to that occurrence?

A. I asked Mr. White to act for United Public Utilities Corporation and I asked Mr. Kruesi to act for Northwestern in forming a new contract for the supply of coal from Knife River Coal Mining Co. to the Aberdeen plant of Northwestern.

Q. That was in the winter of 1944 and 1945, was it?

A. As I remember it was either March or April, 1945.

Q. Were you present at any time when that contract was under discussion?

A. I was present as an observer. Mr. Kruesi did not act for Northwestern. He appointed Mr. Purchas to act as his representative.

Q. He did act?

A. Mr. White and Mr. Solberg, sales manager for Knife River Coal Mining Co., and Mr. Mont, mine manager, for Knife River, acted for Knife River. Mr. Purchas acted for Northwestern.

Q. I don't believe you have stated where those negotiations took place?

A. In the coal mining office in Bismarck, North Dakota.

Q. And after those negotiations was the contract made?

A. The contract was signed.

Q. Did you know before it was signed whether or not it had the approval and consent of Mr. Samuel White?

A. It did. He negotiated it.

Q. Did you sign that? A. I signed it.

Q. Now, I want to ask you in regard to Defendant's Exhibit 215, whether you have seen that before?

A. Yes, I have seen it before.

Q. The names of Bayles and Gazin have been mentioned

in connection with the exhibit, as I understand it. Who were they?

A. Mr. Gazin was assistant chief engineer of Middle West. Mr. Bayles, at the time this exhibit was made, was superintendent of transmission and distribution of the joint companies, the joint staff in Huron, South Dakota.

Q. Do you know who worked that out?

A. Mr. Gazin and Mr. Bayles between them worked it out.

Q. And prepared those papers there, did they?

A. Yes. They prepared the information from which these papers were taken.

Q. Is there a figure there on those papers that was used in connection with a subsequent contract relating to the interconnection facilities?

A. The column headed "Portion for interconnection with Dakota Public Service [Co.]" adds up to 303 thousand some odd dollars and cents, which figure was used for the basis of the amortization clause in the 1941 contract, and half of the figure was used as the figure for the value of half of the interconnection facilities in the 1943 supplement to the 1941 contract.

Q. I want to ask you whether you ever told Mr. R. M. Heskett, president of the plaintiff, that the interchange contract between the defendant and the Dakota Public Service Co. was cancellable on ninety days notice, or substantially that? A. I did not.

Cross Examination, by Mr. Fellows.

Q. When you detailed your connections and the proceedings that led up to your connection with Northwestern Public Service Co., I believe you stated you were sent to their office in Chicago by somebody in Ashland, Wisconsin?

A. That is right.

Q. Who was that?

A. Walter Hodgkins, whom I have known for a good many years.

Q. At least you were sent to the Middle West Corporation? A. Middle West Service Co.

Q. Did you know what connection Middle West Service Co. had at that time with the defendant company?

A. I found out later.

Q. If you know, will you state?

A. What time are you talking about?

Q. At the time you went to work for the company.

A. Middle West Service Co. had a service contract with Northwestern and with Northern Power & Light and North Dakota Power & Light.

Q. Now, at that time the Middle West Corporation owned the stock of the Northwest Utilities Co.?

A. That is correct. That is as I understand it.

Q. You also know, do you not, that in turn the Northwestern Utilities Co.—going back a little, the Middle West Corporation you have stated, owned the stock of Northwestern Utilities Co. A. I understand so.

Q. And the Northwestern Utilities Co. owned the stock of the defendant company?

A. That was a fact. Common stock.

Q. During all of the time from 1938 until the sale of the northern companies to the plaintiff, you were not only an officer but you were a director in both the defendant company and in the northern companies, weren't you?

A. That is correct.

Q. And president of both companies?

A. President of first three companies, and then two companies.

Q. And president of the defendant company, too?

A. That is correct.

Q. Did you own some stock during that period of time in the northern companies?

A. There wasn't any stock available.

Q. You held your office as director without any stock ownership? A. Correct.

Q. Do you own any stock in the defendant company?

A. There wasn't any stock available in the defendant company.

Q. You likewise hold your position as director and officer without any stock holding?

A. I had one share of stock in trust. It was not my stock.

Q. That was in the defendant company?

A. In the defendant company.

Q. You did sign Exhibits C, D and E and F to the complaint as president of the northern companies, did you and the supplement of July 1, 1941?

A. What are the exhibits?

Q. Did you sign the contract, Exhibit C, of January 1, 1938? A. If that is the 1938 contract, I did.

Q. And also the one of July 1, 1939? A. I signed that.

Q. And the other one, July 1, 1939? A. I signed that.

Q. And the one of July 1, 1941?

A. I believe I signed that.

Q. You signed those as president of the northern companies, did you not?

A. I think I signed them as president of Northwestern.

Q. Do you know who signed on behalf of the northern companies?

A. I haven't refreshed my memory on that. I will be glad to do it if you will show me the contracts. My understanding is Mr. Sandstedt signed—

Q. Here is Exhibit C to the complaint. On whose behalf did you sign that?

A. On behalf of Northwestern Public Service Co.

Q. Who signed on behalf of the northern companies?

A. C. L. Sandstedt signed on behalf of North Dakota Power & Light Co. and G. R. McArthur signed on behalf of Northern Power & Light Co.

Q. He was also a dual officer and [directors]?

A. That is correct.

Q. And Mr. Sandstedt was, too? A. That is right.

Q. Where was this signed? A. At Huron.

Q. That is the place where all of you people were operating? A. That was the joint office.

Q. That is true of Exhibit D, is it not?

A. If signed by dual officers, yes.

Q. You signed as president of Northwestern?

A. I signed for Northwestern. Mr. Sandstedt signed for Dakota Public Service Co.

Q. And Exhibit E?

Mr. Royhl: This is all admitted in the pleadings.

A. I signed for Northwestern. Mr. Sandstedt signed for Dakota Public Service.

Q. When they got ready to be signed did you call Sandstedt in and tell him what company he was to sign for and tell him you were signing for the other one?

A. I don't know how we settled who we were going to sign for.

Q. How did you determine which one would sign for one company and which would sign for another company?

A. I haven't the slightest idea. There was no system to it. I don't know as it ever occurred to us.

Q. It was just a matter of getting it signed by two fellows, one on behalf of one company and one for the other?

A. Two people that had authority to sign.

Q. Was it just a question of who signed for one company and who for the other? A. That is right.

Q. All of you being directors of both companies and officers of both companies? A. That is right.

Q. Mr. White was not there, was he? A. No.

Q. Since you were an officer in both companies why didn't you sign for both companies?

A. I would not know that. I think it would have been just as legal if I had.

Q. At least, when you signed, it didn't make any difference to you which one you signed for, as long as you signed for one of them?

A. Not as long as the owners approved of the contract.

Defendant offered in evidence a portion of the testimony by deposition of adverse witness R. M. HESKETT, an officer of plaintiff, which testimony was received in evidence as follows:

Q. Your name is R. M. Heskett? A. Yes, sir.

Q. Where do you live, Mr. Heskett? A. Minneapolis.

Q. What street, please? A. 2127 Pleasant Avenue.

Q. Are you the president of the Montana-Dakota Utilities Co., the plaintiff in this action? A. Yes.

Q. How long have you been president of that company?

A. Well, I think it was '43. I would not be sure.

Q. Were you connected with the company prior to that time? A. I was vice-president.

Q. Vice president. Are you a director of that company?

A. Yes.

Q. How long have you been a director?

A. Since the company was organized.

Q. When was that, approximately? A. In '24.

Q. 1924. You have been continuously a director since that time? A. Yes.

Q. You own stock in the company? A. Yes, sir.

Q. How much stock do you own in the Montana-Dakota, approximately?

A. Well, approximately, I would say, 50,000 shares.

Q. And what percentage is that 50,000 shares of the total? A. There is 900,000 shares.

Q. 900,000 outstanding? A. Yes.

Q. You own 50,000 shares? A. I say about that.

Q. About 50,000? A. Yes.

Q. That's as of the present? A. Yes.

Q. The members of your family own any other stock?

A. Yes, they do.

Q. Now, the 50,000 shares you own now, did you own them during 1945? A. '45, yes, yes.

Q. Now, do Montana-Dakota Utilities Co. own any shares of its own stock?

A. Oh, they may, I would not be sure about that. If it does, it is quite a small amount.

Q. How about in 1945, did they own any stock?

A. If it did it would be a very small amount.

Q. This morning, Mr. Heskett, you said you would endeavor over the noon hour to ascertain the amount of stock that you owned? A. Yes.

Q. Were you able to do that?

A. I have January, '48, and September '45 that's about what you wanted?

Q. What does September, 1945, show? A. I have 49,793.

Q. Does that reflect any additional shares held by members of your family?

A. No, I am going to give you that separate. Mary G. Heskett, my wife, has 18,890.

Mr. Benson: You mean had as of that date.

The Witness: Yes. David M. Heskett, a son, had 11,050. Robert G. Heskett had the same amount. Jean Heskett Feidt, a daughter, 11,050, and Mary Lou Heskett had 11,050. That's of '45.

Q. (By Mr. Stafford) Yes, sir.

A. Now of today's ownership or January 1st, I had 56,702 Mrs. Heskett had 19,290, David Heskett had 11,298, Robert Heskett had 11,250, Jean Heskett Feidt had 11,250, Mary Lou Heskett had 11,250.

Q. And that's a complete list of the stock owned by yourself and members of your family? A. Yes.

Q. That's common stock? A. Yes.

Q. Did you have preferred holdings too?

A. I didn't have any preferred in '45. I now have 100 and Mrs. Heskett had 609 and now she has got 610. I don't know where that one share came from.

Q. She had 609 in '45?

A. Yes, and now she has 610. The children have no preferred.

Q. At either date? A. No.

Q. What were you endeavoring to purchase from Mr. White, the utility properties of the Dakota Public Service Service Company and the mine properties of the Knife River? A. Yes.

Q. But Mr. White sold you stock and securities, how did that come about? You wanted the properties, if I understood you?

A. No, not necessarily properties, we wanted to get the property but buying the stock was simply a step.

Q. Why did you want to get the property, so you could integrate that with the Montana-Dakota?

A. Yes, certainly.

Q. So as to make an integrated—?

A. Merge it with our company.

Q. So you have one system of public utility properties?

A. Yes.

Q. But you had to buy the stock and the securities in order to—as a step in order to achieve that result, is that correct?

A. That's the way he wanted to sell it. Of course, as far as we are concerned we could have bought the property.

Q. Mr. White had a tax problem or some problem of his own?

A. I would not be surprised, I don't know whether he wanted to sell the stock.

Q. And you would have just as soon have bought the properties? A. Oh, yes.

Q. You recall when you agreed upon the price with Mr. White? I take it you did agree on the price with Mr. White? A. Yes.

Q. You recall when that happened?

A. That I have testified it is either in the early summer or in the spring of '45.

Q. It was prior to the time that the formal contract was drawn and signed? A. Yes.

Q. Some time prior to that? A. Yes.

Q. And there wasn't any deviation from that price that was agreed upon and the one in the contract?

A. I don't believe there was, I think that carried out the contract.

Q. If I said to you that you agreed informally on that $7,500,000.00 plus earnings, with Mr. White, about April 24, 1945, would that be incorrect?

A. I would not dispute it.

Q. You would not dispute it? A. No.

Q. It could have been agreed upon at that time?

A. Yes.

Q. Who else did you deal with in connection with acquiring these Dakota Public Service Company properties other than Mr. White?

A. Why, I never dealt with anybody.

Q. Anybody else in the United Public Utilities Corporation organization? A. Not about that property.

Q. When you said "they" did something a minute ago, who did you mean by "they"?

A. I mean the Northwestern.

Q. And you said they had control of both companies?

A. Yes.

Q. So your testimony is that Northwestern Public Service Company had control of itself and of Dakota Public Service Company? A. Yes.

Q. Do you recall that I interrogated you a few moments ago about allegations in the Federal Power Commission complaint filed by Montana-Dakota Utilities Co. alleging domination and control by Middlewest Corporation of Northwestern Public Service Company and of Dakota Public Service Company? A. Yes.

Q. But you are now testifying that Northwestern Public Service Company had control of—

A. Well, they had—they are the only company that I was in contact with.

Q. Who is "they"?

A. The Northwestern. I don't attempt to follow that tier of ownership about the Northwestern. I don't remember the connection.

Q. Well, you say Northwestern Public Service Company had control of Dakota Public Service Company?

A. Well, I thought so. They had an operating contract.

Q. Well, when you negotiated for the acquisition of the securities of Dakota Public Service Company, did you deal with the Northwestern Public Service Company?

A. Well, no, you know—

The Witness: I dealt with the owner.

By Mr. Schiff:

Q. What was the answer?

A. I said you know I dealt with White.

Q. I so understood your testimony, yes. A. Yes.

Q. And you dealt with Freeman with reference to the proposed acquisition of Northwestern Public Service Company? A. Yes.

Q. No 7, after the conversations with Mr. White in April or the spring of 1945, were any investigations made by the personnel of the Montana-Dakota Power Utilities Co. of the Dakota Public Service property records and so forth? A. Yes, there were.

Q. Under whose supervision were those investigations made? A. Mr. Gamble and Mr. Elvig.

Q. Mr. Gamble and Mr. Elvig. Was that at your direction, Mr. Heskett? A. Yes.

Q. What instructions did you give Mr. Gamble and Mr. Elvig in connection with these investigations?

A. Well, we had a balance sheet. They principally used their own judgment.

Q. Well, what information were you expecting them to get from these investigations?

A. Well, I left that largely to them.

Q. Well, how was it, did you give them the authority

and instruct them to make the investigations to satisfy themselves as to what you were purchasing? A. Yes.

Q. Have you or anyone in your staff, to your knowledge, any information with reference to that contract prior to your purchase of the Dakota Public Service Company stock? A. Well, I had notice of it.

Q. And in your opinion—

A. I knew about it when I went over the property with Mr. Sanborn and I discussed it with him to some extent. I asked him, I remember, when it expired, that is, cancellation, and he told me in three months after notice. Now at this time we knew that was not correct of course.

Q. In your discussion with Mr. Sanborn, can you recall anything else that was discussed with reference to that contract?

A. I think the only thing I asked him was the cancellation clause.

Q. And you have no familiarity with the terms of the contract? A. Yes, I already knew that.

Q. Prior to your discussion with Mr. Sanborn? A. Yes.

Q. Had you ever seen those contracts?

A. No, I don't think I had ever seen them.

Q. But you knew about them? A. Yes.

Q. Do you recall you knew about them, not having seen them?

A. I think Mr. White—I am not sure but I think Mr. White told me that they had an operating contract and the expenses were divided according to the gross income.

Q. Well, was that the management contract?

A. Yes, that was the management contract.

Q. Did Mr. White ever discuss with you what is called the interchange contract, in this prospectus?

A. He mentioned—of course I knew that they had that, we discussed it, but I don't remember just in how much detail.

Q. Had you ever made complaint with reference to the contract to Mr. White? A. No.

Q. Or to Mr. Freeman? A. No.

Q. Or to Mr. Sanborn?

A. I don't think so. I think the first complaint I made was in that letter.

Q. And by "that letter" you mean the July 8th letter of 1946 (R. p. 1600, supra)? A. Yes.

Q. And that is true although you have yourself been dissatisfied with that contract for some period of time prior to July 8th?

A. I considered it a one sided contract quite a while but I didn't appreciate its seriousness until later.

Q. Did you appreciate its seriousness before or after the termination notice of February 27th?

A. Oh, I wouldn't be able to say. The contract on its past performance didn't look bad in the early days up until the time we got in.

Q. Then you mean by that—

A. The contract that one company pays a very small amount for power and the other side pays much larger don't strike me as equitable.

Q. And that is your view of the contract? A. Yes.

Q. But you hadn't arrived at that view at October 19, 1945? A. October?

Q. Yes? A. That is when we bought the property?

Q. Yes.

A. Yes. I thought it was a little out of key but I didn't think it was so serious but what we could buy the property, and it would depend [it] good bit on how it was exercised.

Q. Well, I think that was a different inquiry. I was trying to place the time at which you thought it was a one-sided contract, and it is my recollection that you said in substance that the contract over a period of years had worked fairly. That is what I thought your testimony was. If I am in error I would like to have it corrected.

A. I didn't say fairly. I said it didn't seem to be any particular burden on either one. There wasn't much money transferred.

Q. Well, now, "it wasn't any particular burden on either one", by that you mean on Northwestern or Dakota Public Service Company?

A. Well, I said there wasn't much money. It was settled by interchange of power.

Q. And you are then speaking of the period prior to October 19th? A. As shown in those reports.

Q. Is the effect of your testimony that there wasn't much money involved between Dakota and Northwestern?

Mr. Schiff: As of what period were you speaking?

A. I was referring to the three or four years that are

shown in the reports of the operation of the two companies, between the two companies.

Q. That would include the period of three years and four months covered by the Arthur Young & Company statement? A. Yes.

Q. This is a question on another subject, Mr. Heskett. Did you when you bought the Dakota Public Service Company securities know of the construction of a so-called Aberdeen improvement by Northwestern Public Service Company? A. Yes.

Q. And it was then under construction?

A. Yes, almost complete, I think.

Q. I would like now to address some attention, Mr. Heskett, to the question of when you first knew of the fact whether there was at times common directors between Northwestern Public Service Company and Dakota Public Service Company? A. I could not tell you when that—

Q. You have no recollection at all of when you first knew there were common directors, there were some common directors between those two companies?

A. Well, I think I had that impression for a long time but I don't know when I knew, had positive information.

Q. By a long time, I am trying to see what period is encompassed?

A. Well, I would say several years, as far as that goes.

Defendant offered in evidence a portion of the testimony by deposition of adverse witness CECIL W. SMITH, an officer of plaintiff, which testimony was received in evidence as follows:

Q. Will you state your full name, Mr. Smith?

A. Cecil W. Smith.

Q. And where do you live?

A. 1320 West Minnehaha Parkway in Minneapolis, Minnesota.

Q. Mr. Smith, are you at present connected with the plaintiff in this case, Montana-Dakota Utilities Co.?

A. I am.

Q. And in what capacity are you connected with that company? A. Vice president.

Q. And are you a director of that company?

A. And a director.

Q. How long have you been vice president of that company, approximately?

A. About four years, I believe.

Q. What position did you hold in the company prior to that time?

A. I was chief engineer and assistant vice president.

Q. And how long have you been with the company?

A. Since 1927.

Q. And have you been associated in an active capacity with the company since 1927 in some capacity or other?

A. I have.

Q. And how long have you been a director, Mr. Smith?

A. I don't recall just how long it is. I imagine six or eight years, somewhere along in there. I don't recall exactly.

Q. That's sufficient. Mr. Smith, would you tell us please your duties or functions as vice president of Montana-Dakota Utilities Co.?

A. I have been in charge of operation and construction, particularly.

Q. By operation, you mean the actual running of the company's operating facilities, such as its gas and electric and other facilities of that nature? A. That is correct.

Q. You own any stock in Montana-Dakota Utilities Co.?

A. I do.

Q. How much, please, approximately?

A. Oh, I imagine around four or five thousand shares.

Q. How many did you own in 1945? A. Probably—

Q. Was it about the same?

A. About the same, some less.

Q. Now, prior to the acquisition of the properties of Dakota Public Service Company in 1945, was there any investigation made by engineers of Montana-Dakota Utilities Co. of the properties of Dakota Public Service Company, if you know? A. Yes, there was.

Q. Who made such investigation?

A. My recollection is that the company engineers looked over the power plants and transmission lines of the company and subsequently I believe Day & Zimmerman made examination of the physical properties of the company.

Q. Now, could you fix the date, or approximately the dates upon which the company's engineers looked over the plants and transmission facilities of Dakota Public Service Company?

A. I believe it was in July or August.

Q. Of 1945? A. Of 1945, that's right.

Q. Who were the employees that looked over these facilities?

A. Well, I looked them over and Mr. A. P. McDonald, electrical engineer, looked over the plants.

Q. Were you afforded full access to look at any of the properties of facilities that you desired to see at that time?

A. Yes.

Q. Now, Mr. Smith, it has already been testified by Mr. Gamble, I am certain, and I believe also by Mr. Heskett, that Day & Zimmerman made an investigation of these properties of Dakota Public Service Company and prepared and furnished a report on the integration of these properties which has been marked and offered in evidence as Defendant's (Minneapolis) Exhibit 4. Do you recall whether or not you have ever seen that report?

A. Yes, I believe I have.

Q. When, could you say, Mr. Smith?

A. Shortly after it was completed. I don't recall the date of it.

Q. Now, you state that you have seen it shortly after it was furnished to Montana-Dakota; would that be prior to the actual closing of the purchase of the securities of Dakota Public Service on October 19, 1945?

A. Yes, I believe it was.

Q. Did you make a study or review of that report at that time?

A. Yes, I went over it. I don't recall what its contents are now.

Q. Now, you have also testified that during that same period an investigation was being made of Northwestern properties by Day & Zimmerman. Was any investigation made of Northwestern properties by yourself or Mr. McDonald?

A. No, Mr. McDonald didn't make any investigation, and as I recall it, I went over part of the Northwestern properties, not all of them.

Q. Would this be during this same period or after the acquisition of Dakota Public Service Company on October 19th?

A. That was prior to the acquisition of Dakota. As I recall it was in July or August of '45.

Q. Did you visit the Aberdeen plant of Northwestern Public Service Company during that period? A. Yes.

Q. Did they have under construction at that time a new generating unit?

A. Yes, they were installing a new turbine and a new boiler at the time I was at that plant.

Q. Did you have occasion to see the unit at all during its installation? A. Yes, I saw it.

Q. Was it a modern type of generating unit and boiler, turbine, rather?

A. Yes, it was a new General Electric turbine.

Q. Well, now, just what did the term fraudulently mean to you, Mr. Smith?

A. Well, I think under the conditions there it might mean that as far as the Northern Power & Light was concerned they were being taken advantage of in that situation.

Q. Who was taking advantage of Northern Power & Light?

Mr. Fellows: We object to that as incompetent.

The Court: I don't think it is competent. Sustained.

Q. Was that payment which you state Northwestern had exacted from Northern Power & Light, received pursuant to any contract in force and effect between those parties?

A. I believe in pursuance to the contract cited in that paragraph.

Q. How was that contract unfair, Mr. Smith?

Mr. Fellows: Objected to as conclusion of the witness.

The Court: Sustained.

Q. I don't think you covered this in Mr. Robinson's interrogation this morning so I will ask you now, do you recall now when you first knew who the directors were of Northwestern Public Service Company?

A. Of Northwestern Public Service Company?

Q. Yes, the defendant in this action.

A. I believe the first information that I had as to the directors of Northwestern Public Service Company was from Mr. Sanborn when I was out on the property in July.

Q. Of 1945? A. Of 1945.

Q. Now about directors of Dakota Public Service Company? What is your best recollection as to when you first knew who those directors were?

A. I think about the same time.

Q. About the same time and the source of your information was the same? A. That's right.

Q. That's in July of 1945? A. Yes.

Defendant's Exhibit 343 was received in evidence. It consists of the minutes of the special meeting of the directors of plaintiff held July 11, 1945.

At that meeting, among other things, said directors approved, ratified and confirmed the execution of the contract with United Public Utilities Corporation dated July 2, 1945, relating to the purchase by plaintiff of all of the outstanding securities of Dakota Public Service Company and Knife River Coal Mining Company, which is Defendant's Exhibit 282 (R. p. 1333, supra).

Defendant's Exhibit 344 was received in evidence. It is as follows:

Defendant's Exhibit 344.

United States of America
Federal Power Commission

Before Commissioners:

Nelson Lee Smith, Chairman; Claude L. Draper and Leland Olds.

September 2, 1947

In the Matter of	
Montana-Dakota Utilities Co. and Northwestern Public Service Company.	Docket No. IT-6004 and (Waiver of Notice for Filed Rate Schedules)

Order Allowing Rate Schedules to Take Effect and Dismissing Complaint.

It appears to the Commission that:

(a) On August 12, 1946, Montana-Dakota Utilities Co. (hereinafter "complainant") filed a complaint with this Commission against Northwestern Public Service Company (hereinafter "defendant") alleging among other things, that, under the agreement between it and defendant, dated July 1, 1941, and supplemented by an agreement, dated March 13, 1943:

> "The rates and charges exacted from complainant by defendant . . . are unjust and unreasonable and complainant should not be required . . . to pay to defendant anything on account of the transmission line amortization . . . or anything on account of the capacity of the Aberdeen generating station in excess of 6,000 kw capacity; and should be paid by the defendant not less than 6½ mills per kilowatt-hour for all energy furnished by complainant to defendant."

(b) On January 21, 1947, defendant filed a proposed Notice of Cancellation of the aforementioned agreements be-

tween it and the complainant, to become effective as of August 31, 1947, in accordance with a Notice of Termination served by complainant upon defendant under the terms of the aforementioned agreements.

(c) On February 20, 1947, complainant amended its complaint of August 12, 1946, by requesting that the Commission order the maintenance of the facilities interconnecting it and defendant and fix the rates for power to be interchanged by complainant and defendant.

(d) On August 20, 1947, complainant and defendant made application requesting that the following rate schedules, providing by their terms for temporary emergency interchange service be allowed to take effect at midnight August 31, 1947:

Name of Seller	Rate Schedule Designation	Rate Schedule Superseded	Name of Purchaser
Northwestern Public Service Company	FPC No. 7	FPC No. 6, as amended	Montana-Dakota Utilities Co.
Montana-Dakota Utilities Co.	FPC No. 4	FPC No. 3, as amended	Northwestern Public Service Company

(e) By the terms of the agreement filed August 20, 1947, the issues involved in the complaint, as amended, have become merely moot and the public interest will be served by dismissing the same.

The Commission orders that:

(A) The aforesaid rate schedules be and they hereby are allowed to take effect at midnight August 31, 1947;

(B) The aforesaid rate schedules shall be deemed to have been filed and published in compliance with the Federal Power Act;

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above-designated rate schedules, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;

(D) The foregoing provisions of this order are without prejudice to any findings or orders which have been or may hereafter be made by this Commission in any proceeding now pending, or hereafter instituted, by or against the applicants.

(E) The complaint filed on August 12, 1946, and as amended on February 20, 1947, by Montana-Dakota Utilities Co. against Northwestern Public Service Company be and it is hereby dismissed.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: September 4, 1947.

FRED GAMBLE, being called as an adverse witness by the defendant and being first sworn, testified as follows:

Cross Examination, by Mr. Royhl.

Q. Your name is Fred Gamble? A. Yes.

Q. You are an officer and director of the plaintiff company? A. I am.

Q. And for how long have you acted in that capacity?

A. As an officer since 1925. As a director since 1936 or 1937.

Q. What office do you hold at the present time?

A. I am Treasurer of Montana-Dakota, and assistant secretary.

Q. How long have you acted in those capacities?

A. I have been assistant secretary since 1925. I have been treasurer of the company, I am not sure of the date, 1932, 1933, approximately.

Q. Do you know where Ellendale, North Dakota is on this system of the Dakota companies? A. Yes, I do.

Q. Since October 19, 1945, has the plaintiff installed generating equipment there?

Q. What installation has the plaintiff made of generating capacity at Ellendale?

A. They have made installation of Diesel engines similar

in character as the ones described by Mr. Helmick in his testimony.

Q. At Ellendale? A. Yes.

Q. Of what capacity?

A. Net capacity or gross installed?

Q. Gross installed capacity?

A. I believe the ratings were two 1750 KW units.

Q. That would be 3500 KW? A. That is gross.

Q. What installation has been made by the plaintiff at Gettysburg, South Dakota?

A. We have made no installation of capacity at Gettysburg.

Q. What installation, if any, has been made by the plaintiff at Mobridge, South Dakota?

A. Identical equipment with that installed at Ellendale.

Q. That would be 3500 additional KW at Mobridge?

A. That is correct.

Q. Did you make any additional installations other than the 3500 at Ellendale and 3500 at Mobridge?

A. We are in the process of making additional installations.

Q. Where?

A. At Columbus, North Dakota, just north and west of Mandan, and at Bismarck, North Dakota.

Q. What additional are you making at Bismarck?

A. We are installing additional boiler and generating capacity. Generating capacity of 5000 KW.

Q. Any other?

A. Yes, we are installing generating capacity at Sheridan, Wyoming.

Q. That is not on the North Dakota property?

A. Part of the Montana-Dakota property.

Q. Are you installing any additional capacity at Dickinson, North Dakota?

A. No. We have taken generating capacity out of that station.

Redirect Examination, by Mr. Benson.

Q. Mr. Gamble, are you familiar with the general increase of electrical consumption over the whole of the ... ted States since the first of January, 1936?

Mr. Royhl: Objected to as not proper cross examination; immaterial.

The Court: I think he can show by this witness, if he is competent to testify, there has been a general increase in demand for electric power all over the country. Within reasonable limitations the witness may answer.

A. Yes, I believe I am.

Q. How many years have you been in the utility business? A. Since 1920.

Q. Has there been a period that you know of in the utility business from the time you have been in it, when there has been such an increase in demand for energy as began about January 1, 1936?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. No.

Q. Do you know whether the defendant company has installed any additional generation on its system? A. Yes.

Q. Where?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. At Mitchell, South Dakota.

Q. Do you know how much? A. I believe 7500.

Q. KW? A. Yes.

Mr. Royhl: Defendant rests.

Mr. Fellows: Plaintiff rests, and I want to ask leave of the Court to amend the complaint in certain particulars to conform to the proof, and the amendment has to do with the amount of underpayment current, for energy, and based on figures which now appear as our cost of production of current.

We ask leave to amend Paragraph II of the second cause of action, by changing that paragraph to read as follows:

"From the 1st day of September, 1935, to July 1, 1939, the defendant, through its officers and directors, who were officers and directors in common with Northern Power and

Light Company and North Dakota Power & Light Company, caused said North Dakota Power & Light Company to generate in the State of North Dakota and transmit to Northern Power & Light Company at Keldron, South Dakota, and at Driscoll, North Dakota, electrical energy which was in turn by Northern Power and Light Company transmitted to defendant at Gettysburg, Barnard, Ipswich and Aberdeen, South Dakota, and at said points purchased for resale by defendant. The amount of such energy was 12,550,381 kilowatt hours and said energy was of the just and reasonable value of One Hundred Two Thousand Two Hundred Eighty-five and 61/100 Dollars ($102,285.61), but defendant, through its officers and directors aforesaid, paid to said Northern Power and Light Company only the sum of Sixty-two Thousand Seven Hundred Fifty-one and 90/100 Dollars ($62,751.90), which was unjustly and unreasonably and unlawfully low price therefor, to the damage of North Dakota Power & Light Company and Northern Power and Light Company in the amount of Thirty-nine Thousand Five Hundred Thirty-three and 70/100 Dollars ($39,533.70)."

Amend Paragraph III so that the last sentence of said paragraph will read as follows:

"That by reason of the facts hereinbefore alleged, the defendant became indebted to and liable to said North Dakota Power & Light Company and Northern Power and Light Company in the sum of Thirty-nine Thousand Five Hundred Thirty-three and 70/100 Dollars ($39,533.70), no part of which has been paid."

Amend the Fourth Cause of Action by amending the last paragraph of Paragraph VI of said Cause of Action to read as follows:

"The net energy sold as aforesaid by Dakota Public Service Company to Northwestern Public Service Company from July 1, 1939 to July 1, 1941, under the terms of said original of said Exhibit 'D' was fairly, justly and reasonably of the value of Ninety Thousand Nine [Hundred] Seventeen and 65/100 Dollars ($90,917.65) but the defendant, through its officers and directors aforesaid, paid to said Dakota Public Service Company and caused said

Dakota Public Service Company to receive for said energy only the sum of Fifty-nine Thousand Three Hundred Forty-five and 74/100 Dollars ($59,345.74) which was an unjustly, unreasonably and unlawfully low and inadequate price therefor."

Amend Paragraph VII of the Fourth Cause of Action to read:

"By reason of the facts hereinbefore in this cause of action alleged, defendant became liable to and indebted to Dakota Public Service Company in the amount of Seventy-one Thousand, Five Hundred Seventy-one and 91/100 Dollars ($71,571.91), no part of which has been paid."

Amend the Sixth Cause of Action by amending Paragraph IX to read as follows:

"From the 1st day of July, 1941, to the 19th day of October, 1945, the defendant, through its officers and directors, who were officers and directors in common with Dakota Public Service Company, caused said Dakota Public Service Company to generate electrical energy in the State of North Dakota and transmit the same to the defendant at Gettysburg, Barnard and Ipswich, South Dakota, and there to resell the same to the defendant and defendant transmitted the same and resold the same to its public utility customers in the State of South Dakota, and the net energy thus generated, transmitted and sold by Dakota Public Service Company to defendant was fairly, justly and reasonably of the value of Three Hundred Seventy-seven Thousand One Hundred Eight and 6/100 Dollars ($377,108.06), but the defendant, through its aforesaid officers and directors, paid to said Dakota Public Service Company and caused said Dakota Public Service Company to receive for said energy only the sum of Two Hundred Eighteen Thousand Nine Hundred Ninety-four and 23/100 Dollars ($218,994.23), which was an unjustly, unreasonably and unlawfully low price therefor."

Amend Paragraph X of the Sixth Cause of Action to read as follows:

"By reason of the facts hereinbefore in this cause of action alleged, defendant became indebted to the Dakota

Public Service Company in the amount of Three Hundred Thousand Four Hundred Dollars ($300,400.00) no part of which has been paid."

Amend the amended prayer to the complaint so that Paragraph (5) thereof will read as follows:

"(5) For the sum of Five Hundred Fifty-six Thousand One Hundred Twenty and 77/100 Dollars ($556,120.77), with interest at the rate of six per cent (6%) per annum from the date of each payment of each portion thereof by North Dakota Power & Light Company, Northern Power and Light Company and Dakota Public Service Company to the defendant, and with interest on all underpayments by defendant for electrical energy at the rate of six per cent (6%) per annum from the date of each monthly underpayment on account of such energy."

Mr. Royhl: To which the defendant objects for the reason that such application comes too late; it is not timely made; and the defendant having completed the trial of the action, both sides having rested, is surprised; prejudicial and can't meet such additional issues; improper and prejudicial to the defendant, and no proof upon which to make such offer exists.

The Court: I don't see there is any additional issues presented. He has merely made a motion to amend the complaint to conform to the testimony now in the record. As to whether or not the evidence before the Court, the record of the case so far would prove the allegations of the complaint is a matter I am not prepared to pass upon at this time, but I think, if the evidence before the Court is conclusive enough to justify the allegations in the proposed amendment, I think counsel should have a right to amend his complaint to conform to the evidence as it now stands. I don't think there is any question about that, but I would not want to pass upon the motion at this time.

Mr. Royhl: May we have an exception to the ruling?

The Court: Certainly. I will take the matter under advisement and I may rule the other way in the future, but if the evidence in the case will prove the allegations in

the proposed amendment then there is no question but what he has a right to amend the complaint to conform to the facts.

(Opinion.)

The Court: Gentlemen, I have made a careful study of the briefs submitted in this case; I have examined a good deal of the evidence; I have listened with a great deal of interest to the oral presentation of your several positions, and I am convinced that perhaps I am as well, if not better, prepared to decide the case now than I would be if I made a further study of it.

As far as the law of the case is concerned, I have already passed upon the question as to the jurisdiction of the Court.

The next question, as I remember [is], raised by the proof, is the contention of the defendant that the action is barred by the equity rule which prohibits a stockholder, who was not a stockholder at the time of the alleged wrong in the conduct of the board of directors of a corporation, from maintaining a suit for or resulting from the wrongdoing, unless he was a stockholder at the time of the wrongful act, or unless his ownership of the stock was due to legal possession of it. While I have no quarrel with the authorities submitted in support of defendant's contention, this is not a law suit that I think that law is applicable to at all. This is not a suit by a stockholder upon a so-called derivative cause of action. This is a suit by an assignee of the cause of action, and I don't think the equity rule contended for by the defendant is applicable at all.

The next law question, as I recall it, as raised by the proofs, is that of the statute of limitations. I don't think the statute of limitations has anything to do with this case.

That leaves only, as I recall it, the main questions of fact to be determined. As to a good many of the essential facts in the case there seems to be no dispute. As I recall the evidence and contention of counsel, there is no dispute as to the figures representing the amount of money which it is contended the plaintiff paid to the defendants for the services contended for by the defendant in the action.

The next question is whether or not those amounts, collected from the plaintiff by the defendant were collected under legal rate schedules and legal contracts under the provisions of the Federal Power Act.

As to the first proposition, that of the alleged deficiency in the rate, there isn't any dispute, as I recall it, as to the amount paid under that agreement.

As I view the law, the Power Act contemplated that corporation or individuals engaged in the interstate transportation of electric energy, as were the parties to this suit, should file with the Commission, prior to the time that any rate went into effect, not only the proposed rate, but all contracts, charges or other agreements that in any way affect the rate. Under the evidence, as I view it, this rate and these various contracts and agreement were never filed properly, within the contemplation of the statute. It is true, the Power Commission, by orders, permitted the filing of the rates that had been withheld from the record and been in force between these parties for as long as two years, if I recall correctly. They permitted the filing of the rate without the filing of other contracts or agreements or charges or information which, under the contemplation of the law, should have been filed. There is no explanation in the evidence, so far as I am able to recall it, which would in [anyway] tend to excuse or justify the defendant company in withholding from the Power Commission, the rate and contracts affecting it, for a period of two years. That is contrary to the real purpose and intent of the law that a thing like that should occur. The fact that the rates were filed in this haphazard manner, coupled with the fact that the necessary information which should have accompanied them was not filed before the Commission, notwithstanding the fact that the Commission, under specific authority granted to it by the Power Act authorized the filing of the various instruments, some of them at least, at a specified time after they went into effect, contrary to the whole spirit and purpose of the Power Act.

That fact in itself, when you take into consideration that it was a rate, established and promulgated in transactions between two or more corporations which were managed and operated by the same board of directors, is enough to create a presumption of unfair dealing.

As I indicated to counsel a few moments ago, I have no thought that any of the men who were directors and officers of the defendant company, who participated in these contracts and agreements were guilty of any lack of personal integrity or personal honor. That is not the question. The question is not whether these men were honest, or whether they were self-respecting citizens. The question is whether or not the rates which they promulgated and which were put into operation by them between these companies, the contracts which were entered into by these companies, whether or not those contracts were absolutely fair and reasonable in every way; whether or not they gave to one of the companies an unfair advantage over another; whether or not one of the companies by the promulgation of these rates and contracts profited materially to the disadvantage of the other company. That is the question before the Court.

Under the facts in this case, as I view them, Gentlemen, I cannot come to any other conclusion in the matter than that these contracts were entered into by this joint board of directors, and that the result of that was of material advantage to the defendant company and to the disadvantage of the predecessors of the plaintiff in this case.

It is argued that all of these acts were permitted, ratified and approved by Mr. White. Mr. White must have been a very busy man. As I recall the evidence, he had charge not only of the operations involved in this suit of some two or three public service corporations who were engaged in the manufacture and distribution of electric energy over a wide stretch of territory, but he had some six or seven public utilities companies under his charge and supervision. The evidence shows that he made several visits to this territory; that he talked to the officers of the company; that he talked to men employed, and [gain] such information as anyone would be expected to gain by that visit and talking with these men, but I don't think that he had that intimate understanding and knowledge of the transactions or details that would enable him to approve a contract in such a way as to be of very much benefit to anybody. Mr. White, as I say, was engaged in the management of some six or seven corporations, all held by the same holding company,

United Public Utilities Corporation. I have no doubt but what Mr. White used his best judgment and his energies in an effort to so conduct those companies as to produce for the holding company, United Public Utilities, the greatest profit that he could, but I am convinced from the evidence in this case that in passing upon the conduct of these joint directors and officers in the transactions between the corporations which were controlled by them and which were operated by them, that he also had in mind the benefit which might accrue to some other corporation that he had. The evidence shows that nothwithstanding the fact that he knew that the production of electricity at Beulah was being sold to the Northwestern Public Service Company at a rate which exceeded the cost of production, that he was anxious that they run to capacity because it benefitted the Knife River Coal Company, and Knife River Coal Company, if he could keep that plant running 24 hours a day, and they furnished all of the coal, the Knife River Coal Company could dispose of coal which otherwise might be surplus.

I don't think Mr. White had that particular interest in the welfare of the individual corporation involved in this case that he had in the success of the aggregate of the corporations which were under his control, and even if he did, I don't think Mr. White's approval or disapproval of the conduct of the Board of Directors of these northern companies has anything to do with it.

The officers of the northern companies were the officers charged with the duty of operating this corporation. There is nothing in the law that I know of that made it necessary for Mr. White to approve or disapprove of their conduct. His board of directors, as he calls them, the Board of Directors of the holding company, United Public Utilities Co., knew nothing about the transactions between the companies involved in this law suit, or their predecessors, except what Mr. White told them. Mr. White knew nothing about it except what somebody connected with the transactions involved in this law suit told him. I don't regard the approval of the United Public Utilities Co. as in any material way affecting the equities in this case.

It is true the record shows the whole board of directors

of the United Public Utilities Co. came out to South Dakota once and looked these properties over. I don't know how much time they put in; how much in detail they went in the examination of the records, or manner in which it was conducted and contracts entered into or contemplated at that time. I don't recall that the record indicates how long they stayed here; whether they were out here primarily as a vacation or whether they came out to find out what they could about the plant. I only know that as a matter of common knowledge it is not unusual for a board of directors of a big holding company like this to plan a trip to San Francisco to a Worlds Fair, where they can transact some company business. I have heard of a board of directors of a corporation planning a trip to South Dakota during the pheasant season. I don't know what these men came out here for, but there isn't anything connected with their trip out here, as far as the record goes, that shows they found out anything particularly about the conduct of these corporations. So I don't think their approval in any way affected the activities of any of the companies.

As I say, there is no contest, as I recall it, as to the figures affecting the amount which it is claimed by the plaintiff was wrongfully collected by the defendant. The only question in dispute then would be as to whether or not these rates and contracts were unfair and unreasonable; whether or not they have been properly and duly filed with the Power Commission. From the evidence, I can't view it in any other way than that the contracts that were entered into, the rates and schedules and everything that was entered into, operated by this joint board of directors and officers, primarily were of material benefit to the defendant company and to the material detriment of the plaintiff's predecessors.

As I say, I don't think any further study would change my mind in regard to it.

It is the judgment of the Court that the plaintiff shall recover, and upon presentation of findings and judgment to that effect, the same will be signed and entered of record.

Mr. Woods: We would like to have a little time to make some requests for findings and conclusions.

The Court: That is entirely satisfactory to me. You may have until September 15th. We will set it for that date or as soon thereafter as counsel can be heard.

(Indorsed)—Filed Aug. 27, 1948, Roy B. Marker, Clerk. By Helen S. Lambert, Deputy.

Requests by Defendant, Northwestern Public Service Company, for Findings of Fact and Conclusions of Law.

Now comes defendant, Northwestern Public Service Company, pursuant to leave of Court and respectfully submits the following findings of fact and conclusions of law and requests that the Court adopt and enter each of said findings of fact and each of said conclusions of law as the findings of fact and conclusions of law of the Court in this cause.

Findings of Fact.

I. *Findings Applicable to All Causes of Action.*

1. Plaintiff was prior to the commencement of this action and at all times thereafter has been and now is a Delaware corporation and a citizen of said state, continuously qualified as a foreign corporation in the State of South Dakota since June 27, 1935 and in the State of North Dakota since July 2, 1935.

2. Defendant was prior to the commencement of this action and at all times thereafter has been and now is a Delaware corporation and a citizen of said state and has been continuously qualified to do business in the State of South Dakota since December 23, 1923.

3. The amount in controversy in each of the ten causes of action in the complaint, as amended, exclusive of interest and costs, exceeds $3,000, except that the amount in controversy in each of the seventh and eighth causes of action does not exceed $3,000, exclusive of interests and costs.

4. Northern Power & Light Company (hereinafter called "Northern") was a Delaware corporation continuously

from prior to January 1, 1928, to July 1, 1939 and was qualified to do business in the states of N h Dakota and South Dakota during said period.

5. North Dakota Power & Light Company (hereinafter called "North Dakota") was a Delaware corporation continuously from prior to January 1, 1928 to July 1, 1939 and was qualified to do business in the State of North Dakota during said period.

6. On July 1, 1939 Northern and North Dakota, pursuant to the laws of the State of Delaware, merged into one corporation, the surviving corporation being North Dakota, which changed its name in said merger proceedings to Dakota Public Service Company (hereinafter called "Dakota").

7. From July 1, 1939 to and after October 19, 1945 Dakota was a Delaware corporation, and since July 13, 1939 and to and after October 19, 1945 was qualified as a foreign corporation in the State of South Dakota and since July 1, 1939 and to and after October 19, 1945, in the State of North Dakota.

8. Pursuant to the terms of said merger, Dakota became the owner of all the public utility business of Northern, in addition to the properties on the date of said merger owned by North Dakota; and thereafter Dakota owned and operated as a public utility the properties formerly owned by it (as North Dakota) and the properties on the date of said merger owned by Northern.

9. The corporation laws of the State of Delaware provide that when two corporations of said state merge pursuant to the provisions of said corporation laws, then the surviving corporation shall, among other things, be subject to all of the restrictions, disabilities and duties of each of the corporations so merged; and, further, that in the case of such merger all debts, liabilities and duties of the respective constituent corporations shall upon said merger attach to the surviving corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

10. The following persons were directors and officers of defendant and at the same time directors and officers of

Northern and North Dakota (prior to July 1, 1939) or of Dakota (after July 1, 1939): F. E. Kruesi from January 1, 1935 to July 21, 1937; C. J. Strike from January 1, 1935 to June 1, 1938; C. L. Sandstedt from January 1, 1935 to June 28, 1944; W. R. Gasin from January 1, 1935 to January 31, 1935; J. F. Buckmier from March 10, 1937 to October 19, 1945; G. R. McArthur from July 21, 1937 to October 19, 1945; A. B. Sanborn from July 1, 1938 to October 19, 1945; Wm. M. Dunn from July 24, 1944 to October 19, 1945. The following persons were officers of defendant and at the same time officers of Northern and North Dakota (prior to July 1, 1939) or of Dakota (after July 1, 1939): J. F. Buckmier from January 1, 1935 to February 26, 1935; E. W. Dempewolf from November 27, 1936 to April 21, 1941; Ralph Mauch from April 21, 1941 to September 14, 1942; Margaret Frost from September 14, 1942 to October 19, 1945.

11. Throughout the period from January 1, 1935 to October 19, 1945 there was no person who was either an officer or director of defendant and at the same time was either an officer or director of either Northern, North Dakota or Dakota, except for the persons and during the periods named in the preceding Finding of Fact No. 10.

12. In each of the aforesaid instances enumerated in the preceding Finding of Fact No. 10 the holding of offices and directorships, as the case may be, in Northern, North Dakota or Dakota (hereinafter sometimes collectively called "Northern Companies") simultaneously with the holding of offices or directorships, as the case may be, in defendant by the individuals named in said Finding of Fact was made known to the Federal Power Commission, and the holding of all such positions was authorized by said Commission by orders duly issued by it.

13. Throughout the period from January 1, 1935 to and including June 30, 1939 the Board of Directors of Northern consisted of five members, and the Board of Directors of North Dakota consisted of five members. From July 1, 1939 to October 19, 1945 the Board of Directors of Dakota consisted of five members. From January 1, 1935 to October 19, 1945 the Board of Directors of defendant consisted of seven members.

14. Throughout the period from January 1, 1935 to July 1, 1939 Samuel W. White was a director of both Northern and North Dakota and was also a director and President of United Public Utilities Corporation (hereinafter called "U. P. U."), a New Jersey corporation. Throughout the period from July 1, 1939 to October 19, 1945, both inclusive, Samuel W. White was a director of Dakota and was also a director and President of U. P. U. At no time throughout the period from January 1, 1935 to October 19, 1945, both inclusive, was Samuel W. White an officer of Northern, North Dakota or Dakota or a director, officer or stockholder of defendant or of Middle West Utilities Company, a Delaware corporation, or The Middle West Corporation, a Delaware corporation, or of any subsidiary thereof or company affiliated therewith.

15. On April 15, 1932 Samuel W. White was appointed by the United States District Court for the Northern District of Illinois, Eastern Division, receiver of United Public Utilities Company and of United Public Service Company and a third company. This equity receivership was succeeded by reorganization proceedings under Section 77B of the Bankruptcy Act in which Samuel W. White continued as trustee. The reorganization proceedings terminated on December 31, 1934, and throughout the period from April 15, 1932 to said date all the capital stock of both North Dakota and Northern was owned by United Public Utilities Company. During the same period all of the capital stock of Knife River Coal Mining Company (hereinafter called "Knife River"), a Minnesota corporation, was also owned by United Public Utilities Company. Throughout said receivership and the subsequent reorganization proceedings all the directors of North Dakota, Northern and Knife River were elected by the outstanding stock of said respective corporations under and subject to the control and direction of said Samuel W. White as receiver and as trustee. Also during said period the officers of said three companies in every instance were approved by said Samuel W. White as receiver or as trustee prior to their election or appointment to their respective offices.

16. During practically all of the period from April 15, 1932 through December 31, 1934, Samuel W. White was a director of both Northern and North Dakota.

17. Throughout the period from January 1, 1935 to October 19, 1945, both inclusive, all the stock of the Northern companies and of Knife River was owned by U. P. U. which was successor to United Public Utilities Company. Throughout the same period the persons who acted as directors of the Northern Companies and of Knife River were approved by U. P. U., and the aforesaid stock of said companies was voted in favor of the election of said persons with the consent and at the direction of U. P. U. Also throughout said period the officers of the Northern Companies and of Knife River were approved by U. P. U. prior to their election or appointment to their respective offices.

18. Throughout the period from prior to January 1, 1932 to after October 19, 1945 all the outstanding common stock of defendant was owned by North West Utilities Company, a Delaware corporation, and all the outstanding common stock of North West Utilities Company was owned by The Middle West Corporation or by its predecessor, Middle West Utilities Company.

19. During the receivership and the reorganization proceedings concerning United Public Utilities Company all the common stock of that company was owned by United Public Service Company, a New Jersey corporation, which was one of the three companies of which Samuel W. White was receiver and trustee. During the same period practically all of the common stock of United Public Service Company was owned by Middle West Utilities Company.

20. The common stock of U. P. U. was divided under the provisions of its charter into Class A and Class B shares, and by charter limitation the Class B common stock was entitled to elect only one of the directors of U. P. U. until 50% of the total of U. P. U.'s collateral trust bonds and of its preferred capital stock were either converted or paid and retired. This limitation ceased on July 1, 1945. Throughout the period from January 1, 1935 to July 1, 1945 the number of directors on the Board of U. P. U. varied between five and seven, and for no interval throughout this period did the Class B common stock elect more than one director.

21. Throughout the period from January 1, 1935 to October 19, 1945 not less than 48.65% nor more than 56.34%

of the voting stock of United Public Service Corporation (successor to United Public Service Company) was owned by The Middle West Corporation or by its predecessor, Middle West Utilities Company, and during the same period United Public Service Corporation owned a majority of the Class B common stock of U. P. U. During the same period neither The Middle West Corporation nor its predecessor, Middle West Utilities Company, nor any subsidiary of or other company affiliated with either of said two companies owned other than negligible amounts of the Class A common stock or of either of the series of preferred stock of U. P. U. In 1939 The Middle West Corporation sold all the remaining securities of U. P. U. held by it and thereafter owned no securities whatsoever of U. P. U.

22. At no time from January 1, 1935 to October 19, 1945 did The Middle West Corporation or its predecessor, Middle West Utilities Company, or United Public Service Corporation or any other company affiliated with or controlled by any of said three companies elect more than one director upon the Board of Directors of U. P. U.

23. At no time throughout the period from January 1, 1935 to October 19, 1945 was any director on the Board of U. P. U. also a director of The Middle West Corporation or of any of its subsidiaries, except that Nicholas P. Zech was a director of U. P. U. and of North West Utilities Company in the years 1936, 1937 and 1938, and that Gail Belden was a director of U. P. U. and of North West Utilities Company and of United Public Service Corporation in 1944 and 1945. Nicholas P. Zech and Gail Belden were the directors of U. P. U. elected by the Class B common stock in 1936, 1937 and 1938 and in 1944 and 1945, respectively. At no time throughout said period was any director of U. P. U. a director or officer of defendant.

24. At no time throughout the period from January 1, 1935 to October 19, 1945 was any director or officer of the Northern Companies or of Knife River or of defendant ever a director or officer of U. P. U., North West Utilities Company, Middle West Utilities Company or The Middle West Corporation, with the single exception of Samuel W. White who was a director and President of U. P. U.

25. During the entire period from January 1, 1935 to October 19, 1945 the defendant neither owned any of the capital stock of U. P. U., North Dakota, Northern, Dakota or Knife River, nor did it elect any of the directors or appoint any of the officers of said companies.

26. During the entire period from April 15, 1932 to October 19, 1945 neither U. P. U. nor its predecessor, United Public Utilities Company, was dominated or controlled by the defendant or by The Middle West Corporation or its predecessor, Middle West Utilities Company, or any subsidiary thereof or company affiliated therewith.

27. During the entire period from April 15, 1932 to October 19, 1945 neither North Dakota, Northern, Dakota nor Knife River was dominated or controlled by the defendant or by The Middle West Corporation or its predecessor, Middle West Utilities Company, or any subsidiary thereof or company affiliated therewith.

28. Throughout the period during which Samuel W. White was a director of the Northern Companies, he at all times dominated and controlled the action taken by the Boards of Directors and officers of said corporations and directed and controlled the policies, operations, business and affairs of each of said corporations.

29. The Northern Companies and Knife River produced approximately forty per cent of the operating revenues and two-thirds of the net profits received by U. P. U.

30. None of the individuals who at any time were directors or officers of defendant and were also at the same time directors or officers of any of the Northern Companies acted fraudulently or dishonestly in connection with any of the contracts involved in this action or in the negotiation, preparation or execution thereof or the operations thereunder, but each of said individuals at all times in connection with said contracts and the operations thereunder and the relationships between the defendant and the Northern Companies acted honestly, with personal integrity, and in good faith.

31. Samuel W. White, as Receiver of United Public Utilities Company, consented to and approved the first

arrangements between North Dakota and Northern and the receivers of Middle West Utilities Company under which North Dakota and Northern received certain advisory services in connection with engineering, accounting, advertising and similar matters. Middle West Service Company commenced business January 30, 1936, and new contracts were made between North Dakota and Northern and Middle West Service Company in place of those previously existing between North Dakota and Northern and the receivers and trustees of Middle West Utilities Company. These contracts were fully known to and approved and authorized by U. P. U. A similar contract was made in 1939 between Dakota and Middle West Service Company in order to reflect the results of the merger of North Dakota and Northern.

32. Neither the defendant nor any of the persons who at any time were officers or directors of defendant and simultaneously were also officers or directors of the Northern Companies caused said arrangements with the receivers and trustees of Middle West Utilities Company to be made, or said contracts with Middle West Service Company to be entered into or to be signed by any of the Northern companies or on their behalf.

33. The interconnection facilities described in certain of the contracts involved in this action were constructed by defendant at its sole cost in 1929 to 1931. These facilities and the purposes of their construction and operation were as follows:

(1) A 38,000 volt transmission line from the substation of defendant at Aberdeen, South Dakota, northward to Barnard, South Dakota, to enable Northern to protect its service in the area north, northwest and west to Barnard by access to the generating capacity of defendant;

(2) A 38,000 volt transmission line from the substation of defendant at Aberdeen, South Dakota, westward to Ipswich, South Dakota, to enable Northern to protect its service in that town and the area lying north and west of that point by access to the generating capacity of defendant;

(3) A 33,000 volt transmission line from Highmore, South Dakota, to Gettysburg, South Dakota, to enable Northern to protect and better its service at Gettysburg and its entire system by access to the generating capacity of defendant;

(4) The portion of the interconnected substation and control equipment at Aberdeen, South Dakota, used exclusively for the interconnection with Northern;

(5) A substation at Gettysburg, South Dakota, used exclusively for the interconnection with Northern and to serve the town of Gettysburg.

34. Prior to, during and after the construction of the interconnection facilities described in certain of the contracts involved in this action, Northern's system was weak and inefficient, due principally to the lack of sufficient generating capacity on its system and to poor transmission facilities. Without the interconnection facilities Northern was unable to carry its peak loads and to afford essential protection against the hazards of weather, poor transmission and an inadequate and unreliable supply of energy, resulting in threats of municipal ownership in many parts of the territories served by Northern. Northern was unable to obtain sufficient energy from North Dakota to serve its needs and to protect its service. Neither Northern, North Dakota, nor United Public Utilities Company, at the time the interconnection facilities were constructed, was financially able to provide the additional necessary generating capacity and transmission facilities needed by Northern in its own system. Defendant had ample generating capacity to aid Northern. Through the construction of the interconnection facilities, Northern's deficiency of generating capacity was corrected and the inefficiencies of its transmission system were eliminated except those due to inadequate voltage and poor physical condition.

35. The interconnection facilities described in certain of the contracts involved in this action were not constructed for the sole use and benefit of defendant. The principal benefits resulting from the construction of said interconnection facilities accrued to Northern.

36. From the time the construction of the interconnection facilities described in certain of the contracts involved in this action was completed in 1931 through October 19, 1945, certain additions were made in generating capacity on the system of the Northern Companies with the prior approval of U. P. U. Due to the steadily increasing load on the systems of the Northern Companies, the generating capacity of said companies never was adequate to serve their needs except during the last four months of 1940. During this entire period defendant at all times furnished the necessary additional generating capacity to enable the Northern Companies to meet their requirements which would have been impossible without the continuation of the interconnection facilities. The interconnection facilities were of benefit and value to the Northern Companies throughout said period.

37. U. P. U. had full knowledge throughout the period from January 1, 1935 to October 19, 1945, of all of the operations of the Northern Companies under each of the contracts involved in this suit, the performance of said contracts and of the relationships and transactions between its said subsidiaries and defendant, and, through its directors and officers, U. P. U. fully considered, approved and affirmed all such operations, performances, relationships and transactions.

38. Samuel W. White, as President and a director of U. P. U., sole stockholder of the Northern Companies, and also as a director of said Northern Companies, was fully familiar with all of the provisions of the 1936 contract, 1938 contract, 1939 Interconnection Contract, 1939 Interchange Capacity Agreement, 1941 contract, 1943 amendment thereof, and the 1936 and 1939 Agreements for Allocation of Joint Management Expenses, and with the rates and charges provided for in said contracts, and was fully satisfied with said contracts, the terms and provisions thereof and said rates and charges provided therein.

39. Samuel W. White, both as President and a director of U. P. U., the sole stockholder of the Northern Companies, and as a director of said Northern Companies, was

fully advised of the operations of said companies under the 1936 contract, 1938 contract, 1939 Interconnection Contract, 1939 Interchange Capacity Agreement, 1941 contract, both prior to and after the 1943 amendment, and the 1936 and 1939 Agreements for Allocation of Joint Management Expenses, and was fully satisfied with said operations.

40. In 1942 integration proceedings were instituted by the Securities and Exchange Commission under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 against U. P. U. and its subsidiaries, including Dakota, Extensive hearings were had in said proceedings, at which U. P. U. through its officers and counsel was present and participating. It submitted and supported the contractual arrangements between Dakota and defendant, including the joint management arrangement, the contractual arrangement with Middle West Service Company, and the holding of interlocking offices and directorships by all common officers and directors of Dakota and defendant.

41. On October 9, 1945 hearings were had before the Securities and Exchange Commission concerning the issuance of an order by that Commission permitting the acquisition by plaintiff from U. P. U. of the stock and other securities of Dakota and during the course of said proceedings the entire transcript of said prior integration proceedings was incorporated by reference. Plaintiff was present and participated throughout said proceedings of October 9, 1945, through its officers and counsel.

42. At no time throughout the period September 1, 1935 to October 19, 1945 were any of the rates and charges made by defendant against the Northern Companies, or vice versa, based upon an estimate of a hypothetical cost to the Northern Companies or any mistake of fact.

43. Under date of August 12, 1946 plaintiff filed a verified complaint against defendant with the Federal Power Commission alleging that the rates and charges in effect under the 1941 contract, as amended by the 1943 amendment, were unjust and unreasonable. Said complaint

alleged domination and control of Dakota and its predecessors, North Dakota and Northern, and of defendant by The Middle West Corporation at the time of the execution of the 1936, 1938, the two 1939, and the 1941 contracts and of the 1943 amendment. It contained no charge with respect to any alleged action by or on behalf of defendant, acting through its officers and directors or otherwise.

44. Said complaint filed by plaintiff with the Federal Power Commission referred to and set forth as exhibits thereto the 1936, 1938, 1939 Interconnection Contract, 1939 Interchange Capacity Agreement, 1941 contract and the 1943 amendment thereto. Said complaint contains no allegation with respect to unlawful or improper filing of any of said contracts.

45. Under date of February 27, 1946 plaintiff served notice of termination of the 1941 contract, as amended, effective August 31, 1947. Thereafter, and subsequent to the filing of this suit plaintiff filed a verified amendment to its complaint before the Federal Power Commission in which it alleged that it was short of necessary generating capacity on the Dakota properties and asked for an order that the interconnection facilities be maintained so as to permit plaintiff to purchase large amounts of electric energy from defendant until at least November 1, 1947.

46. Shortly prior to the effective date of the notice of termination of the 1941 contract, as amended, plaintiff and defendant agreed upon a rate for energy to be sold by defendant to plaintiff after September 1, 1947 and upon receipt of copies of said agreement the Federal Power Commission dismissed as moot the complaint and amendment theretofore filed by plaintiff.

47. On July 2, 1945 plaintiff and U. P. U. entered into a written contract pursuant to which plaintiff agreed to purchase from U. P. U. all of the outstanding stock and securities of both Dakota and Knife River for a price in excess of $7,000,000, which price was negotiated and agreed upon in April of 1945 by and between R. M. Heskett, President of plaintiff, and Samuel W. White, President of U. P. U.

48. Both before and after the signing of said contract plaintiff made a thorough and detailed study of the properties, plants and facilities of both Dakota and Knife River and of their books and records, contracts and relations with defendant. Such investigation was conducted on behalf of plaintiff by, among others, a firm of accountants and also a firm of engineers, both of which had represented plaintiff for many years. Plaintiff had complete access to the books and records of Dakota and Knife River and its representatives questioned officers and employees of defendant and of Dakota and Knife River both prior and subsequent to making such contract.

49. Prior to the execution of said contract of purchase dated July 2, 1945 plaintiff knew of all contracts and arrangements then exisiting and which had previously existed by and between Dakota and defendant and by and between Knife River and defendant. Plaintiff also knew of the operation of the Northern Companies under a joint management arrangement with defendant and that certain persons were and had been either officers or directors of defendant and at the same time officers or directors of the Northern Comapnies.

50. Said contract of purchase was consummated on October 19, 1945 and on the same day pursuant to a plan of liquidation adopted by Dakota at the instance of plaintiff the stock and securities of Dakota so acquired by plaintiff were surrendered by plaintiff for cancellation and extinguishment in exchange for the transfer to plaintiff of all assets and property of Dakota.

51. The several contracts between Dakota and its predecessors on the one hand, and defendant on the other, and the rates and charges provided therein were fair, just and reasonable under all the circumstances.

II. *Findings Applicable to First and Second Causes of Action.*

1. From January 1, 1933 to January 31, 1936 defendant and Northern interchanged surplus electric energy at the rate of 5 mills per kilowatt-hour under an oral contract which was fully known to and approved by Samuel W.

White as receiver and trustee of United Public Utilities Company and by U. P. U. Under date of January 28, 1936 defendant submitted to the Federal Power Commission the terms of said oral contract, being the information required by Order No. 36 of said Commission as originally adopted December 16, 1935. The letter submitting such information was designated by the Federal Power Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 1 and given an effective date of January 31, 1936 by the Commission.

2. The rate covered by said Northwestern Public Service Company Rate Schedule F. P. C. No. 1 was 5 mills per kilowatt-hour for the interchange of surplus electric energy. Plaintiff has admitted that said rate schedule was properly filed with the Federal Power Commission. The 5 mill per kilowatt-hour rate for the interchange of energy remained the same from January 1, 1933 through October 19, 1945.

3. The contract dated October 7, 1936, between Northern and defendant (Exhibit B to the Complaint), by its terms was effective from January 1, 1936 and ran for five years thereafter, terminable by either party on 18 months notice. Said contract was signed and attested by officers of Northern on its behalf at the direction and with approval of U. P. U., the sole stockholder of Northern.

4. Neither defendant nor any of the persons who at any time were officers or directors of defendant and were also at the same time officers or directors of Northern caused said 1936 contract to be entered into or to be signed by Northern or on its behalf.

5. Said 1936 contract was not entered into for the benefit of defendant or to the injury or detriment of Northern, but was fair, reasonable and just in all of its terms and provisions.

6. The terms and provisions of said 1936 contract were negotiated and drafted on behalf of Northern by Samuel W. White and other representatives of U. P. U. who had no connection with or interest in defendant or The Middle West Corporation or any subsidiary thereof or company affiliated therewith.

7. The question of making such contract and the reasonableness of the rates and charges therein provided as to Northern was extensively considered and discussed by the entire Board of Directors of U. P. U. at several meetings thereof, and the entire situation, including particularly the reasonableness and fairness as to Northern of the rates and charges to be provided in said contract, was extensively investigated by C. E. Lakin and Samuel W. White as agents and representatives of U. P. U., whose recommendations were reported in full to and considered at length by the entire Board of U. P. U. C. E. Lakin had no connection with or interest in defendant or The Middle West Corporation or any subsidiary thereof or any company affiliated therewith, but was the President of several other utility subsidiaries of U. P. U. in Ohio and Indiana. In 1940 said Lakin was also elected a director of U. P. U. and continued to serve as such continuously thereafter to and including October 19, 1945.

8. Prior to its execution by Northern or defendant, said 1936 contract was authorized and approved by the Board of Directors of U. P. U.

9. Said 1936 contract was filed with the Federal Power Commission on December 23, 1938, assigned a rate schedule classification by said Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 3, and made effective as of January 1, 1936 by order issued by the Federal Power Commission.

10. Said 1936 contract contained two rates or charges, one being an interchange energy rate of 5 mills per kilowatt-hour, and the other being transmission line charge of $1666.66 a month covering Northern's share of the fixed charges, maintenance and operating expenses relating to the interconnection facilities described in the contract. The 5 mill per kilowatt-hour interchange energy rate was the same as the 5 mill interchange energy rate previously on file with the Federal Power Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 1. The transmission line charge of $1666.66 a month was created for the first time by the 1936 contract and was a new rate or charge filed for the first time with the Federal Power Commission. Said transmission line

charge was neither a change in nor an addition to the previously filed interchange energy rate of 5 mills per kilowatt-hour.

11. The 5 mill per kilowatt-hour interchange energy rate and the $1,666.66 monthly transmission line charge in said 1936 contract was each fair, just and reasonable in so far as Northern and North Dakota were concerned during the entire period that said contract was in force and effect, from January 1, 1936 to July 1, 1939.

12. The $1,666.66 monthly transmission line charge in said 1936 contract was based upon and supported by adequate consideration.

13. Neither the 5 mill per kilowatt-hour interchange energy rate nor the transmission line charge of $1,666.66 per month in said 1936 contract was fixed by any of the individuals who at any time were officers or directors of North Dakota or Northern and also were at the same time officers or directors of defendant.

14. Said 1936 contract was not executed for the purpose of fixing terms, rates and charges which would be made by the parties against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota or vice versa. Said contract was executed to provide for the payment by Northern of its share of the fixed charges, maintenance and operating expenses relating to the interconnection facilities described in the contract in consideration of the continued use thereof by Northern, and to reduce to written form the then existing oral agreement covering the interchange of surplus energy at 5 mills per kilowatt-hour.

15. For the period from January 1, 1936 to July 1, 1939 Northern paid to defendant $70,000 for and on account of said transmission line charge of $1,666.66 per month. Defendant did not cause Northern to make these payments. It had nothing to do with such payments except to receive the same in consideration for the use by Northern of the interconnection facilities as provided in

the 1936 contract. Said payments were made in every case with the complete knowledge and approval of U. P. U.

16. From September 1, 1935 to July 1, 1939, neither the defendant nor any of the individuals who at any time were officers or directors of the defendant and were also at the same time officers or directors of Northern and North Dakota caused North Dakota to generate in that state and transmit to Northern at any point energy, which was in turn transmitted by Northern to defendant at any point.

17. All amounts of energy which were generated by either North Dakota or Northern and transmitted by Northern to defendant during the entire period from September 1, 1935 to July 1, 1939, were generated and transmitted either under the oral contract between Northern and defendant filed with the Federal Power Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 1 (Exhibit A-1 to the Complaint) or under and pursuant to the provisions of the 1936 contract (Exhibit B to the Complaint), and were generated and transmitted by and with the full knowledge, approval and consent of U. P. U., the sole stockholder of both North Dakota and Northern.

18. The just and reasonable value of all energy delivered by Northern to defendant during said period September 1, 1935 to July 1, 1939, was 5 mills per kilowatt-hour, which Northern received from defendant.

19. Defendant did not cause Northern to receive from defendant for the net energy delivered by Northern to defendant during the period September 1, 1935 through June 30, 1939, the amount of $62,751.90, being computed at the rate of 5 mills per kilowatt-hour. Defendant had nothing to do with the receipt of that amount by Northern except to pay said amount pursuant to the terms and provisions of the 1936 Contract. Payments aggregating such amount for the net energy delivered by Northern in said period were received by Northern in every case with the complete knowledge and approval of U. P. U.

III. *Findings Applicable to Third Cause of Action.*

1. Under date of January 28, 1936 defendant submitted to the Federal Power Commission the terms of its oral contract with Northern for the exchange of electric energy by and between said companies, being the information required by Order No. 36 of said Commission as originally adopted December 16, 1935. The letter submitting such information was designated by the Federal Power Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 1 and given an effective date of January 31, 1936 by the Commission.

2. The rate covered by said Northwestern Public Service Company Rate Schedule F. P. C. No. 1 was 5 mills per kilowatt-hour for the interchange of surplus electric energy. Plaintiff has admitted that said rate schedule was properly filed with the Federal Power Commission. The 5 mills per kilowatt-hour rate for the interchange of energy remained the same from January 1, 1933 through October 19, 1945.

3. The contract dated January 1, 1938 between North Dakota, Northern and defendant (Exhibit C to the Complaint) by its terms was effective from January 1, 1938 for one year and for successive periods of one year thereafter unless cancelled by six months' notice by any party. Said contract was signed and attested by officers of North Dakota and Northern on their behalf at the direction and with the approval of U. P. U., the sole stockholder of North Dakota and Northern.

4. Neither defendant nor any of the persons who at any time were officers or directors of defendant and were also at the same time officers or directors of Northern or North Dakota caused said 1938 contract to be entered into or to be signed by Northern or North Dakota or on their behalf.

5. Said 1938 contract was not entered into for the benefit of defendant or to the injury or detriment of North Dakota or Northern, but was fair, reasonable and just in all of its terms and provisions.

6. The terms and provisions of said 1938 contract were negotiated and drafted on behalf of Northern and North Dakota by Samuel W. White and other representatives of U. P. U., none of whom had any connection with or interest in defendant or The Middle West Corporation or any subsidiary thereof or company affiliated therewith.

7. Said 1938 contract was not executed for the purpose of fixing terms, rates and charges which would be made by the parties against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota or vice versa. The purpose of said contract was to pool the generating capacities of North Dakota, Northern and defendant so as to operate the three systems as one single interconnected system and thereby to effect a saving in the amount of reserve generating capacity which would otherwise have been required by each of said three companies operated as a single independent system. Said contract required each of the parties thereto to maintain and make available to the other parties thereto such reserve capacity as said party might possess, and under the contract the party or parties which were short of reserve capacity were required to make payments to the party or parties having an excess of reserve capacity. The rate at which energy was to be generated and transmitted from either the State of North Dakota to the State of South Dakota or vice versa was already fixed and agreed upon in and by the 1936 contract between Northern and defendant.

8. The question of making such contract and the reasonableness of the rate therein provided as to North Dakota and to Northern was extensively considered and [discusses] by the Board of Directors of U. P. U. at several meetings thereof and the entire situation, including the increasing shortage of reserve capacity on the system of North Dakota and of generating capacity on the system of Northern, the increasing load on the systems of both companies, and the reasonableness and fairness as to both North Dakota and Northern of the rate to be provided in said contract, was extensively investigated by Samuel W. White, as President and agent of U. P. U. Said Samuel W. White reported in full the results of all of his investigations and study to the

Board of U. P. U. and the several directors on said Board studied and considered the questions involved independently.

9. Prior to its execution by Northern, North Dakota or defendant, said 1938 contract was approved by the Board of Directors of U. P. U.

10. Said 1938 contract was executed during the first ten days of December, 1938, and was filed with the Federal Power Commission on December 23, 1938. It was thereupon assigned a rate schedule classification by said Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 4 and made effective as of January 1, 1938 by order issued by the Federal Power Commission.

11. The rate contained in said 1938 contract was $13.20 per kilowatt of firm demand per year, as defined in said contract, payable by the party or parties which had a deficiency in reserve capacity to the party or parties having an excess of reserve capacity. This reserve capacity charge of $13.20 was created for the first time by the 1938 contract and was a new rate or charge filed for the first time with the Federal Power Commission. Said rate or charge of $13.20 was neither a change in nor an addition to the previously filed interchange energy rate of 5 mills per kilowatt-hour or the previously filed transmission line charge of $1,666.66 per month.

12. Said 1938 contract was not a scheme or plan conceived and put into effect or operation by defendant or by any of the officers or directors of defendant for the purpose of exacting large charges from Northern and North Dakota in order to offset charges of those two companies for energy generated in North Dakota and transmitted to and sold to defendant for resale in South Dakota.

13. The $13.20 reserve capacity charge in said 1938 contract was fair, just and reasonable insofar as both Northern and North Dakota were concerned during the entire period that said contract was in force and effect from January 1, 1938 to June 30, 1939, both inclusive.

14. The $13.20 reserve capacity charge in said 1938 contract was based upon and supported by adequate consideration.

15. The $13.20 reserve capacity charge was not fixed by any of the individuals who at any time were officers or directors of North Dakota or Northern and also were at the same time officers or directors of defendant.

16. While the 1938 contract was in force and effect from January 1, 1938 through June 30, 1939, Northern paid to defendant $22,440.00 for the year 1938 for the excess of reserve capacity which defendant supplied because of Northern's deficiency in reserve capacity, and neither North Dakota nor defendant paid anything to any other party to the contract for that year; for the period, January 1, 1939, through June 30, 1939, Northern paid to defendant $9,068.40 because of that portion of its deficiency in reserve capacity which was supplied out of the excess of reserve capacity which the defendant supplied, and Northern also paid to North Dakota $4,131.60 for the balance of its deficiency in reserve capacity which was supplied by the excess of reserve capacity which North Dakota had. Defendant did not cause Northern to make the foregoing payments to defendant or to North Dakota and had nothing to do with such payments except to receive those made to it in consideration for the excess of reserve capacity which it supplied to the power pool. Said payments by Northern, both to defendant and to North Dakota, were made in every case with the complete knowledge and approval of U. P. U.

17. At all times during the period when the 1938 contract was in effect the excesses and deficiencies in reserve capacity of North Dakota, Northern and defendant were [determmined] for each of the years by the operating committee as provided in and by said contract and in accordance with the terms and provisions thereof. U. P. U. had full knowledge of and approved such determinations in every case. In each year the determinations of the operating committee were filed with the Federal Power Commission and accepted by that Commission. In no case did the determinations by said operating committee change or in any way affect the reserve capacity charge of $13.20 provided in said contract.

IV. *Findings Applicable to Fourth and Fifth Causes of Action.*

1. Under date of January 28, 1936 defendant submitted to the Federal Power Commission the terms of its oral contract, with Northern for the exchange of electric energy by and between said companies, being the information required by Order No. 36 of said Commission as originally adopted December 16, 1935. The letter submitting such information was designated by the Federal Power Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 1 and given an effective date of January 31, 1936 by the Commission.

2. The rate covered by said Northwestern Public Service Company Rate Schedule F. P. C. No. 1 was 5 mills per kilowatt-hour for the interchange of surplus electric energy. Plaintiff has admitted that said rate schedule was properly filed with the Federal Power Commission. The 5 mill per kilowatt-hour rate for the interchange of energy remained the same from January 1, 1933 through October 19, 1945.

3. The contracts dated July 1, 1939 and designated "Interconnection Contract" (Exhibit D to the Complaint) and "Interchange Capacity Agreement" (Exhibit E to the Complaint) between Dakota and defendant were each signed and attested by officers of Dakota on its behalf at the direction and with the approval of U. P. U., the sole stockholder of Dakota. The Interconnection Contract was effective on July 1, 1939 and for eighteen months thereafter, and was then to remain in effect until cancelled by eighteen months' written notice by either party. The Interchange Capacity Agreement was also effective on July 1, 1939 and for succeeding terms of one year thereafter unless cancelled by either party upon six months' written notice.

4. Neither defendant nor any of the persons who at any time were officers or directors of defendant and were also at the same time officers or directors of Dakota caused either the 1939 Interconnection Contract or the 1939 Interchange Capacity Agreement to be entered into or to be signed by Dakota or on its behalf.

5. Neither the 1939 Interconnection Contract nor the 1939 Interchange Capacity Agreement were entered into for the benefit of defendant or to the injury or detriment of Dakota. Each of said contracts was fair, just and reasonable in all of its terms and provisions.

6. The rates and charges contained in the 1939 Interconnection Contract with respect to the interchange of energy at 5 mills per kilowatt-hour and with respect to the use of interconnection facilities at $1,666.66 per month were the same as those contained in the 1936 contract. The rate and charge of $13.20 for reserve capacity contained in the 1939 Interchange Capacity Agreement was the same as the rate or charge for reserve capacity contained in the 1938 contract.

7. Both the 1939 Interconnection Contract and the 1939 Interchange Capacity Agreement were drafted and prepared by Francis H. Scheetz, General Counsel for U. P. U., and Karl Goldsmith, an attorney in South Dakota representing U. P. U. in connection with the merger of Northern and North Dakota, and the same two attorneys worked out between themselves the question of the manner, method and time of filing said 1939 Interconnection Contract and said 1939 Interchange Capacity Agreement with the Federal Power Commission. Neither the defendant nor any of the persons who were at any time officers or directors of defendant and were also at the same time officers or directors of Dakota had anything to do with the determination of the time, manner or method of filing either said 1939 Interconnection Contract or said 1939 Interchange Capacity Agreement with the Federal Power Commission.

8. The idea of preparing and executing new contracts covering the 5 mill interchange energy rate and the transmission line charge to supersede the 1936 contract and covering charges for reserve capacity furnished by one party to another party to supersede the 1938 contract originated with Samuel W. White as President of U. P. U., and neither the defendant nor any of the individuals who at any time were officers or directors of defendant and were also at the same time officers or directors of Dakota had anything to do with that matter.

9. The 5 mill per kilowatt-hour interchange energy rate and the $1,666.66 monthly transmission line charge contained in said 1939 Interconnection Contract and the $13.20 reserve capacity charge contained in the 1939 Interchange Capacity Agreement was each fair, just and reasonable in so far as Dakota was concerned during the entire period that said contracts were in force and effect, viz., from July 1, 1939 to June 30, 1941, both inclusive.

10. The $1,666.66 monthly transmission line charge in said 1939 Interconnection Contract and the $13.20 reserve capacity charge in said 1939 Interchange Capacity Agreement was each based upon and supported by adequate consideration.

11. Neither the 5 mill per kilowatt-hour interchange energy rate nor the transmission line charge of $1,666.66 per month in said 1939 Interconnection Contract nor the $13.20 reserve capacity charge in said 1939 Interchange Capacity Agreement was fixed by any of the individuals who at any time were officers or directors of Dakota and also were at the same time officers or directors of defendant.

12. Neither the 1939 Interconnection Contract nor the 1939 Interchange Capacity Agreement was executed for the purpose of fixing terms, rates or charges to be made by the parties thereto against each other for electric energy and the transmission thereof. Said contracts were each executed for the purpose of reflecting the results of the merger of North Dakota and Northern in so far as said merger affected the corporate parties to the existing 1936 and 1938 contracts.

13. The 1939 Interchange Capacity Agreement was not a scheme or plan conceived and put into effect or operation by defendant or by any of the officers or directors of defendant for the purpose of exacting large charges from Dakota in order to offset charges of Dakota for energy then being sold and thereafter to be sold by Dakota to defendant.

14. Both the 1939 Interconnection Contract and the 1939 Interchange Capacity Agreement were filed with the Federal Power Commission on January 10, 1940 and were as-

signed rate schedule classifications by said Commission as Northwestern Public Service Company Rate Schedules F. P. C. Nos. 5-A and 5-B, respectively, and both were made effective by said Commission as of July 1, 1939.

15. Said 1939 Interconnection Contract continued without change the same 5 mill per kilowatt-hour interchange energy rate and the same $1,666.66 per month transmission line charge which were contained in the 1936 contract, and said 1939 Interchange Capacity Agreement continued without change the same $13.20 reserve capacity charge which was contained in the 1938 contract, and each of said rates and charges were already on file with the Federal Power Commission at the time of the filing of the 1939 Interconnection Contract and the 1939 Interchange Capacity Agreement.

16. For the period from July 1, 1939 through June 30, 1941 Dakota paid to defendant $40,000 for and on account of said transmission line charge of $1,666.66 per month. Defendant did not cause Dakota to make these payments. It had nothing to do with said payments except to receive the same in consideration for use by Dakota of the interconnection facilities as provided in the 1939 Interconnection Contract. Said payments were made in every case with the complete knowledge and approval of U. P. U.

17. For the period from July 1, 1939 through June 30, 1941 Dakota paid to defendant the following amounts: $9,068.40 for the period July 1, 1939 through December 31, 1939; $13,622.40 for the period January 1, 1940 through August 31, 1940; and $2,138.40 for the period January 1, 1941 through June 30, 1941; and defendant paid to Dakota $937.20 for the period September 1, 1940 through December 31, 1940. These payments were made pursuant to the 1939 Interchange Capacity Agreement by each of the parties to the other because of their respective deficiencies in reserve capacity and for use of the excess of reserve capacity of the party receiving payment. Defendant did not cause Dakota to make or receive the aforesaid payments made or received by Dakota and had nothing to do with said payments except to receive or make the same in consideration for the excess of reserve capacity which it supplied to or received from the power pool. Both the payments

by Dakota to defendant and the payments by defendant to Dakota were made in each case with the complete knowledge and approval of U. P. U.

18. At all times during the period when the 1939 Interchange Capacity Agreement was in effect the excesses and deficiencies in reserve capacity of Dakota and defendant were determined for each of the years by the operating committee as provided in and by said contract and in accordance with the terms and provisions thereof. U. P. U. had full knowledge of and approved such determinations in every case. In each year the determinations of the operating committee were filed with the Federal Power Commission and accepted by that Commission. In no case did the determinations by said operating committee change or in any way affect the reserve capacity charge of $13.20 provided in said contract.

19. During the effective period of the 1939 Interconnection Contract neither the defendant nor any of the individuals who at any time were officers or directors of defendant and were also at the same time officers or directors of Dakota caused Dakota to generate and transmit to defendant energy at any point. All amounts of energy which were generated by Dakota and transmitted to defendant during the entire period from July 1, 1939 through June 30, 1941 were generated and transmitted under and pursuant to the provisions of the 1939 Interconnection Contract and by and with the full knowledge and approval and consent of U. P. U., the sole stockholder of Dakota.

20. The just and reasonable value of all energy delivered by Dakota to defendant during said period July 1, 1939 through June 30, 1941 was 5 mills per kilowatt-hour, which Dakota received from defendant.

21. Defendant did not cause Dakota to receive from defendant for the net energy delivered by Dakota to defendant during the period July 1, 1939 through June 30, 1941, the amount of $59,345.74, being computed at the rate of 5 mills per kilowatt-hour. Defendant had nothing to do with the receipt of that amount by Dakota except to pay said amount pursuant to the terms and provisions of the 1939 Interconnection Contract. Payments aggregating

such amount for the net energy delivered by Dakota in said period were received by Dakota in every case with the complete knowledge and approval of U. P. U.

V. *Findings Applicable to Sixth Cause of Action.*

1. The contract dated July 1, 1941 between Dakota and defendant (Exhibit F to the Complaint) by its terms was effective from July 1, 1941 for a period of ten years and thereafter until terminated by either party upon eighteen months' notice. Said contract was signed and attested by officers of Dakota on its behalf at the direction and with the approval of U. P. U., the sole stockholder of Dakota.

2. Neither defendant nor any of the persons who at any time were officers or directors of defendant and were also at the same time officers or directors of Dakota caused said contract to be entered into or to be signed by Dakota or on its behalf.

3. Said 1941 contract was not entered into for the advantage and benefit of defendant or to the injury or detriment of Dakota, but was fair, just and reasonable in all of its terms and provisions.

4. Said 1941 contract was not a scheme or plan conceived and put into effect or operation by defendant, through its officers and directors or otherwise, for the purpose of exacting large charges from Dakota for the advantage and benefit of defendant and, among others, to offset charges of Dakota for energy then being sold and thereafter to be sold by Dakota to defendant.

5. The terms and provisions of said 1941 contract were negotiated and drafted on behalf of Dakota by Samuel W. White and other representatives of U. P. U. who had no connection with or interest in defendant or The Middle West Corporation or any subsidiary thereof or company affiliated therewith.

6. The question of making the 1941 contract and the reasonableness as to Dakota, of the rates and charges therein provided and of the other provisions therein contained, were extensively considered and discussed by the

entire Board of Directors of U. P. U., and the negotiation of said contract was expressly authorized by said Board. The increasing shortage of generating capacity and necessary reserves, the increasing load on the system of Dakota, the proposed installation of 7500 kw generating capacity by defendant and the location thereof at Aberdeen, South Dakota, at the north end of defendant's system so as to benefit the system of Dakota as well as that of defendant, the ten year term and all other provisions of the contract, were extensively investigated and considered by Samuel W. White as President and agent of U. P. U. and by him reported to and considered by the Board of Directors.

7. Prior to its execution by Dakota or defendant said 1941 contract was approved and authorized by the Board of Directors of U. P. U.

8. Said 1941 contract was filed with the Federal Power Commission on February 28, 1942, assigned a rate schedule classification by said Commission as Northwestern Public Service Company Rate Schedule F. P. C. No. 6, and made effective as of July 1, 1941 by order issued by said Federal Power Commission.

9. Said 1941 contract continued without change the intercharge energy rate of 5 mills per kilowatt-hour and the transmission line charge of $1,666.66 a month contained in the 1939 Interconnection Contract and the reserve capacity charge of $13.20 contained in the 1939 Interchange Capacity Agreement. Each of said rates and charges was already on file with the Federal Power Commission at the time of filing the 1941 contract.

10. The 5 mills per kilowatt-hour interchange energy rate, the $1,666.66 monthly transmission line charge, and the $13.20 reserve capacity charge in the 1941 contract each was fair, just and reasonable insofar as Dakota was concerned during the entire period said contract was in force and effect between defendant and Dakota from July 1, 1941 to October 19, 1945, both inclusive.

11. The $1,666.66 monthly transmission line charge and the $13.20 reserve capacity charge in said 1941 contract each was based upon and supported by adequate consideration.

12. Neither the 5 mills per kilowatt-hour interchange energy rate, the transmission line charge of $1,666.66 per month nor the $13.20 reserve capacity charge in said 1941 contract was fixed by any of the individuals who at any time were officers or directors of Dakota and who also were at the same time officers or directors of defendant.

13. For the period from July 1, 1941 to October 19, 1945, pursuant to the 1941 contract, Dakota paid to defendant the following amounts because of its deficiencies in reserve capacity, which deficiencies were supplied out of the excesses of reserve capacity which defendant furnished to the power pool: for July 1, 1941 through December 31, 1941, $2,138.40; for 1942, $17,199.60; for 1943, $8,514.00; for 1944, $9,992.40; and for January 1, 1945 through October 19, 1945, $18,420.25. Defendant did not cause Dakota to make any of the foregoing payments to defendant and had nothing to do with such payments except to receive them in consideration for the excesses of reserve capacity which it supplied to the power pool. Said payments by Dakota to defendant were made in every case with the complete knowledge and approval of U. P. U.

14. At all times during the period when the 1941 contract was in effect the excesses and deficiencies in reserve capacity of Dakota and defendant were determined for each of the years by the operating committee as provided in and by said contract and in accordance with the terms and provisions thereof. U. P. U. had full knowledge of and approved such determinations in every case. In each year the determinations of the operating committee were filed with the Federal Power Commission and accepted by that Commission. In no case did the determinations by said operating committee change or in any way affect the reserve capacity charge of $13.20 provided in said contract.

15. For the period from July 1, 1941 to October 19, 1945 Dakota paid to defendant the sum of $86,021.51 for and on account of the transmission line charge of $1,666.66 per month, as provided in said 1941 contract. Defendant did not cause Dakota to make these payments. It had nothing to do with such payments except to receive the same in consideration for the use by Dakota of the inter-

connection facilities as provided in said contract. Said payments were made in every case with the complete knowledge and approval of U. P. U.

16. Throughout the period when said 1941 contract was in effect between Dakota and defendant, neither the defendant nor any of the individuals who were at any time officers or directors of defendant and were also at the same time officers or directors of Dakota caused Dakota to generate and transmit to defendant energy at any point. All amounts of energy which were generated by Dakota and transmitted to defendant during the entire period from July 1, 1941 to October 19, 1945, were generated and transmitted under and pursuant to the provisions of said 1941 contract and by and with the full knowledge, approval and consent of U. P. U., the sole stockholder of Dakota.

17. The just and reasonable value of all energy delivered by Dakota to defendant during said period July 1, 1941 to October 19, 1945 was 5 mills per kilowatt-hour, which Dakota received from defendant.

18. Defendant did not cause Dakota to receive from defendant for the net energy delivered by Dakota to defendant during the period July 1, 1941 to October 19, 1945, the amount of $218,994.23 being computed at the rate of 5 mills per kilowatt-hour. Defendant had nothing to do with the receipt of that amount by Dakota except to pay said amount pursuant to the terms and provisions of said 1941 contract. Payments aggregating such amount for the net energy delivered by Dakota in said period were received by Dakota in every case with the complete [knowledged] and approval of U. P. U.

19. Said 1941 contract was not executed for the purpose of fixing terms, rates and charges which would be made by the parties against each other for and in connection with the transmission and sale of electric energy to be generated in the State of North Dakota and transmitted to the State of South Dakota or vice versa. The purpose of said contract was to provide a written contract covering the rates and charges already existing between the parties under the 1939 Interconnection Contract and the 1939 Interchange Capacity Agreement, but for a definite ten-year

term without right of earlier termination by either party, predicated upon the location by defendant of its proposed 7500 kw additional generating capacity at Aberdeen, South Dakota, at the north end of its own system, instead of at Mitchell, South Dakota, or some other point located near the center of its own system.

20. The 1941 contract (Exhibit F to the Complaint) was amended by the parties under date of March 13, 1943. Said amendment was signed and attested by officers of Dakota on its behalf at the direction and with the approval of U. P. U., the sole stockholder of Dakota.

21. The purpose of the 1943 amendment was to provide for the termination of the 1941 contract upon 18 months' written Notice by either party because of the inability of defendant due to the war to construct its proposed additional generating capacity at Aberdeen, South Dakota.

22. Neither defendant nor any of the persons who at any time were officers or directors of defendant and were also at the same time officers or directors of Dakota caused said 1943 amendment to be signed by Dakota or on its behalf. Said 1943 amendment was not entered into for the advantage and benefit of the defendant or to the injury or detriment of Dakota, nor was it a scheme or plan conceived and put into effect or operation by defendant, through its officers or directors or otherwise, for the purpose of exacting large charges from Dakota for the advantage and benefit of defendant and, among other things, to offset charges of Dakota for energy then being sold and thereafter to be sold by Dakota to defendant.

23. The terms and provisions of said 1943 amendment were negotiated and drafted on behalf of Dakota by Samuel W. White and other representatives of U. P. U. who had no connection with or interest in defendant or The Middle West Service Corporation or any subsidiary thereof or company affiliated therewith.

24. The 1943 amendment to the 1941 contract was approved and its execution authorized by the Board of Directors of U. P. U. prior to such execution.

25. The 1943 amendment to the 1941 contract was filed with the Federal Power Commission on April 8, 1943, assigned a rate schedule classification by said Commission as Northwestern Public Service Company Supplement No. 1 to Rate Schedule F. P. C. No. 6, and made effective by said Commission as of May 8, 1943.

26. None of the rates or charges provided for in the 1941 contract were changed by the 1943 amendment to said 1941 contract.

VI. *Findings Applicable to First, Second, Third, Fourth, Fifth and Sixth Causes of Action.*

1. Since prior to January 1, 1935 and to October 19, 1945, the Northern Companies at all times had a generating plant at Beulah, North Dakota. This was a "mine-mouth" plant situated adjacent to the tipple of the Knife River mine so that lignite which was mined by Knife River could be delivered directly to the bunkers of the Beulah plant without freight charges. Throughout this entire period lignite was delivered to the Beulah plant and Knife River obtained for such deliveries the highest price of all the lignite which it sold, and the Beulah plant obtained the lignite at the lowest fuel cost of any of the generating plants of the Northern Companies and defendant. Included in said deliveries of lignite were the screenings from the mine which were otherwise [unsalable].

2. The energy delivered to defendant by the Northern Companies came entirely from energy put into the transmission system of said Northern Companies, and the Beulah plant furnished approximately 79% of all of the energy put into said transmission system.

3. In the transmission of electrical energy certain losses are incurred which are commonly referred to as transmission line losses. The Northern Companies' losses in the operation of their transmission lines averaged 23.1%.

4. The load (consumption) on an electric system varies during each 24-hour cycle. These portions of the 24-hour cycle when the load on the system is heavy are referred to as the daily peak periods and energy generated and

delivered during said periods is said to be generated and delivered "on-peak". The other periods of the 24-hour cycle are referred to as "Off-peak" periods. The period of the day between midnight and about 8 A. M. is usually the period of the smallest load on the system and is referred to as the "graveyard" period. Electric energy cannot be stored for future use.

5. Throughout the period from September 1, 1935 to and including October 19, 1945, almost all of the energy generated by the Northern Companies and delivered to defendant was generated and delivered during the "off-peak" periods of the day and mostly during the "graveyard" period. Throughout the same period September 1, 1935 to and including October 19, 1945, defendant generated and delivered energy to the Northern Companies, almost all of which was delivered during "on-peak" periods of the day which necessitated the operation by defendant of high cost generating units.

6. Surplus energy is that energy over and above the requirements of a producer at any given time which the producer is capable of generating and which the purchaser thereof is not required to take. During "off-peak" periods the Northern Companies were capable of producing and did produce surplus energy.

7. The energy delivered to defendant by the Northern Companies from September 1, 1935 to October 19, 1945 was surplus energy. Incremental cost of production is a proper basis for determining the rate for the sale of surplus energy. The incremental cost of producing electrical energy is that cost over and above the cost of producing energy necessary to fill the normal requirements of the producer which is required to produce energy over and above such normal requirements. Such incremental cost comprises the cost of additional fuel required to produce the additional or surplus energy plus lubrication, water and maintenance.

8. The incremental cost to the Northern Companies of producing the gross energy delivered to defendant, expressed in mills per kilowatt-hour, was 3.19 in 1936, 2.59 in 1937, 2.64 in 1938, 2.66 in 1939, 2.39 in 1940, 2.55 in 1941, 2.82 in 1942, 2.94 in 1943, 3.05 in 1944, 3.15 in 1945 to

October 19. After allowing for the average transmission losses of 23.1% the delivered cost to said Northern Companies of the surplus energy delivered to defendant, expressed in mills per kilowatt-hour, was 4.15 in 1936, 3.37 in 1937; 3.43 in 1938, 3.46 in 1939, 3.11 in 1940, 3.22 in 1941, 3.71 in 1942, 3.86 in 1943, 4.00 in 1944, 4.10 in 1945 to October 19.

9. The Northern Companies made a profit on the energy delivered to defendant in each of the years 1936 through October 19, 1945, being the difference between the delivered cost to the Northern Companies of such energy and the 5 mills per kilowatt-hour received by the Northern Companies from defendant. Said profits were: $4,342 in 1936, $10,169.85 in 1937, $9,815.35 in 1938, $10,318.02 in 1939, $13,348.59 in 1940, $20,140.00 in 1941, $15,612.00 in 1942, $13,248.50 in 1943, $10,883.50 in 1944 and $7,962.50 in 1945 up to October 19, totaling $115,840.31.

10. The lowest cost generating plant of defendant during the period January 1, 1936 through October 19, 1945, was its plant at Aberdeen, South Dakota. The incremental cost of producing energy at said plant during said period, expressed in mills per kilowatt-hour, was: for 1936, 5.43; 1937, 5.51; 1938, 5.54; 1939, 5.48; 1940, 5.48; 1941, 5.49; 1942, 5.47; 1943, 5.69; 1944, 5.52; and 1945 through October 19, 5.65.

11. Through its purchases of energy from the Northern Companies at 5 mills per kilowatt-hour, defendant realized net savings during the period January 1, 1936 to and including October 19, 1945, in the following amounts: for 1936, $644.30; 1937, $1,861.45; 1938, $2,218.35; 1939, $2,042.02; 1940, $2,430.39; 1941, $4,867.42; 1942, $5,215.30; 1943, $7,108.20; 1944, $4,916.00; 1945 through October 19, $4,928.00, totaling $36,231.43.

12. In each and every year from January 1, 1936, through October 19, 1945 the Northern Companies obtained greater benefits from the interchange of energy with the defendant than defendant received.

13. The 5 mill rate for the sale of energy by the Northern Companies to defendant from January 1, 1935 to October 19, 1945, was based upon the incremental cost of

producing surplus energy by the Northern Companies, and U. P. U., the sole stockholder of the Northern Companies, through its directors, officers and agents, knew of this fact and approved the same.

14. Throughout the entire period since prior to January 1, 1935 through October 19, 1945, the Beulah plant of the Northern Companies was operated as a base load plant, that is, it was operated at all times at capacity or as near capacity as possible, which was not true of any of the other generating plants on the interconnected system of the Northern Companies and defendant U. P. U. insisted upon the operation of the Beulah plant in such manner and upon the Northern Companies selling to defendant as much surplus energy as possible throughout the period from January 1, 1935 to October 19, 1945. Neither defendant nor any of the individuals who were officers or directors of defendant and were also at the same time officers or directors of the Northern Companies caused these things to be done, except in so far as to carry out the expressed desire of U. P. U.

15. If the interconnection facilities had not been built, or if the same had been discontinued at any time throughout the period involved in this lawsuit, the Northern Companies would have been compelled to install additional generating capacity on their systems together with necessary connecting transmission lines. The testimony and exhibits show additional generating capacity requirements of the Northern Companies during this period ranging from a minimum of 1500 K. W. to 5000 K. W. Such additions would have cost the Northern Companies sums ranging from approximately $248,000 to $625,000, carrying annual fixed charges on such costs ranging from approximately $30,000 to $75,000. Throughout this entire period the Northern Companies were without sufficient funds to install such additional generating capacity and lines, and they could not make any expenditures for such purposes without the prior approval and authorization of U. P. U. except in amounts from $100 to $500.

16. Over a period commencing in 1935 and continuing to 1941 portions of the transmission system of the Northern Companies were rebuilt and increased in voltages from

22,000 volts to 38,000 volts. This reconstruction and voltage increase was necessary in order to protect and better service to the customers of the Northern Companies on their own system and to meet the steadily increasing load on said system from their own customers by stabilizing the voltage and by replacing worn out portions of the transmission lines. Such reconstruction of the transmission lines and the increase in the voltage thereof was not made for the purpose of delivering energy to defendant. All such reconstruction and voltage changes were fully known to and approved and authorized by U. P. U.

17. On September 30, 1941 the Federal Power Commission entered its order granting the application of plaintiff dated September 9, 1941 that plaintiff's Supplement No. 1 to its Rate Schedule FPC No. 1 be allowed to take effect retroactively as of January 1, 1941. The order so allowing such retroactive effect contains terms and provisions identical with those in the order entered by said Commission allowing the 1941 contract involved in this suit to take effect retroactively as of July 1, 1941.

VII. *Findings Applicable to Seventh, Eighth, Ninth and Tenth Causes of Action.*

1. During the period 1932 to October 19, 1945 the operations of the Northern Companies, Knife River and defendant were carried on under a joint management arrangement.

2. Late in 1932 the joint management arrangement then existing was changed with the consent of Samuel W. White as receiver of United Public Utilities Company to an allocation of expenses on a gross earnings basis. This change was approved by the United States District Court for the Northern District of Illinois, Eastern Division.

3. Under date of January 2, 1936 an agreement for allocation of joint management expenses terminable on 90 days notice (Exhibit G to the complaint) was entered into by and between North Dakota, Northern, Knife River and defendant. Under date of July 1, 1939, Dakota, Knife River and defendant entered into a similar agreement for allocation of joint management expenses terminable on 90 days' notice (Exhibit H to the complaint).

4. The 1936 and 1939 joint management contracts (Exhibits G and H to the complaint) were submitted to and approved by U. P. U.

5. Neither defendant nor any of the persons who at any time were officers or directors of defendant and were also at the same time officers or directors of the Northern Companies or Knife River caused said 1936 or 1939 joint management contracts to be entered into or to be signed by the Northern Companies or Knife River or on their behalf.

6. None of the payments made by the Northern Companies to defendant under the 1936 or 1939 joint management contracts for dispatchers' salaries and expenses affected or related to any rate or charge for the transmission or sale of electric energy by the Northern Companies to defendant or vice versa; nor did such payments constitute a rate or charge for the transmission or sale of electric energy by and between any of said companies.

7. Payments made by the Northern Companies to defendant under both the 1936 and 1939 joint management contracts were made to reimburse defendant for the portion attributable to the Northern Companies of the amounts expended by defendant for the salaries and expenses of the load dispatchers whose services were performed for the joint benefit of all of the companies. Defendant did not cause the Northern Companies to make these payments. It had nothing to do with such payments except to receive the same pursuant to said contracts. The amounts of such payments were in every case fair, just and reasonable.

Conclusions of Law.

1. The Court does not have jurisdiction over the subject matter of this suit or of any of the ten separate causes of action alleged in the complaint.

2. Upon the facts and the law, plaintiff has shown no right to relief.

3. The Court is without power to determine in the first instance the reasonableness or justness of any rate or charge for the sale or transmission of electric energy in

interstate commerce or to determine what such rate or charge should be, such determination being a matter exclusively within the jurisdiction of the Federal Power Commission, subject to judicial review only as provided in the Federal Power Act.

4. The only right of plaintiff with reference to any of the rates or charges in any of the contracts involved in this suit, or with reference to the determination of the justness and reasonableness of such rates and charges, is the right to apply to the Federal Power Commission and to have that body pass upon the justness and reasonableness of such rates and charges.

5. No legal distinction can properly be drawn between the instant case and the case of Ambassador v. United States (325 U. S. 317) or the case of Mississippi Power & Light Co. v. Memphis Natural Gas Co. (162 F. 2d 388, cert. den., 332 U. S. 770).

6. If the Court had jurisdiction, defendant would be entitled to judgment dismissing the complaint upon the merits.

7. Upon the merger of North Dakota and Northern, the surviving corporation, Dakota, became bound and obligated under all of the terms and provisions of the 1936 contract between Northern and defendant, and under all of the terms and provisions of the 1938 contract between Northern, North Dakota and defendants, to the same extent as Northern and North Dakota were bound and obligated under said contracts prior to the merger.

8. The 1936 contract, 1938 contract, 1939 Interconnection Contract, 1939 Interchange Capacity Agreement, 1941 contract and the 1943 amendment to the 1941 contract were each properly filed with the Federal Power Commission.

9. The 1936 contract, the 1938 contract and the 1941 contract were each given retroactive effective dates by the Federal Power Commission acting within the power conferred upon it by the Federal Power Act, and neither the 1939 Interconnection Contract nor the 1939 Interchange Capacity Agreement required any action by said Commission.

10. The orders of the Federal Power Commission allowing a retroactive effective date for any of the contracts involved in this suit cannot be collaterally attacked by plaintiff in this proceeding.

11. Even if the Federal Power Commission did not have authority to permit any of the contracts filed in this cause to become effective retroactively, nevertheless said contracts each became effective as of the date filed with said Commission, except the 1943 amendment to the 1941 contract.

12. The 1936 and 1939 contracts for the allocation of joint management expenses were not required to be filed with the Federal Power Commission.

13. There is no presumption of fraud against the defendant in this cause either because of the contracts involved in this suit having been executed by officers of defendant who at the same time were also officers of the Northern Companies or because at the times when said contracts were executed or at any other time a majority of the directors of the Northern Companies were at the same time directors of defendant.

14. Plaintiff, as assignee of Dakota, has no greater or other rights than Dakota, Northern or North Dakota had.

15. Contracts between corporations having common boards of directors are not void, but are only voidable; but even if the several contracts involved in this suit and the operations and payments thereunder would otherwise have been voidable by any of the Northern Companies because of the fact that the same individuals were officers or directors of said Northern Companies and at the same time were officers or directors of defendant, or for any other reason, said Northern Companies would have had no cause of action on account of said contracts or any of the operations or payments thereunder because of the authorization and ratification thereof and acquiescence therein by U. P. U.

16. All information received by Samuel W. White and all knowledge possessed by Samuel W. White, as President of U. P. U., was imputed to U. P. U. and said company was

charged with having the same information and same knowledge as Samuel W. White.

17. Where the same individuals are directors on the Boards of Directors of each of two contracting corporations but in all cases of contracts between said corporations said individuals refer the matter of the making of such contracts and the determination of the terms and provisions thereof to the stockholders of each of the corporations for decision, neither such contracts nor the performance thereof are subject to judicial scrutiny or review; and this rule applies even more particularly in a case where such individuals are elected to the Boards of Directors of each of said contracting corporations by different owners of said corporations.

18. Plaintiff has not established by any evidence in this case any fraud, or any acts constituting fraud, against the Northern Companies on the part of defendant, or on the part of any of the individuals who at any time were officers or directors of defendant, whether or not they were also at the same time officers or directors of the Northern Companies.

19. A fair price to the seller for surplus electric energy is measured by the additional cost to the seller, including additional operating expense incurred by the seller and fixed charges on additional plants, if any, installed for the purpose of making the sale of such additional energy, over and above the operating expenses and fixed charges on plants which would be incurred by the seller if the sale of such surplus energy were not made.

20. The rates and charges provided in each and all of the contracts involved in this suit were fair, just and reasonable and in each case were supported by adequate consideration.

21. Plaintiff as purchaser of the capital stock and securities of Dakota from U. P. U. became the assignee of U. P. U., and as such assignee plaintiff is estopped to deny the validity of any of the contracts involved in this cause or of any of the operations or payments thereunder.

22. Any relief sought by plaintiff in any of the ten separate causes of action in the complaint, as amended, is

barred by subdivision 4 of Section 33.0232 of Chapter 33.02 of the South Dakota Code, 1939, except for any transactions which occurred within six years next preceding the commencement of this suit.

23. No action by the boards of directors of any of the Northern Companies was necessary in connection with any of the contracts involved in this suit.

24. At no time during the entire period from April 15, 1932 to October 19, 1945 was North Dakota, Northern, Dakota, Knife River, U. P. U. or United Public Utilities Company, or any of them, dominated or controlled by the defendant or by The Middle West Corporation, or its predecessor, Middle West Utilities Company, or by any subsidiary thereof or any company affiliated therewith.

25. By reason of the fact that all things of which plaintiff complains [occured] prior to the time plaintiff acquired the stock and securities of Dakota, and plaintiff stands as an assignee of the assets of Dakota solely as an incident of Dakota's liquidation plaintiff has no claim or demand on which any relief can be granted.

(Indorsed)—Filed Sept. 15, 1948. Roy B. Marker, Clerk.

(Transcript of Proceedings in District Court on September 15, 1948, on Motions to File Proposed Findings of Fact, to Change Record, to Amend Complaint and to Amend Findings and Judgment.)

Before Hon. A. Lee Wyman, District Judge.

Mr. Woods: This being the time appointed, Your Honor, we would like to make defendant's Findings of Fact and Conclusions of Law, which are herewith submitted to the Court.

The Court: I haven't had time to look them over. There might be a finding that was material to the case and supported by the evidence.

Mr. Fellows: We are going to make objection to the filing of that for the reason it is not proper procedure.

For the further reason, any matter in there they may have reviewed on appeal from the Findings of the Court on file.

The Court: It is to the interest of all parties to the case that if the facts are sufficient to justify a finding which is material to the issues in the case and the Court has neglected to do it, the facts ought to be found. However, if that [conditions] exists the defendant in the action would have just as good a [change] to raise that issue without this proceeding as with it. In other words, under the practice in Federal Court, it has always been the practice as far as equity proceeding is concerned, and under the Conformity Act there was a time when it was necessary to present findings and except to findings made and except to the failure of the Court to find the stated findings. That is all done away with now. To go into any proposition of that kind at this time, it seems to me like a case of lost motion.

Mr. Woods: I would like to state this, we don't think it can be categorically stated that such a record is useless, and against the contingency of the failure of the Court to find upon a material issue may be of no effect if not requested by defendant. We want to ask these things be requested and the request be granted.

The Court: So far as the rules are concerned, if the court has failed to find an essential fact which is supported by the evidence, it is not necessary that counsel request that finding or except to the failure to find it. I don't want to go on record as refusing to find a fact that is essential and supported by the evidence. I think I should sustain the motion of the plaintiff in the case. You have your record then. You have requested them and I have sustained their motion. Your findings are in the record. You may file them as part of the record.

Mr. Woods: We so file it with the Clerk.

* * * * * * *

(Indorsed) Filed Oct. 11, 1948. Roy B. Marker, Clerk.

Findings of Fact and Conclusions of Law.

The Court makes the following Findings of Fact from the pleadings and evidence:

1. Plaintiff Montana-Dakota Utilities Co. is a Delaware corporation qualified to do business and doing business as an electric public utility in North Dakota since July, 1935, and in South Dakota since June 27, 1935. Plaintiff as assignee of Dakota Public Service Company, North Dakota Power & Light Company and Northern Power and Light Company seeks to recover unreasonable rates and charges affecting and relating to sales of electric energy in interstate commerce at wholesale for resale and exacted from North Dakota Power & Light Company, Northern Power and Light Company and Dakota Public Service Company, predecessors of the plaintiff and assignors to the plaintiff directly or indirectly, as will hereinafter more specifically appear, of all claims and rights of the last three named companies against the defendant for the exaction of said unreasonable rates and charges which were exacted and charged by the defendant in violation of the Federal Power Act, 16 U. S. C. A. 824, et seq. Plaintiff as assignee as aforesaid also seeks to recover from the defendant the difference between the amounts paid by the defendant from time to time for electric energy transmitted in interstate commerce and sold in such commerce to the defendant at wholesale for resale, and the just and reasonable value of such energy to said Dakota Public Service Company and said North Dakota Power & Light Company and said Northern Power and Light Company, the details of said transactions in said electric energy being hereinafter more specifically set forth. Plaintiff also seeks to recover for said unreasonable rates and charges and the aforesaid underpayments for energy on the grounds that said rates and charges were fraudulently exacted from plaintiff's assignors and predecessors, and also seeks to recover the aforesaid underpayments for energy by the defendant on the grounds that plaintiff's predecessors were induced by defendant's fraud to deliver such energy to the defendant at unreasonably low and inadequate prices.

2. Defendant Northwestern Public Service Company is a Delaware corporation organized in 1923 and engaged in

the electric public utility business as an operating company in South Dakota where it has been qualified to do business since 1923.

3. At all times hereinafter mentioned, North Dakota Power & Light Company, hereinafter referred to as "North Dakota", was a Delaware corporation qualified to do business in the State of North Dakota where it engaged at all times hereinafter mentioned in the electric public utility business as an operating company in that state. It qualified to do business in South Dakota July 13, 1939, and from that date until its liquidation October 19, 1945, it engaged in the electric public utility business in South Dakota. It was liquidated under its then name of Dakota Public Service Company on October 19, 1945, the plaintiff then being the owner of all of the capital stock of Dakota Public Service Company and the recipient in liquidation of all properties and assets and claims, rights and demands of every kind of Dakota Public Service Company.

4. Northern Power and Light Company, hereinafter referred to as "Northern", was a Delaware corporation qualified to do business in both North Dakota and South Dakota at all times mentioned in these Findings up to the date of its merger with North Dakota on July 1, 1939. During all the times mentioned in these Findings prior to July 1, 1939, Northern was engaged in the electric public utility business as an operating company in both North Dakota and South Dakota.

5. On July 1, 1939, Northern and North Dakota, pursuant to the laws of the State of Delaware, merged into one corporation, North Dakota being the survivor and, pursuant to the terms of the merger, changing its name to Dakota Public Service Company, hereinafter referred to as "Dakota". Pursuant to the terms of the merger, Dakota became the owner of all the public utility plants, systems and business and all claims and assets whatsoever of Northern, in addition to the properties and assets owned on the date of the merger by North Dakota, and thereafter Dakota operated as an electric public utility in the States of North Dakota and South Dakota all of the

properties which it owned on the date of the merger and those which it acquired through said merger. The operation of said properties by Dakota continued until October 19, 1945.

6. In 1929 Middle West Utilities Company, a Delaware corporation, controlled North West Utilities Company, which owned and controlled the defendant. About August 6, 1929, Middle West Utilities Company acquired control of United Public Service Company, which controlled United Public Utilities Company, which owned all of the capital stock of North Dakota and Northern. Immediately on acquisition of control of United Public Service Company, Middle West Utilities Company caused North Dakota and Northern to elect to their respective Boards of Directors men who were then Directors of defendant and such newly elected Directors of North Dakota and Northern elected as officers men who were then officers and directors of defendant. At the time Middle West Utilities Company acquired control of United Public Service Company and United Public Utilities Company, Middle West Utilities Company caused the accounting and management offices of Northern and North Dakota to be moved to Huron, South Dakota, and located in and as a part of the management and accounting office of the defendant and such arrangement continued until the purchase of Dakota by the plaintiff.

7. Middle West Utilities Company at the time of the acquisition of control of United Public Service Company intended to promptly merge the properties of North Dakota and Northern into the defendant and with such merger in mind defendant began construction of high tension electric transmission lines from Aberdeen, South Dakota, to Barnard, South Dakota, and from Aberdeen, South Dakota, to Ipswich, South Dakota, and at the same time defendant began construction of a high tension electric transmission line from Ree Heights, South Dakota, to Pierre, South Dakota, as defendant was hopeful of buying the municipal plant at Pierre and intended to tie that plant into defendant's transmission system. Defendant was not successful in its attempt to buy the Pierre municipal plant in the fall of 1929 but continued its efforts to

acquire said plant through 1930 and continued construction of the line from Ree Heights toward Pierre but proceeded no farther west than Blunt, South Dakota. The high tension transmission lines from Aberdeen to Barnard and Aberdeen to Ipswich and the substation at Aberdeen partially built solely for use on the defendant's properties and partially built to secure energy from Northern and North Dakota were completed in the year 1930. In said year defendant also completed construction of the lines from Ree Heights to Blunt and from Blunt to Gettysburg, South Dakota. The high tension lines from Aberdeen to Barnard and Ipswich and from Ree Heights to Blunt and thence to Gettysburg interconnected the northeastern and northwestern ends of defendant's properties with the properties of Northern. North Dakota and Northern some years prior to 1930 had interconnected their properties at Driscoll, North Dakota and at Keldron, South Dakota. The latter interconnections between Northern and North Dakota were made by owners not connected at that time with Middle West Utilities Company, or any of its subsidiaries, and such interconnections were made pursuant to plans of the then owners of Northern and North Dakota to interconnect their properties and make them an operating system sufficient for the needs of the then businesses of those companies.

The high tension lines from Aberdeen to Barnard and Aberdeen to Ipswich and from a town west of Ree Heights, namely, Highmore, South Dakota, to Blunt and Gettysburg and transformer facilities at Gettysburg used in the interchange of energy between defendant and Northern, North Dakota and Dakota and transformer facilities in the substation at Aberdeen used in the interchange of energy between defendant and Northern, North Dakota and Dakota will be called the "interconnection facilities".

Before North Dakota and Northern and Northwestern could be merged or their properties merged into one ownership, Middle West Utilities Company was placed in equity receivership in the United States District Court for the Northern District of Illinois, Eastern Division, on April 15, 1932, and on the same date in the same court, United Public Service Company and United Public Utili-

ties Company were also placed in Equity receivership. Samuel W. White, an investment banker, Vice Chairman of the Board of Directors of Central Republic Company, the investment affiliate of Central Republic Bank and Trust Company of Chicago, Illinois, was appointed Receiver of United Public Service Company and United Public Utilities Company. North Dakota and Northern, though wholly owned subsidiaries of United Public Utilities Company, were not placed in receivership. After the appointment of Samuel W. White as Receiver of United Public Utilities Company and at all times subsequent thereto until October 19, 1945, at the suggestion of the Directors of the defendant, the Board of Directors of Northern and North Dakota and, subsequent to the merger, of Dakota was at all times composed of men who were at the same time directors of defendant, except that during all of said times Samuel W. White was also a director of each of said last named three companies but he was not an officer of any of said companies, and from January 1, 1935, to October 19, 1945, the officers of Northern, North Dakota and Dakota also held the same offices in the defendant. During the entire period of time from prior to September 1, 1935, until October 19, 1945, Samuel W. White was a director and President of United Public Utilities Corporation. Samuel W. White never attended a meeting of the Directors of Northern, North Dakota or Dakota.

8. United Public Service Company, United Public Utilities Company and Middle West Utilities Company were each brought under Chapter 77-B of the Bankruptcy Act and as a result of proceedings under said Chapter Middle West Utilities Company was reorganized as The Middle West Corporation and United Public Service Company was reorganized as United Public Service Corporation and United Public Utilities Company was reorganized as United Public Utilities Corporation.

9. At the time of the receiverships of United Public Service Company and United Public Utilities Company, Middle West Utilities Company owned controlling interests in United Public Service Company and through such ownership controlled United Public Utilities Company,

which was controlled by United Public Service Company. United Public Service Company and United Public Utilities Company came out of reorganization with their respective names changed as above noted in December, 1934, United Public Utilities Corporation owning Northern and North Dakota and the other subsidiaries hereinafter referred to. At that time the Articles of Incorporation were such that interests of Middle West Utilities Company in United Public Service Corporation gave to Middle West Utilities Company, and after its reorganization, The Middle West Corporation, actual control of United Public Service Corporation and potential control of United Public Utilities Corporation and since July 1, 1945, United Public Utilities Corporation has been a subsidiary of The Middle West Corporation.

From prior to August 6, 1929, to October 19, 1945, the controlling stock of defendant was owned by and defendant was completely dominated and controlled by Middle West Utilities Company and its successor, The Middle West Corporation, through the medium of an intermediary subholding company, North West Utilities Company.

10. North Dakota and Northern were entirely owned by United Public Utilities Company from prior to August 6, 1929, until United Public Utilities Company was reorganized into United Public Utilities Corporation and the entire ownership of North Dakota and Northern continued in United Public Utilities Corporation to October 19, 1945.

11. On October 19, 1945, United Public Utilities Corporation sold all of the stock and other securities of Dakota (which was North Dakota with a changed name as the surviving corporation in the merger of North Dakota and Northern hereinbefore set forth). Such stock was sold to the plaintiff in this action and on the same day Dakota made a general assignment to the plaintiff of all of its public utility property, assets, claims and rights of every kind, including its claims and rights against the defendant hereinafter considered and dealt with.

12. United Public Service Corporation and its subholding company, United Public Utilities Corporation, owned a

large number of public utility companies and some nonpublic utility property and among the public utility and nonpublic utility properties owned by United Public Utilities Corporation were electric utilities, a mining company, ice and coal companies, refrigerating companies, natural gas companies and water companies. The aggregate of the operating companies owned by United Public Utilities Corporation and engaged in such various businesses was 21. Mr. White did not have sufficient intimate understanding and knowledge of the operations of Northern, North Dakota or Dakota or of the contracts involved in this litigation or of the details of the transactions involved in said contracts to enable him to approve or ratify any of the contracts involved in these Findings. The Board of Directors of United Public Utilities Corporation had no knowledge of the transactions between defendant and Northern, North Dakota and Dakota except what Mr. White told them and Mr. White had no knowledge of the material facts involved in these transactions except what was conveyed to him by the officers and directors of defendant who were at the same time officers and directors of Northern, North Dakota and Dakota, or such knowledge as was conveyed to him indirectly from such common officers and directors.

13. During the entire period from September 1, 1935, through October 19, 1945, the common officers and directors of Northern, North Dakota, Dakota and the defendant were paid their entire compensation by the defendant. During all of that time defendant, pursuant to a formula which it worked out, was reimbursed by Northern, North Dakota and Dakota for a portion of the salaries which it paid to said common officers and directors. Beginning January 1, 1936, the agreements with reference to the reimbursement of defendant for a portion of said salaries of said common officers and directors was evidenced by written agreements, one dated as of January 2, 1936, and the other dated as of July 1, 1939, which superseded the prior agreement. These agreements were entitled "Agreement for allocation of joint management expenses".

14. After United Public Service Corporation and United Public Utilities Corporation came out of reorganization

proceedings, those corporations and certain of their subsidiaries, including Northern, North Dakota and Dakota, at all times had service contracts with the trustees of Middle West Utilities Company, and after its reorganization with its successor The Middle West Corporation, and after the creation of The Middle West Corporation's service company, with such service company, which was known as Middle West Service Company, a wholly owned subsidiary of The Middle West Corporation. Pursuant to these contracts, Northern, North Dakota and Dakota paid to Middle West Service Company and its predecessors in said service contracts very substantial amounts of money for services and expenses for the rendition by Middle West Service Company and its predecessors of engineering and rate services, accounting and similar aid and advice. At all times when Middle West Service Company and its predecessors had service contracts with Northern, North Dakota and Dakota, it and its predecessors had service contracts with a large number of public utilities affiliated with The Middle West Corporation, including defendant.

15. For the period from June, 1930, to the end of February, 1931, North Dakota generated energy, some of which was delivered to Northern, and some of this energy thus delivered to Northern was by it delivered over its transmission lines to the interconnection facilities and over the interconnection facilities to the defendant, and during that period of time the defendant paid North Dakota for the energy thus delivered to defendant at 7½ mills per kilowatt hour.

16. Beginning with March 1, 1931, payments by the defendant to North Dakota for energy were discontinued and thereafter and until July 1, 1939, the date of the merger of North Dakota and Northern, the defendant and Northern exchanged surplus energy at wholesale for resale, the energy delivered to the defendant having been generated in the State of North Dakota for the most part by North Dakota and sold by it to Northern, which in turn sold it to defendant which received and metered such energy in South Dakota and sold it to its retail customers in that state. During this same period just referred to, the de-

fendant generated electric energy in the State of South Dakota and transmitted it to Northern. Substantial amounts of energy thus delivered by defendant to Northern were transmitted by Northern to the State of North Dakota where the same was sold to retail customers of Northern, as defendant well knew.

17. Beginning on February 1, 1932, the price at which energy was interchanged by Northern and defendant was changed by the common officers and directors of defendant and Northern from a flat rate of 7½ mills per kilowatt hour to 7½ mills per kilowatt hour for the first 225,000 kilowatt hours per month and 4½ mills for the excess over said 225,000 kilowatt hours per month. That price averaged 6.6 mills and continued until January 1, 1933, when the price was changed by the common directors and officers of defendant and Northern to 5 mills per kilowatt hour.

18. From some time prior to September 1, 1935, to July 1, 1939, the defendant caused North Dakota to deliver energy to Northern at 3½ mills per kilowatt hour. From September 1, 1935, to October 19, 1945, the energy transmitted over the transmission systems of North Dakota, Northern and Dakota, including the energy delivered to the defendant, was generated at Beulah, North Dakota, Bismarck, North Dakota, and Mobridge, South Dakota. Such energy includes the energy sold during said period by North Dakota to Northern and by Northern to defendant.

19. Pursuant to the provisions of the Federal Power Act, the Federal Power Commission promulgated its Order No. 36, providing among other things as follows:

"(a) (Filing) On or before January 15, 1936, each public utility shall file with the Commission schedules showing all rates and charges made, demanded, or received for or in connection with the transmission, sale, purchase, or interchange of electric energy subject to the jurisdiction of the Commission, and all contracts, rules and regulations, interchange agreements, and working agreements for the use of facilities, affecting or pertaining to such rates and charges which were effective on January 1, 1936, and such rates and

charges shall not be changed except in accordance with the provisions of Section 205, Part II, Federal Power Act.

"(b) (Oral Agreements) If any interchange agreement, working agreement for the use of facilities, or other understanding under which electric energy is sold, or interchanged or under which facilities are used for the transmission of electric energy is not in writing, the basic terms of such agreement or understanding upon which settlement is made shall be reduced to writing, approved by the parties thereto, and filed with the Commission, as prescribed in paragraph (a)."

The Federal Power Commission extended the time of Northern, North Dakota and the defendant for filing rates to January 31, 1936.

Pursuant to said Order No. 36, the directors and officers of defendant, North Dakota and Northern, holding identical positions in all of said companies, filed with the Federal Power Commission on February 7, 1936, a letter of defendant dated January 28, 1936, denominated by said Commission "Northwestern Public Service Company Rate Schedule F. P. C. No. 1", stating that it was exchanging under an oral agreement surplus energy with Northern at Barnard, Ipswich and Gettysburg, South Dakota, at 5 mills per kilowatt hour, and on January 31, 1936, filed with said Commission a letter of Northern dated January 28, 1936, and signed by the common Vice-President of defendant and Northern, stating that Northern was exchanging under an oral agreement surplus energy with defendant at Barnard, Ipswich and Gettysburg, South Dakota, at 5 mills per kilowatt hour, and on February 7, 1936, filed with the Federal Power Commission on behalf of North Dakota a letter dated January 28, 1936, signed by the common Vice-President of defendant, Northern and North Dakota, stating that North Dakota was exchanging under an oral agreement surplus energy with Northern at 3½ mills per kilowatt hour.

The letter filed on behalf of Northern was denominated by the Federal Power Commission "Northern Power and Light Company Rate Schedule F. P. C. No. 1" and the

letter filed on behalf of North Dakota was denominated "North Dakota Power and Light Company Rate Schedule F. P. C. No. 1 and No. 2".

20. At the time defendant's Rate Schedule F. P. C. No. 1 was filed with the Federal Power Commission and from January 1, 1936, defendant was charging Northern and collecting from said company at the rate of $1,666.66 per month an annual charge of $20,000 per year, fixed by the common officers and directors of defendant and Northern, as a charge for the utilization of the interconnection facilities over which energy sold by Northern to defendant was transmitted and over which energy sold by defendant to Northern was transmitted, and at the time of the filing of defendant's Rate Schedule F. P. C. No. 1 with the Federal Power Commission, there was also in existence the agreement for allocation of joint management expenses dated January 2, 1936, under which Northern and North Dakota were obligated to pay to defendant a portion of the salary and expenses of defendant's load dispatchers located on defendant's system at Aberdeen, South Dakota, and who controlled the flow of energy back and forth between defendant, Northern and North Dakota. The agreement for allocation of joint management expenses dated January 2, 1936, and the agreement for allocation of joint management expenses dated July 1, 1939, were never filed with the Federal Power Commission. The agreement covering the charges on account of the use of the interconnection facilities was not filed with the Federal Power Commission until December 23, 1938, and then under circumstances which will be hereinafter stated. The monthly payments of $1,666.66 per month and the payments on account of dispatchers' salaries affected the rate at which energy was interchanged between Northern and defendant.

21. From September 1, 1935, to July 1, 1939, defendant, through the common officers and directors of defendant and Northern and North Dakota, caused North Dakota to generate electric energy in the State of North Dakota and transmit the same to Northern at Keldron, South Dakota, and at Driscoll, North Dakota, at which points such energy was in turn transmitted by Northern to Gettys-

burg, Barnard, Ipswich and Aberdeen, South Dakota, where it was purchased for resale in South Dakota by defendant.

During said period Northern delivered to defendant 12,550,381 kilowatt hours of electric energy over and above all electric energy delivered by defendant to Northern and defendant paid to Northern for said 12,550,381 kilowatt hours at only 5 mills per kilowatt hour, whereas the cost of said 12,550,381 kilowatt hours to Northern and to North Dakota at the point of delivery to defendant was 8.15 mills per kilowatt hour.

The 8.15 mill costs of said energy are only average production costs, a fair and reasonable cost of transmission of such energy and the line loss of the energy in the transmission of said energy to the defendant. The average production costs do not include any depreciation, taxes or insurance of any kind or any fixed charges on capital or any return on capital.

The payment of only 5 mills per kilowatt hour for said 12,550,381 kilowatt hours caused a loss to Northern and North Dakota of $39,533.70.

The record is silent as to the exact number of kilowatt hours delivered from September 1, 1935, to December 31, 1935 and is silent as to the exact number of kilowatt hours delivered from January 1, 1939, to July 1, 1939, but shows that 1,499,540 kilowatt hours were delivered during 1936, 3,648,909 kilowatt hours were delivered in 1937 and 4,109,130 kilowatt hours were delivered in 1938. Therefore, on the balance of 3,292,802 kilowatt hours interest would have to be figured from July 1, 1939.

The common officers and directors of the defendant and of Northern and North Dakota had charge of the operations of North Dakota and Northern and of their accounting records and knew or should have known the cost to Northern and North Dakota of said energy delivered to defendant and they did not tell said companies or Samuel W. White the cost of said energy or that the amount paid by defendant to Northern and North Dakota during the aforesaid period was unfair and unreasonably low in the amount of 3.15 mills per kilowatt hour or in any other amount.

On October 7, 1936, the common directors and officers of defendant and of Northern caused defendant and Northern to make and enter into an agreement denominated "Interconnection Contract" providing among other things for the interchange of electric energy between defendant and Northern and providing that defendant would pay to Northern for energy delivered a sum equivalent to 5 mills per kilowatt hour and that Northern would pay to defendant for energy delivered a sum equivalent to 5 mills per kilowatt hour and that Northern would pay to defendant on account of fixed charges, maintenance and operating expenses relative to the interconnection facilities beginning as of January 1, 1936, the sum of $1,666.66 per month, thereby reducing to writing the arrangement hereinbefore recited whereby Northern began as of January 1, 1936, to pay to defendant the aforesaid monthly payments on account of the interconnection facilities.

During the period from September 1, 1935, to July 1, 1939, hereinbefore recited, defendant was at all times buying energy from Northern at 3.15 mills less than the cost of said energy to Northern and at less than it would have cost defendant to generate the energy itself, but represented to Samuel W. White that the rate of 5 mills was a fair and reasonable rate for the energy purchased by defendant, and said officers and directors represented to said White that since the price at which the energy was sold exceeded the incremental cost, North Dakota and Northern were making a gain, whereas in fact they were losing on an assumed cost to North Dakota of solely the incremental cost.

22. As of January 1, 1938, the common directors and officers of Northern, North Dakota and defendant caused North Dakota and Northern to enter into a written agreement with defendant called "Interchange Capacity Agreement" providing that the generating capacities of all three companies should be considered as constituting a common pool of energy and setting forth how a formula should be worked out each year to determine whether or not either party to the contract was deficient in furnishing its share of said common pool according to the terms of said contract and such formula and providing for a charge against any party having a deficiency in reserve capacity accord-

ing to such contract and said formula of $13.20 per kilowatt of such deficiency. Then defendant began charging Northern for a deficiency as of January 1, 1938. This contract was not filed with the Federal Power Commission until December 23, 1938.

23. During the years 1935 and 1936, the common officers and directors of defendant and Northern caused Northern to expend $127,694.45 in rebuilding the transmission line of Northern from Wishek to Bowdle and installing oil circuit breakers. Said oil circuit breakers would not have been necessary for the operations of North Dakota and Northern and the rebuilding of the line was not necessary for the operations of North Dakota and Northern and said rebuilding and installations were for the purpose of enabling defendant to purchase increased energy at 5 mills per kilowatt hour and created transmission capacity on said line in excess of Northern and North Dakota's requirements.

The interchange capacity contract between defendant, Northern and North Dakota dated January 1, 1938, contained in Article IV provisions that if any company to the agreement had provided transmission capacity between existing points of interchange in excess of ts own requirements, it should be entitled to receive compensation for the use of such excess from the party using such excess and the construction of the line and the installation of the circuit breakers on the line between Wishek and Bowdle created such excess and was used by defendant to secure interchange energy from Northern and North Dakota, but defendant has never compensated Northern for the use of such excess transmission capacity.

24. As of July 1, 1939 (the date of the merger of North Dakota and Northern resulting in North Dakota being the surviving corporation under the name of Dakota Public Service Company), the common officers and directors of defendant and Dakota made and entered into an interconnection contract between defendant and Dakota containing the same provisions as hereinbefore recited from the interconnection contract between defendant and Northern and as of said date said common officers and directors made and entered into a so-called interchange capacity agree-

ment between defendant and Dakota containing, among other things, the same provisions as quoted hereinbefore, from the interchange capacity agreement dated as of January 1, 1938, between defendant and North Dakota and Northern. The last mentioned interconnection contract between defendant and Dakota was not filed with the Federal Power Commission until January 10, 1940, and the same is true of the interchange capacity agreement between said parties.

25. From July 1, 1939, to July 1, 1941, Dakota and defendant interchanged energy as contemplated by the interconnection contract and the net energy interchanged during this period was 11,869,145 kilowatt hours which went to defendant. At the time of the filing of said interconnection contract and interchange capacity agreement with the Federal Power Commission on January 10, 1940, there was also a written agreement dated July 1, 1939, made and entered into by the common officers and directors of defendant and Dakota under which Dakota was obligated to pay to defendant a portion of the salary and expenses of the defendant's load dispatchers located on defendant's system at Aberdeen, South Dakota, and who controlled the flow of energy back and forth by the defendant and Dakota and which salary affected and was in connection with the rate for such interchange energy. Said agreement under which charges for dispatchers' services were collected by defendant from Dakota was never filed with the Federal Power Commission.

From July 1, 1939, to July 1, 1941, the defendant, through the common officers and directors of defendant and Dakota, caused Dakota to generate electric energy in the State of North Dakota and transmit the same to defendant at Gettysburg, Barnard, Ipswich and Aberdeen, South Dakota, where it was purchased for resale in South Dakota by defendant and the aforesaid 11,869,145 kilowatt hours was energy thus generated, transmitted and sold. Said kilowatt hours of electric energy were paid for by defendant to Dakota at only 5 mills per kilowatt hour, whereas the cost thereof per kilowatt hour to Dakota at points of delivery to defendant was 7.66 mills per kilowatt hour.

The 7.66 mills cost of said energy is only average production cost, a fair and reasonable cost of transmission of such energy and the line loss of energy in the transmission of such energy to defendant. The average production costs do not include any depreciation, taxes or insurance of any kind, or any fixed charges on capital, or any return on capital.

The payment of only 5 mills per kilowatt hour for said 11,869,145 kilowatt hours caused a loss to Dakota of $31,571.91.

The record is silent as to the exact number of kilowatt hours delivered from July 1, 1939, to December 31, 1939, and is silent as to the exact number of kilowatt hours delivered from January 1, 1941, to July 1, 1941, but shows that 5,062,322 kilowatt hours were delivered during 1940. Therefore the balance of 6,806,823 kilowatt hours will draw interest only from July 1, 1941.

The common officers and directors of defendant and Dakota had charge of the operations of Dakota and of its accounting records and knew or should have known the cost to Dakota of said energy delivered to defendant and they did not tell Dakota or Samuel W. White the cost of said energy and the amount paid by defendant to Dakota during the aforesaid period was unfair and unreasonably low in the amount of 2.66 mills per kilowatt hour.

During the period from July 1, 1939, to July 1, 1941, defendant was at all times buying energy from Dakota at less than the cost of said energy to Dakota and at less than it would have cost defendant to generate the energy itself, but represented to Samuel W. White that the rate of 5 mills was a fair and reasonable rate for the energy purchased by defendant, and defendant represented to said White that since the price at which the energy was sold exceeded the [imcremental] cost, Dakota was making a gain, whereas in fact Dakota was losing even on an assumed cost to Dakota of solely the incremental cost.

During the year 1940 the common officers and directors of defendant and Dakota caused Dakota to expend $50,851.11 to rebuild the transmission line of Dakota from Bowdle to Ipswich and to increase the voltage of said line

from 22,000 volts to 38,000 volts and caused Dakota to expend $1,928.98 to increase the voltage of Dakota's line from Bowdle to Selby from 22,000 volts to 38,000 volts and caused Dakota to spend $46,529.96 to install a new substation at Bowdle, South Dakota. None of said expenditures would have been necessary for the operations of Dakota and such expenditures created transmission capacity on said lines in excess of Dakota's requirements and said rebuilding and installations were for the purpose of enabling defendant to purchase increased energy at 5 mills per kilowatt hour.

The interchange capacity agreement aforesaid between defendant and Dakota dated July 1, 1939, contained provisions that if either company provided transmission capacity between existing points of interchange in excess of its own requirements it should be entitled to receive compensation for the use of such excess from the party using such excess and the reconstruction of the aforesaid lines and the installation of the substation at Bowdle created such excess which was used by defendant to secure interchange energy from Dakota but defendant has never compensated Dakota for the use of such excess transmission capacity.

26. As of July 1, 1941, the common officers of defendant and Dakota made and entered into a contract between defendant and Dakota wherein the parties agreed to exchange surplus energy at the rate of 5 mills per kilowatt hour and requiring Dakota to pay to defendant an interchange capacity charge under a power pooling arrangement similar to that set forth in the agreement for interchange capacity described in Finding No. 22 hereof but said contract of July 1, 1941, set forth the then agreed upon generating capacities of the parties but otherwise contained none of the figures necessary to determine the interchange capacity charge for the first year or subsequent years of said agreement.

Said contract of July 1, 1941, also required Dakota to pay to defendant $1,666.66 per month beginning as of January 1, 1936, and continuing through June 1, 1950, and the further sum of $1,348.82 on July 1, 1950, and beginning

August 1, 1950, $442.53 per month. This contract was for a term of ten years. This contract was not filed with the Federal Power Commission until February 28, 1942. It was the intention of said common officers and directors that the payments of $1,666.66 per month should retire $151,724.63 by July 1, 1950, at a maintenance rate of 3½% and interest rate of 5%, the balance of each monthly payment to be applied on the principal. The sum of $151,724.63 was one-half of $303,449.26 which the officers of defendant represented to Samuel W. White was the cost of the interconnection facilities.

In addition to the payments required by said contract to be made to defendant on account of interconnection facilities, Dakota was also required during each year of said contract to pay substantial amounts, as will hereinafter appear in these Findings, on account of the interchange capacity charges provided for in said contract, and both the charges on account of the interconnection facilities and on account of the interchange capacity provisions of said contract were part of the rate for surplus energy which defendant sent to Dakota for interchange under said contract.

From July 1, 1941, to October 19, 1945, Dakota and defendant interchanged energy as contemplated by the contract of July 1, 1941, and the net energy interchanged during this period was 43,798,846 kilowatt hours which went to defendant. At the time of the filing of the aforesaid contract of July 1, 1941, with the Federal Power Commission on February 28, 1942, there was also the written agreement dated July 1, 1939, made and entered into between the common officers and directors of defendant and Dakota under which Dakota was obligated to pay to defendant a portion of the salaries and expenses of defendant's load dispatchers located on defendant's system at Aberdeen, South Dakota, and who controlled the flow of energy back and forth by defendant and Dakota, which salary affected and was in connection with the rate for such interchange energy. Said agreement for which charges for dispatchers' services were collected by defendant from Dakota was never filed with the Federal Power Commission.

From July 1, 1941, to October 19, 1945, the defendant, through its officers and directors, who were officers and directors in common with Dakota caused Dakota to generate the aforesaid electric energy in the State of North Dakota and transmit the same to defendant at Gettysburg, Barnard, Ipswich and Aberdeen, South Dakota, where it was purchased for resale in South Dakota by defendant and the aforesaid 43,798,846 kilowatt hours was energy thus generated, transmitted and sold. Said kilowatt hours of electric energy were paid for by defendant to Dakota at only 5 mills per kilowatt hour, whereas the cost thereof per kilowatt hour to Dakota at points of delivery to defendant was 8.61 mills per kilowatt hour.

The 8.61 mills cost of said energy is only average production cost, a fair and reasonable cost of transmission of such energy and the line loss of energy in the transmission of such energy to defendant. The average production costs do not include any depreciation, taxes or insurance of any kind, or any fixed charges on capital, or any return on capital.

Payment of only 5 mills per kilowatt hour for said 43,798,846 kilowatt hours caused a loss to Dakota of $158,113.83.

Of the aforesaid 43,798,846 kilowatt hours, 5,365,546 were delivered to defendant from July 1, 1941, to and including December 31, 1941, and 11,095,540 from January 1, 1942, to and including December 31, 1942, and 10,301,160 from January 1, 1943, to and including December 31, 1943, and 9,454,400 from January 1, 1944, to and including December 31, 1944, and 7,582,200 from January 1, 1945, to and including October 19, 1945.

The common officers and directors of defendant and Dakota had charge of the operations of Dakota and of its accounting records and knew or should have known the cost to Dakota of said energy delivered to defendant and they did not tell Dakota or Samuel W. White the cost of said energy and the amount paid by defendant to Dakota during the aforesaid period was unfair and unreasonably low in the amount of 3.61 mills per kilowatt hour.

During the period from July 1, 1941, to October 19, 1945, defendant was at all times buying energy from Dakota at less than the cost of said energy to Dakota and at less than it would have cost the defendant to generate the energy itself, but defendant represented to Samuel W. White that the rate of 5 mills per kilowatt hour was a fair and reasonable rate for the energy purchased by defendant, and the aforesaid officers and directors of defendant represented to said White that since the price at which the energy was sold exceeded the incremental cost Dakota was making a gain, whereas in fact Dakota was losing even on an assumed cost to Dakota of solely the incremental cost.

During the year 1940 the officers and directors of defendant, who were common officers and directors of Dakota, had caused Dakota to expend funds hereinbefore in Finding No. 25 set forth to rebuild the transmission line of Dakota from Bowdle to Ipswich and to increase the voltage from Bowdle to Selby and to install a new substation at Bowdle, South Dakota, and had caused Northern in 1936 to make the expenditures set forth in Finding No. 23 for the transmission line from Wishek to Bowdle and the oil circuit breakers described in said Finding, and none of said expenditures would have been necessary for the operations of Dakota during the period in this Finding referred to and such expenditures created transmission capacity on said lines in excess of Dakota's requirements, and the aforesaid rebuilding and installations were for the purpose of enabling defendant to purchase increased energy at 5 mills per kilowatt hour.

27. The interconnection facilities were constructed by defendant for its own use and benefit to secure without any charge against Northern and Dakota on account of such interconnection facilities a net return to defendant of $29,500 a year. The interconnection facilities cost the defendant as of the time of their original construction, completed in 1930, not to exceed $255,699.54, and thereafter in 1941 the defendant added thereto a transformer at Aberdeen at a cost not exceeding $14,359.15, so that the maximum aggregate investment at any time by the defendant in said facilities did not exceed $270,058.69.

Further findings concerning the interconnection facilities are contained in the foregoing portions of the Findings in this case.

The interconnection facilities were utilized by defendant for the interchange with Northern, North Dakota and Dakota of energy in interstate commerce at wholesale for resale.

From January 1, 1936, and through October 19, 1945, the common officers and directors of Northern, North Dakota and Dakota caused said companies under the terms of the contracts hereinbefore in this findings referred to to pay to defendant at the rate of $1,666.66 per month as a charge on account of said interconnection facilities an aggregate of $196,021.51 of which Northern paid $70,000.00 in the period from January 1, 1936, to June 30, 1939, and Dakota paid from July 1, 1939, to October 19, 1945, the balance, or $126,021.51, of which $1,021.51 was paid for the period from October 1st to October 19, 1945.

During the entire period of the payments referred to in the foregoing paragraph, defendant knew that by far the bulk of energy interchanged would and did flow southward from Northern and Dakota to defendant as opposed to the energy flowing to the north from defendant to Northern and Dakota. During this period the gross energy interchanged was 95,720,480 kilowatt hours and Northern and Dakota delivered of that amount 81,330,996 kilowatt hours to defendant.

The charge thus made against Northern and Dakota on account of the interconnection facilities constituted a charge for energy and an increase in the 5 mill charge for energy which Northern and Dakota paid to defendant.

This charge of $1,666.66 per month was originally conceived by defendant as a method of recouping most of the loss defendant would suffer if the agreement for allocation of joint management expenses should be terminated by Northern and North Dakota and was originally proposed at $20,000.00 per year for 1,000 kilowatts of firm power to be furnished by defendant to Northern, but defendant after such proposal, realizing it had no such firm power, abandoned that as a basis for the charge. In con-

nection with the proposal for said charge, defendant falsely represented to Samuel W. White that the interconnection facilities had been built solely for the benefit of Northern and that said interconnection facilities had cost $340,000, whereas said interconnection facilities were in fact built for the benefit of defendant, as set forth in these Findings, and at amounts not to exceed $270,058.69. Later defendant represented to said Samuel W. White that said facilities cost $325,000 and some time in 1943 represented to said White that said facilities cost $303,449.26.

Throughout the entire period from January 1, 1936, to October 19, 1945, Samuel W. White relied implicitly on the statements of the defendant to him concerning defendant's investment in and the carrying charges on said interconnection facilities and on the judgment of the common officers and directors of Northern, Dakota and the defendant as to the propriety of said charge on account of said interconnection facilities.

Samuel W. White was never fully advised of the facts on which he could have determined whether there should have been any charge on account of said interconnection facilities or the amount thereof. The defendant represented to Samuel W. White that taxes and maintenance were equivalent to 3½% of the investment in said interconnection facilities, whereas taxes, maintenance and operation did not exceed 2¼% of $303,449.26.

On December 20, 1938, defendant transmitted to the Federal Power Commission a copy of the interconnection contract hereinabove referred to dated as of October 7, 1936, and stated:

> "We wrote you on January 28, 1936, with respect to the energy interchanged, but since writing you have reduced to writing the energy interchange agreement between Northwestern Public Service Company and Northern Power and Light Company."

The letters of January 28, 1936, are the letters constituting defendant's Rate Schedule F. P. C. No. 1 and Northern's Rate Schedule F. P. C. No. 1. Upon being advised by the Federal Power Commission that the interconnection contract would not be effective as of January 1, 1936, without

an application therefor pursuant to the rules of the Commission, the defendant filed such application with said Commission on January 25, 1939, falsely advising the Commission that the oral agreement of January 28, 1936, providing for the interchange of surplus energy, which has hereinbefore been referred to, was reduced to writing on October 7, 1936, without changing the terms of the agreement, whereas in fact the charge of $20,000 per year began as of January 1, 1936, and was incorporated in the agreement of October 7, 1936, and defendant also falsely advised the Federal Power Commission in said application that the defendant and North Dakota and Northern operated their respective systems as a single interconnected system for a number of years under an oral agreement providing for the billing of energy interchanged and also for the billing of fixed charges on the interconnection facilities, whereas in fact no charge had been made for fixed charges on interconnection facilities by the defendant against Northern prior to January 1, 1936. When the aforesaid charge of $20,000 per annum was instituted and at the time of the filing of said application for authority to make said contract of October 7, 1936, retroactive to January 1, 1936, defendant failed to notify said Commission of the charges on account of dispatchers' salary and expenses hereinbefore recited in these Findings. On February 22, 1939, the defendant advised the Commission by letter received by the Commission on February 24, 1939, that the charge to Northern of $20,000 per annum on account of interconnection facilities was made on the basis of actual costs, which statement was untrue.

On the 23rd day of February, 1939, the Federal Power Commission issued an order that the agreement of October 7, 1936, between the defendant and Northern filed with the Commission on December 23, 1938, be allowed to take effect as of January 1, 1936.

On March 15, 1939, the defendant, pursuant to a request for information from the Federal Power Commission concerning the transmission charges on the interconnection facilities, falsely advised the Federal Power Commission that the interconnection facilities had cost $324,989.78. No hearing was held by the Commission on the application

of defendant to have the contract of October 7, 1936, made effective as of January 1, 1936, and no notice was given by the Federal Power Commission to Northern of such application.

28. Sometime after June 1, 1938, and as of January 1, 1938, the common officers and directors of defendant, Northern and North Dakota caused Northern and North Dakota to make and enter into an interchange capacity contract, hereinbefore referred to, which had for its purposes the purposes hereinbefore stated.

At the time of the execution of said interchange capacity contract, defendant knew that by far the bulk of the electric energy interchanged and to be interchanged by the defendant and Northern would be generated in the State of North Dakota and transmitted to the State of South Dakota and, in fact, from January 1, 1938, through October 19, 1945, the bulk of said energy was generated by North Dakota or Dakota in the State of North Dakota and by Northern or Dakota delivered to the defendant in the State of South Dakota at Barnard, Ipswich, Aberdeen and Gettysburg and the energy thus received by defendant was resold to its retail electric customers. Substantial portions of the energy generated by defendant in the State of South Dakota during the aforesaid period and by it sold to Northern or Dakota was transmitted to the State of North Dakota where it was sold by Northern or North Dakota, and after July 1, 1939, by Dakota, to their respective retail electric customers.

Said interchange capacity contract was filed with the Federal Power Commission on December 23, 1938, as hereinbefore stated and without filing the agreement for allocation of joint management expenses then in existence under which defendant was charging North Dakota and Northern for load dispatchers' salaries and expenses, as hereinbefore found. The Federal Power Commission notified the defendant that said contract would not be effective as of January 1, 1938, without an application being presented to the Federal Power Commission, pursuant to the rules of said Commission, for consideration by it as to whether said contract should be made effective as of Janu-

ary 1, 1938. The letter of transmittal of said interchange capacity agreement to the Federal Power Commission contained the following statement of the defendant:

> "We have recently reduced to writing the oral agreement between Northwestern Public Service Company, North Dakota Power & Light Company and Northern Power and Light Company with respect to reserve capacity."

Upon receipt of notice from the Federal Power Commission as aforesaid, defendant filed with the Federal Power Commission an application to have said contract given retroactive effect to January 1, 1938, and in said application stated to said Commission with reference to said contract as follows:

> "Under date of January 1, 1938, an agreement was entered into whereby each company would furnish its proportion of the reserve capacity required for the interconnected system, or in lieu thereof the company or companies with a deficiency of reserve capacity will pay the company or companies having excess reserve capacity a demand charge."

No notice of the filing of said application by the defendant was given to Northern or North Dakota though defendant was then charging Northern under said contract at the rate of $22,440 per annum for the year 1938, and for the period beginning January 1, 1939, and ending June 30, 1939, defendant charged Northern the sum of $9,068.40. The aforesaid charges for the year 1938 and for the aforesaid period in the year 1939 were received by the defendant in said years.

On July 1, 1939, the interchange capacity contract dated as of said date between defendant and Dakota was made as hereinbefore found, under the circumstances hereinbefore found, and was filed with the Federal Power Commission as hereinbefore found, and from July 1, 1939, to December 31, 1939, defendant charged and received from Dakota the sum of $9,068.40 and during the year 1940, under the terms of said contract, charged and received from Dakota the sum of $12,685.20, and during the period from January 1, 1941, to June 30, 1941, defendant charged and received from Dakota under the terms of said contract

$2,138.40. As of the 1st day of July, 1941, but actually on January 28, 1942, defendant's common directors and officers, who were at the same time directors and officers of Dakota, caused Dakota to make and enter into the contract dated as of July 1, 1941, covering interchange power, interconnection facility charges and interchange capacity charges as hereinbefore found, and caused said agreement to be filed with the Federal Power Commission on the 5th day of February, 1942. At the time of the filing of said agreement with the Federal Power Commission, defendant represented that the agreement was a combination of the interchange capacity agreement dated July 1, 1939, and the interconnection contract dated July 1, 1939, hereinbefore referred to, and stated falsely that the agreement made January 28, 1942, contained no material change in the formula for determining the charges, whereas in fact the formula for determining the charges had a material change in the interval fixed for the determination of system demands whereby said interval was changed from one-half hour to one hour, and said letter of transmittal falsely stated that the payments on account of transmission facilities would be applied against the existing investment and after the investment had been amortized the charge would be reduced to cover maintenance and operation on the interconnection facilities, whereas the charge was on a greater amount than the existing investment and the provision for charge in the agreement after the amortization of the investment was substantially greater than the maintenance and operation charges, and said letter of transmittal contained a false statement to the Federal Power Commission that even if said contract so transmitted was not effective for 1942, nevertheless the provision for regulating payments under the interchange capacity provisions would be the same as under the interchange capacity agreement dated July 1, 1939, whereas in fact the payments for the year 1942 were under the agreement then transmitted to the Federal Power Commission $7,761.60 greater than they would have been under the interchange capacity agreement dated as of July 1, 1939. Under date of February 19, 1942, the Federal Power Commission advised defendant that an application would have to be filed to make said contract dated July 1, 1941, executed on January 28, 1942,

effective as of July 1, 1941, and asked why the interval for figuring the demands for the interchange capacity charge had been changed to a sixty minute interval and asked defendant to state the values of the excess or deficiency in reserve capacity which would have resulted had a thirty minute demand interval been used as provided in the interchange capacity agreement dated as of July 1, 1939, and asked the original cost of the interconnection facilities, and defendant falsely represented to the Federal Power Commission that the rates provided in the interchange capacity agreement and the interconnection contract, both dated as of July 1, 1939, and the rates provided in the contract made January 28, 1942, were the same, whereas in fact the contract of January 28, 1942, provided for a ten year term which was an additional burden on Dakota, and in response to said request from the Federal Power Commission, defendant falsely represented and stated to the Federal Power Commission that it did not have facilities for determining the values of the excess or deficiency in reserve capacity which would have resulted had a thirty minute demand interval been used, as provided in the then existing contract, instead of the sixty minute interval provided in the contract of January 28, 1942, whereas in fact defendant then knew and had prepared schedules showing that had the thirty minute interval been used as under the 1939 contract, the charge against Dakota would have been $9,438.00, whereas under the contract of January 28, 1942, the charge was $17,199.60, and in response to said request of said Commission defendant falsely stated to the Commission that the original cost of the interconnection facilities was $303,449.26. After receipt of the aforesaid misrepresentations by the defendant to the Federal Power Commission, the Federal Power Commission issued an order dated March 31, 1942, providing that the contract made January 28, 1942, be allowed to take effect as of July 1, 1941, and providing that said contract should be deemed to be filed and published in compliance with the Federal Power Act, and providing that nothing contained in the order of the Federal Power Commission should be construed as constituting approval by the Commission of any service, rate, provision or condition contained in said contract. Pursuant to the terms of

said contract dated as of July 1, 1939, the defendant charged and received from Dakota for so-called interchange capacity charges in the year 1941 the sum of $2,138.40, in the year 1942 $17,199.60, in the year 1943 $8,514.00, in the year 1944 $9,992.40 and in the year 1945, for the period from January 1, 1945, through October 19, 1945, $18,420.25.

All of the aforesaid interchange capacity contracts represented a plan whereby defendant purported to furnish reserve capacity to the other contracting parties, but in fact agreed to furnish only surplus energy which it was already bound to furnish under the interconnection contracts, or in the case of the 1941 contract, under the provisions thereof with reference to the interchange of energy.

The interchange capacity contracts did not contain data from which the charge could be determined and such information was never filed with the Federal Power Commission until after charges for the then current year had been instituted and said data was never accompanied with any request that the charges disclosed in such data should be made operative as of any prior date or as of any date.

The charge of $13.20 per kilowatt provided for in said contracts was in fact the going charge in the territory where the parties to said contract operated for firm power and the so-called interchange capacity agreements were of no value to Northern, North Dakota or Dakota and it is admitted by the defendant that said contracts were not firm power contracts and defendant did not at any time furnish firm power to Northern, North Dakota or Dakota.

The defendant knew at the time of the making of the interchange capacity contract of January 1, 1938, and at all times thereafter, that it did not have and was not furnishing firm power to Northern, North Dakota or Dakota, and that there was no justification for any charge for interchange capacity, but never disclosed to Samuel W. White its knowledge relative thereto.

Prior to the year 1942, defendant arbitrarily selected a day on which it assumed the maximum demand would occur on all the properties of all of the companies parties to the interchange capacity contracts, and selected the

hours in which it assumed such demand would occur, and after such selections of the day and the hours, read meters to determine the highest thirty minute demand and using those readings as one of the elements of its formula determined the interchange capacity charge for the ensuing year and charged the other parties to the interchange contracts accordingly. This method was wholly unreliable and purely speculative.

The interchange capacity charges collected by defendant from Northern and Dakota as hereinbefore found constituted a charge for energy and an increase in the 5 mill charge for energy which Northern and Dakota paid to defendant.

29. The agreements for allocation of joint management expenses hereinbefore referred to in these Findings, which were never filed with the Federal Power Commission, as hereinbefore found, affected the rates and charges collected by the defendant from Northern and North Dakota for interchange energy and defendant, pursuant to the terms of said agreements and through the aforesaid common officers and directors, charged Northern and North Dakota and caused them to pay to defendant from January 1, 1936, to July 1, 1939, the sums of $2,652.25 and $1,900.89, respectively, for dispatchers' services and expenses and under said agreement for the allocation of joint management expenses dated as of July 1, 1939, defendant, through said common officers and directors, caused Dakota to pay to defendant from July 1, 1939, to October 19, 1945, on account of said dispatchers' salaries and expenses, the sum of $14,661.62 by years as follows: From July 1, 1939, to July 1, 1941, the sum of $4,423.88, and for the period from July 1, 1941, to October 19, 1945, the sum of $10,237.74.

Pursuant to the terms of the aforesaid agreements for the allocation of joint management expense, defendant exacted the aforesaid payments on account of the salaries and expenses of the load dispatchers employed by defendant to control the flow of energy between the parties to said agreements, as set out hereinbefore in these Findings, which energy, as hereinbefore noted, moved in interstate commerce and was sold by the respective parties to the

other parties to said agreements for resale to retail customers. Defendant failed to offer any proof establishing the fairness and reasonableness of the load dispatchers' salaries and expense charges.

30. Charges exacted by defendant under the aforesaid interconnection contracts, the interchange capacity contracts and the agreements for allocation of joint management expense were all part of a scheme of defendant to offset the price that it was paying Northern and Dakota for energy.

The defendant's charge on account of the interconnection facilities assumed an equal use of such facilities by the defendant and by Northern in the first instance and Dakota after the aforesaid merger and was in an amount sufficient to retire one-half of the entire cost of such property in 14½ years, pay interest at 5% and pay taxes, maintenance and operation of the property. Such a charge is unreasonably high and it is manifest defendant knew such amount was excessive, ignoring the $29,500.00 defendant said it would realize annually out of such facilities even before a charge to Northern and North Dakota was contemplated. All of the charges for interconnection facilities were without consideration, unjust, unreasonable and unlawful in their entirety.

31. At no time was Mr. White or the members of the Board of Directors of United Public Utilities Corporation aware of the frauds being practiced upon Northern, North Dakota or Dakota.

32. The interest which has accrued at 6% per annum to September 15, 1948, on the monthly payments of $1,666.66 made by plaintiff's predecessors to defendant on account of interconnection facilities amounts to $91,340.18.

33. The interest which has accrued at 6% per annum to September 15, 1948, on the payments made by plaintiff's predecessors to defendant on account of the interchange capacity demand charges, computed on $22,440.00 from January 1, 1939, and on $18,136.80 from January 1, 1940, and on $12,685.20 from January 1, 1941, and on $4,276.80

from January 1, 1942, and on $17,199.60 from January 1, 1943, and on $8,514.00 from January 1, 1944, and on $9,992.40 from January 1, 1945, and on $18,420.25 from January 1, 1946, amounts in the aggregate to $43,866.13.

34. The interest which has accrued at 6% per annum to September 15, 1948, on the payments made by plaintiff's predecessors to defendant on account of dispatchers' salaries and expenses, computed on $2,652.25 from July 1, 1939, and $1,900.89 from July 1, 1939, and on $4,428.88 from July 1, 1941, and on $10,237.74 from October 19, 1945, amounts in the aggregate to $6,213.38.

35. The interest which has accrued at 6% per annum to September 15, 1948, on the amounts which defendant paid plaintiff's predecessors for energy less than the cost thereof to such predecessors, as found herein, is:

Interest		Principal	
$ 3,318.29 on	(1,499,540 KWH at 3.15 mills)	$ 4,723.55 from	1/ 1/37
$ 7,284.93 on	(3,648,909 KWH at 3.15 mills)	$ 11,494.06 from	1/ 1/38
$ 7,539.74 on	(4,108,130 KWH at 3.15 mills)	$ 12,942.76 from	1/ 1/39
$ 5,730.71 on	(3,292,802 KWH at 3.15 mills)	$ 10,372.33 from	7/ 1/39
$ 6,227.92 on	(5,062,322 KWH at 2.66 mills)	$ 13,465.78 from	1/ 1/41
$ 7,830.91 on	(6,806,853 KWH at 2.66 mills)	$ 18,106.15 from	7/ 1/41
$ 7,796.27 on	(5,365,546 KWH at 3.61 mills)	$ 19,369.62 from	1/ 1/42
$13,718.80 on	(11,095,540 KWH at 3.61 mills)	$ 40,054.90 from	1/ 1/43
$10,505.28 on	(10,201,160 KWH at 3.61 mills)	$ 37,187.19 from	1/ 1/44
$ 7,594.01 on	(9,454,400 KWH at 3.61 mills)	$ 34,130.28 from	1/ 1/45
$ 4,770.89 on	(7,582,200 KWH at 3.61 mills)	$ 27,371.74 from	10/19/45
Total $82,417.85		$229,819.46	

Upon the foregoing Findings of Fact, the Court states the following as its

Conclusions of Law.

1. This Court has jurisdiction of the subject matter and of the parties to this cause, and said cause is properly cognizable in a court of equity.

2. The merger of Northern and North Dakota vested in the surviving corporation all rights, claims and demands of Northern against the defendant on account of the exaction by defendant from Northern of unjust, unreasonable and unlawful rates and charges for interconnection facilities and interchange capacity and dispatchers' sal-

aries and expenses, and vested in Dakota all rights, claims and demands of Northern against the defendant on account of underpayments for electric energy delivered by Northern to defendant.

3. Plaintiff by virtue of the assignment of October 19, 1945, is owner and holder of all claims, including the ones in issue, which Northern, North Dakota and Dakota had and have against defendant.

4. All rates and charges in issue were subject to the provisions of Section 205 (a) of the Federal Power Act, 16 U. S. C. A. 824d (a), which requires that such rates and charges be reasonable, and were further subject to Section 205 (c) of the Federal Power Act, 16 U. S. C. A. 824d (c), and Order No. 36 of the Federal Power Commission which required that all such rates and charges be filed with the Federal Power Commission.

Defendant when it filed the rate contracts recited in the preceding Findings of Fact at no time made a complete filing of all of the rates and charges affecting or relating to the sale of electric energy in interstate commerce at wholesale for resale which it had placed in effect between itself and Northern, North Dakota and Dakota. Since these unfiled charges, to-wit, the charges for dispatchers' salaries and expenses, and from January 1, 1936, to its date of filing on December 23, 1938, the interconnection facility rental contract, constituted contracts which affected or related to such rates or charges as defendant was attempting to file, defendant never had a lawful rate on file with the Commission. Further, the frauds practiced by defendant on the Federal Power Commission and on Northern, North Dakota and Dakota also made the attempted filing of rates by the defendant void and ineffective for any purpose whatsoever.

5. Under Section 205 (d) of the Federal Power Act, 16 U. S. C. A. 824d (d), the attempted filings of the aforesaid contracts by the aforesaid common officers after the initial filing of the energy interchange contract between defendant and Northern filed on February 7, 1936, with the Federal Power Commission were ineffective as all of said

rates, with the exception of the initial filing above referred to, were filed after they had gone into effect, though they constituted changes in the initially filed rate, being merely increased charges for energy, and the Federal Power Commission was without power or authority to give such changes in rates a retroactive effect.

6. The Federal Power Commission was granted no authority by Congress to take away from a utility which had made payments under unfiled rates such utility's right to recover such rates from the payee thereof.

7. The Federal Power Commission has no power to grant reparations or retroactive relief to a utility injured because of violations of the Federal Power Act by another utility.

8. Recourse to the Federal Power Commission is not the sole remedy available to a party damaged as were Northern, North Dakota and Dakota under the circumstances described in the foregoing Findings of Fact.

9. The Federal Power Act grants to an electric utility which is subjected to unreasonable rates and charges, or charges collected pursuant to unfiled contracts, or contracts improperly filed as disclosed by the Findings herein, for or in connection with electric energy or transmission thereof which moves at wholesale in interstate commerce, a remedy enforceable in the District Courts of the United States to recover on account of such rates and charges and to recover damanges for energy which it was caused to sell at unreasonably low prices under the circumstances set forth in the foregoing Findings of Fact.

10. The fact that a rate or charge for or in connection with the sale or transmission of electric energy at wholesale in interstate commerce is on file with the Federal Power Commission does not establish the reasonableness of such rates or charges or constitute approval by the Federal Power Commission, nor does it alleviate the liability under the Federal Power Act or otherwise of an electric utility exacting an unreasonable rate thereunder or paying an unreasonably low rate thereunder. Those guilty of

fraud cannot avail themselves of the provisions of the Federal Power Act to protect themselves.

11. In view of the doctrine of Hurn v. Oursler, 289 U. S. 238, 77 L. Ed. 1148 (1933), plaintiff has a claim against defendant which it may enforce in Federal Court either under the provisions of the Federal Power Act or in Equity because of the fraudulent practices imposed on plaintiff's assignor and its predecessors by the defendant.

12. The status of defendant's directors, who were also directors of the Northern companies, is that of express trustees as determined by Delaware law which establishes the nature of their relationship to their corporation.

13. All of the contracts in question were presumptively fraudulent as to plaintiff's assignor and its predecessors in view of the common directors and officers. Defendant has failed to rebut this presumption and sustain the fairness of the contracts.

14. Defendant's unlawful, wrongful and fraudulent underpayment to plaintiff's assignor and its predecessors for energy delivered by them to it amounted to $229,219.44.

15. Defendant unlawfully, wrongfully and fraudulently charged and exacted from plaintiff's assignor and its predecessors $196,021.51 for interconnection facility rental.

16. Defendant unlawfully, wrongfully and fraudulently charged and exacted from plaintiff's assignor and its predecessors $111,665.05 under the guise of the so-called interchange capacity charges.

17. Defendant unlawfully, wrongfully and fraudulently charged and exacted from plaintiff's assignor and its predecessors $19,214.76 for dispatchers' salaries and expenses in view of the fact that the agreements for allocation of joint management expenses were never filed with the Commission though they represented a charge for and in connection with the sale and transmission of electric energy at wholesale in interstate commerce, and, further, since defendant has failed to meet its burden of establish-

ing the reasonableness of this charge, it may not retain same.

18. Plaintiff is not barred by laches or the statute of limitations from enforcing any of the rights set out in its complaint herein in view of the fact that plaintiff's assignor and its predecessors were under the domination and control of the defendant until October 19, 1945. Further, in view of the fact that plaintiff's cause of action is one which heretofore was solely cognizable in equity and that the fraud practiced by defendant was not discovered until after October 19, 1945, after which time plaintiff proceeded with due diligence, plaintiff's causes of action are not barred by any statute of limitations.

19. Defendant is guilty of a breach of fiduciary duty which it owed Northern, North Dakota and Dakota by virtue of the actions of common officers and directors, as set forth in the Findings.

20. The contracts for payment of interconnection charges being unjust and unreasonable were unlawful and illegal and therefore incapable of ratification.

21. The contracts for the payment of interchange capacity charges being for charges that were unjust and unreasonable were unlawful and illegal and therefore incapable of ratification. The contracts for the payment on account of dispatchers' salaries and expenses being unjust and unreasonable were unlawful and illegal and they were also unlawful and illegal because they were not filed with the Federal Power Commission and they therefore could not be ratified.

22. Neither plaintiff's assignor, Dakota, North Dakota, or Northern, nor United Public Utilities Corporation at any time so acted that such action would have constituted a ratification of any of the transactions in issue, had such transactions been capable of ratification.

23. Plaintiff is entitled to recover from the defendant $556,120.76, being the aggregate payments on account of interconnection facilities and on account of interchange capacity charges and on account of the payments for

dispatchers' salaries and expenses and the underpayments for energy and, in addition, the plaintiff is entitled to recover interest as found in the Findings of Fact herein, making an aggregate of principal and interest of $779,958.30.

Let Judgment Be Entered Accordingly.

By the Court,

A. LEE WYMAN,
Judge of the United States
District Court.

Arrest:

ROY B. MARKER,
Clerk. (Seal of Court)

Dated September 15th, 1948.

(Indorsed)—Filed Sept. 15, 1948. Roy B. Marker, Clerk.

(Judgment, September 15, 1948.)

This cause was duly tried by the Court, Honorable A. Lee Wyman, Judge, without a Jury, at Sioux Falls, South Dakota, on February 9, 1948 and succeeding days: all parties being represented by their Attorneys of record herein: And the Court having made, adopted and filed its Findings Of Fact and Conclusions Of Law [consituting] the decision herein:

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the Plaintiff, Montana Dakota Utilities Company, a Corporation, have and recover Judgment against the Northwestern Public Service Company, a Corporation, Defendant, for the sum of $779,958.30 principal and interest, together with the further sum of Seventeen Hundred Eighty-one and 41/100 Dollars, costs and disbursements to be taxed and hereinafter inserted by the Clerk of this Court.

Dakota Public Service Co. 745 on peak. This is just a representation of the purpose of the excess capacity contract. In other words, once a year—

Mr. Fellows: Just what question is before you?

Q. Will you explain that as to its application to the power pool relationship between these companies?

A. This excess capacity was determined by the operating committee once a year at the time of the coincident peak of the prior year to be applied to the following year. Any excess capacity, you put the excess that is indicated that each of the companies have at the time of the coincident peak of one or more systems into a pot, as we might say. Then we determine how much each of the companies have to carry their proportionate part. In other words, the excess capacity is then prorated as to the need of the company, and the campany under these contracts is expected to carry his ratio of the maximum peak of the excess capacity. For instance, if one company had 2000 kilowatt peak, and another one had 1000, and another one 1000, so there was three altogether, then the one having 2000 peak would carry 50% and the excess capacity would be charged against it, and each of the others would carry 25%. It doesn't mean that either one of the companies can draw on that excess capacity.

Mr. Fellows: I object to that. He is asking him to explain something from this document.

Mr. Benson: You are asking him about power pools, generally? Are you asking him to interpret the contract, or just talk about power pools generally?

Mr. Royhl: I am asking him to talk about the application to this Exhibit 339.

Mr. Fellows: Of what?

Mr. Royhl: Power pools.

Mr. Fellows: All over?

Mr. Royhl: This power pool.

Mr. Fellows: That is the reason I make the objection, it is not responsive at all.

The Court: I think it was explanation of the exhibit that has been introduced here. I think the objection is well taken.

Q. Have you explained as to how the Dakota Public Service Co. deficiency was arrived at for the year 1943 and 1944? A. Yes.

Q. I note that for the year 1940, you have two columns. Is that correct? A. Yes.

Q. And as applied to the column, September 1 to December 31, 1940, there is a minus 213, or a deficiency of reserve capacity for the defendant company? A. Yes.

Q. Where do you show what amount was paid by the defendant company for that deficiency or reserve capacity? A. Down under (8). $2811.60.

Q. Did I ask you if line 7 indicated the date of the coincident combined system peak?

A. If you didn't, I can say it does.

Q. Do you know, under the practice of electric utilities industry, the reasonable rate or charge per kilowatt of capacity, under the power pool contract? A. Yes.

Q. What is the reasonable rate or charge?

Mr. Fellows: We make the same objection.

The Court: If he knows he can answer.

A. My experience is that the charge on the one most like this with which I have had experience is the same charge as this.

Mr. Fellows: We move to strike the answer for all of the reasons given in the objection.

The Court: Sustained.

Q. Will you give it in dollars and cents.

Mr. Fellows: Same objection.

The Court: Overruled.

A. $13.20.

Mr. Fellows: We move to strike the answer for the purpose of objection.

The Court: It may go out for the purpose of objection.

By Mr. Fellows:

Q. What particular power pool were you referring to when you made your answer? A. Commonwealth Edison.

Mr. Fellows: We move to strike the answer for all of the reasons given in the objection; immaterial; no proper foundation laid.

The Court: It may go out.

By Mr. Royhl:

Q. Do you know how the KW value is computed or based under the contract involved in this litigation?

A. Yes.

Q. Have you prepared and made a study of the kilowatt values of the generating capacities in the combined system of these companies?

A. I have of the Northwestern Public Service Co.

Q. That is the defendant company? A. Yes.

Q. And do you know what those values are? A. Yes.

Q. Mr. Learned, from your knowledge, education and experience, do you know what a fair charge for reserve capacity in this territory during the years 1938 to 1945, inclusive, was? A. Yes.

Q. What was that charge?

By Mr. Fellows:

Q. Did you make an [installations] of the kind which you impute to the question Mr. Royhl just asked you, during any of the period embraced in the question, in the territory in which you assume he is asking about?

A. No, I think not. Not in South Dakota.

Q. Do you know what territory he is referring to in the question? A. I think I do.

Q. Do you know the conditions under which the installations were made which you assume are included in the question?

A. I have seen the results of the installations. I have been in a number of plants.

Q. For what period of time are you attempting to answer the question? A. For a period from 1935 on.

Q. Do you know what kind of installations, specifically, he is asking about?

A. I take it he is asking about installation of the character on this property.

Q. Have you ever seen the installation on this property?

A. Yes.

Q. Did you ever see the installations you assume he is asking about in the questions to you?

A. I was not there when they were installed. I have seen the plants in operation.

The Court: They are not asking about the cost of the installation. That is not the way I understood the question. Read the question.

Q. (Read) "Mr. Learned, from your knowledge, education and experience, do you know what a fair charge for reserve capacity in this territory during the years 1936 to 1945, inclusive, was? A. Yes.

"Q. What was that charge?"

The Court: It is a charge for reserve capacity.

Mr. Fellows: We object to that as no foundation.

The Court: He has testified that he knows.

By Mr. Fellows:

Q. How do you know? A. My business is studying rates.

Q. I am not asking your business of studying rates elsewhere. I said, how do you know in relation to this particular property?

A. Because properties of certain size have certain costs installed, and they do not vary a tremendous amount from section to section in a range of territory.

Q. Do they vary with conditions?

A. Somewhat. Some elements do. But the installation of a power plant of a certain size will run in certain range per KW.

Q. You are basing your testimony on the general knowledge you have had from experience in other places?

A. On my general knowledge over-all, together with my having visited these plants, some of them, the larger ones, and my engineering experience in appraisal and valuation and rate work.

Q. You can look at a plant and tell what it cost, can you?

A. I can't to the exact dollar. I don't know just what

I will find on appraisal. In [appraisale] we go out and study each one, but they have a general zone of cost.

A. At least $13.20.

Q. Per kilowatt? A. Per kilowatt for excess capacity.

Q. Is that per year? A. Yes.

Q. Did you hear Mr. Helmick's testimony for the plaintiff? A. Yes.

Q. To the effect that in his opinion, that the interchange capacity contracts had no value to the Dakota Public Service Co. and its predecessor companies? Did you hear that testimony? A. Yes.

Q. Do you have an opinion with respect to the value of the interconnection facilities contract between these companies and to the Dakota Public Service Co.? A. Yes.

Q. And its predecessor companies? A. Yes.

Q. What is that opinion?

A. I think it does have value to both companies.

Q. It is of actual benefit, is it? A. Yes.

Q. What is the difference in the expression KW, and the further expression KWH, or kilowatt hours?

A. KW, when it describes capacity, represents amount. In other words, KW is the rate, and the kilowatt hour is the rate delivered over the time. Kilowatt hour, to be technical, is a thousand watts in an hour. KWH is a quantity of energy.

Q. And KW is more particularly a capacity of development? A. Yes.

Q. Do you know, Mr. Learned, the usual and ordinary charge made for fixed charges of rentals in connection with interconnection facilities? A. Yes.

Q. Do you know that for the years 1936 to 1945, inclusive? A. Yes.

Q. What is a reasonable charge or rental for interconnection facilities, for the years 1936 to 1945, in the territory of North and South Dakota and adjacent territory?

A. 12% on investment plus operating expense.

Q. And what per centage for operating expense, approximately?

A. That may amount to possibly one or one and a half. Not to exceed that. I think one per cent.

Cross Examination, by Mr. Fellows.

Q. Will you refer to Exhibit 339, your tabulation? Have you that there? A. Yes.

Q. Referring to the 9th item, use of reserve capacity. Do you have that? A. Yes.

Q. I noticed in your direct examination that you testified to items 1940 to 1945, inclusive, did you not? A. Yes.

Q. And you failed to testify to the items of 1938, 1939 and 1940. Is that right? A. That is correct.

Q. Tell me this. On your tabulation, Exhibit 339, under that paragraph (9) you were explaining, isn't it a fact that in the years 1938, 1939 and 1940, the Northern Power & Light and the North Dakota Power & Light, paid to Northwestern, a total of $53,262.00, made up of the items of $22,440.00 for 1938, $18,136.80 for 1939, and $12,685.20, for the year 1940? A. Yes.

Q. And took no kilowatts during those years or any of those years on the peak?

A. I do not know that, or I would have put the figures in.

Q. You didn't even try to ascertain that, did you?

A. Yes, I did.

Q. Why didn't you ascertain that?

A. I could not find any data.

Q. They furnished you the books and records of the company for that purpose?

A. Yes, but as I understand the 1922 and 1510 were from some load diagrams, and I could not find any such information on load diagrams prior to that time.

Q. Those figures were taken for those three items, wasn't they? A. Yes.

Q. When did you start to work on this case?

A. I was in Huron the week of November 18, 1946. I think I arrived in Mitchell and went up to Huron the 19th of November, 1946.

Q. Is that the first contact you had with the case?

A. Yes.

Q. Were you sent there by your employer, Black & Veatch? A. Yes.

Q. At the time they sent you up here had they shown you the pleadings in the action? A. No, sir.

Q. Did they tell you what you were coming up here to prove or disprove?

A. No, sir. Mr. Sanborn came to our office and I had a conversation with him and he said he would like to have me call first on the attorney in Chicago, who advised me they wanted to know what the facts were.

Q. Mr. Sanborn first contacted you in Kansas City?

A. He contacted Mr. Black and Mr. Black called me in to meet with Mr. Sanborn.

Q. He is president of the defendant company? A. Yes.

Q. He had you go see the lawyers in Chicago? A. Yes.

Q. Did they show you the pleadings?

A. I don't recall at the time that they did.

Q. Did they tell you what they wanted to prove or disprove in this case?

A. No, sir. We don't do business in that way.

Q. Did they tell you what they wanted you for at all?

A. They said they wanted to find out what our idea was, whether there was a reason for the case.

Q. Your idea of what? A. Engineering facts.

Q. Did they tell you what they wanted you to find out an idea about?

A. They told me, generally, what the case was, I believe in district court here at that time. But when I got to Huron I think I had opportunity to read those pleadings.

Q. When you talked to Sanborn in Kansas City and when you talked to the lawyers in Chicago, they didn't tell you what the case was about, even?

A. Only in a general way.

Q. Did they tell you what the claims of the plaintiff were and what the defenses of the defendant were alleged to be?

A. I don't recall that there was anything said about the defense. As I recall it, they told us the general problem, they were being sued for about half a million dollars by a company which had purchased a property they had prior operated under joint management and which, at one time, when they first took over, was owned, I think, by a common owner who had requested them to take it over and operate it. We were approached and certainly asked to find out what we thought the facts showed.

Q. Did they tell you what they wanted you to do out here?

A. Yes. Find out facts from an engineering standpoint and give them an idea of what it meant.

Q. Had you ever worked for the defendant company before?

A. I think only once. I believe our firm made an appraisal of the Columbus, Nebraska system, when it was condemned by the Public Power Districts in Nebraska, around 1938, or somewhere in that neighborhood.

Q. That is the only work you know of your company or yourself having done for the defendant? A. Yes.

Q. Have you put in your time since November 19th on this job? A. Oh, my, no.

Q. Have you been an expert witness for utility companies before this time? A. Yes.

Q. Many times?

A. I don't know what would be considered many. I have probably testified once, possibly some years twice, some years not at all.

Q. Over this period from 1910?

A. I haven't done much testifying—I think the first testifying was about 1927 or 1928. Then I have testified a number of times since.

Q. From these different places you have worked, from Florida to Minnesota? A. Yes.

Q. You are the man Black & Veatch send out as an expert witness, are you?

A. I used to work largely as an assistant to Mr. Black, and in recent years he hasn't been going out and doing testifying, and I have taken over in a number of cases.

Q. You are the man out of over 300 employees in the office who they sent out as an expert witness?

A. No, we have others.

Q. How many others?

A. Mr. Veatch goes out. Some of the electrical men have gone out at different times, if it is a very technical problem sometimes the electrical men will go out. If it is a matter of this character generally I do the testifying.

Q. This is an electrical job? A. Certainly.

Q. Do you know why they didn't send an electrical man out?

A. Because they asked me to come, I suspect, because my work for the last fifteen or sixteen years has had to do with rates, appraisals, investigations and opinions of a general nature in utility operations, and revenues, returns,

rate structures analyses, and consequently I expect I had probably had more experience and was better fitted.

Q. You had testified oftener than the others. Is that it?

A. I wouldn't say that.

Q. What is the fact?

A. I just don't know whether they have testified more than I have or not, some of them.

Q. In addition to having been in Huron have you been over any other part of the defendant's system at all?

A. I went to the Mitchell plant. I was up to Aberdeen. I drove up to Barnard. I drove out to Ipswich along the line, and then I cut across down to Gettysburg and towards Highmore. Between Gettysburg, however, and Ipswich, I did not follow the transmission line because it was not close to the traveled road.

Q. Did you go up into North Dakota? A. No.

Q. Have you been over any part of the plaintiff's system or the system of its predecessors in North Dakota?

A. Not over the system as a property, no, sir.

Q. Ever inspect any part of their system? A. No.

Q. You worked from the figures and the information that the defendant's officers and regularly employed engineers and their attorneys gave you to build up a result?

A. Oh, no. I went to solid data. The Federal Power Commission reports are sworn to and are now regarded in the industry as probably the most reliable source of information as one gets into a company. I used that sort of information and I also went to the defendant and I got some collected information that brought some of the information carried in Federal Power Commission data into a little more convenient form for review. So I was able to satisfy myself on the problem.

Q. Mr. Expert, you testified this morning that the major portion of the figures you had on one of your exhibits were figures furnished you by Mr. Sickel, didn't you?

A. That was just some figures that are in evidence here and which I didn't realize; and they only had to do with one deduction I made, and it had nothing to do with the exhibits I put in. The exhibits I put in come from source data which I think are unimpeachable.

Q. You haven't any interest in this case, have you?

A. No, sir.

Q. With the exception of getting paid for your services?

A. We will be paid irrespective of the results and at the same rate, whether we win or lose.

Q. Did these attorneys and officers of the company give you information to work on as you went along and looked over the various contracts?

A. No. I was surprised at how much they asked me for information.

Q. Did they tell you about dual officers and directors entering into contracts?

A. I knew that was one of the pleadings. I had a copy of the pleadings.

Q. Did they tell you the fact of the control by the defendant of the load dispatchers?

Mr. Royhl: Objected to as assuming facts not in evidence; not proper cross examination.

The Court: This man comes here as an expert. Within reasonable limitations the objection will be overruled.

Q. Did they tell you about that? A. Yes.

Q. That the defendant kept control of the load dispatchers? A. That is just common—

Q. I asked you if they told you?

A. No, they would not tell me that sort of thing because I would not believe it.

Q. You would not have believed it? You would have thought it was outrageous? In the utility business you would have thought that was an outrage, for the defendant to keep control of the load dispatcher where they were operating two separate systems under joint control?

Mr. Royhl: Objected to as improper cross examination.

The Court: Overruled.

Q. You would have thought that was an outrageous thing for them to do, wouldn't you?

A. I don't understand what you mean by control?

Q. This is joint management.

A. Joint management can be bad or good.

Q. You would have thought that was an outrageous thing for them to do for the defendant to have control of the load dispatchers under the situation you have here?

Mr. Royhl: Objected to as immaterial; not proper cross-examination.

The Court: Overruled.

A. If you take that hypothesis that it was under control and was controlled to the disadvantage of one company to the other, I would go along with you.

Q. Answer the question. You said a minute ago you would not have believed them if they had told you, that the defendant kept control of the load dispatcher, didn't you? A. Yes. I haven't seen any evidence of that here.

Q. Were you in court here during the course of this trial? A. Yes.

Q. Did you hear a letter in which Mr. Strike wrote to North Dakota Power Commission that the defendant kept control of the load dispatchers?

Mr. Royhl: Objected to as not a proper statement of record; not proper cross-examination.

The Court: Arguing whether it is or not, doesn't get us anywhere.

Q. Did you hear a letter read?

A. As a recall I heard it read.

Q. As you went along and developed your case in order to testify you would ask various officers and attorneys for facts and figures, would you?

A. I largely took them from the record.

Q. Did you ask them for any at all?

A. I asked them where to find data.

Q. They furnished you figures from time to time?

A. I verified them.

Q. They furnished you figures from time to time, did they? A. Yes, at my request.

Q. And you accepted those figures whole-heartedly, without any question?

A. No. Those figures that I had were largely furnished me when I was in Huron on the first trip and I verified them, checked a large portion of them from the records which were kept there in order to be satisfied that I could use them.

Q. Alright. You said largely. What about the balance of them?

A. It is possible that some I didn't use at all were those that I did not check. They furnished them but I didn't bother to check them because I would not be using them.

Q. Some of the figures you used were not matters of record, but were estimates. Isn't that a fact?

A. Not many that I have used.

Q. How about the figures that were used where there were no meters to show the current, that was not metered. What did you use there? The things they told you?

A. I haven't used that kind of stuff. I have used data which is in the operating reports and in the Federal Power Commission reports and in the zone records by three representatives of the operating committee reports. That is the kind of information I have used.

Q. You figured the transmission loss?

A. I didn't figure the transmission loss. I figured the over-all—I didn't even figure that—I took the over-all unaccounted for energy, from the reports.

Q. You got all of that from reports? A. Yes.

Q. Didn't you use any figures in any of your testimony here that came from calculations?

A. I simply used basic figures and made calculations from them.

Q. Didn't you use any figures that came from calculations of yours in this testimony you have given here?

A. I did some which I understood was stricken, and it was information that is on exhibit here. I didn't realize it at the time I explained it to you.

Q. I thought you said you used Federal Power Commission reports that are sworn to? A. Yes.

Q. Will you come down and look at these Federal Power Commission reports and show me where they are sworn to?

A. That is my understanding, they are sworn to. They have been on jobs where I have been. These may not be the copy that went to the Federal Power Commission.

Q. You don't find this sworn to, do you?

A. That is pencil copy. The other is a carbon copy and shows a place for a notary public, so I expect the copy that went to Federal Power Commission was sworn to.

Q. You testified you worked with Federal Power Commission reports that were sworn to, didn't you?

A. I said I used them because they are sworn to.

Q. Didn't you testify you used Federal Power Commission reports that were sworn to?

A. I think they were sworn to.

Q. You used these that are in evidence here? A. Yes.

Q. And they are not sworn to?

A. They are not sworn to there.

Q. You didn't go down to Washington and use any that are sworn to, down there? A. No.

Redirect Examination, by Mr. Royhl.

Q. Did you use the Federal Power Commission reports the plaintiff put in evidence in this case? A. Yes.

Q. You have mentioned that when you first came to Huron there was a case in the state court. You didn't mean this court, did you? A. District court.

Q. You meant the state court up there in Beadle County?

A. Yes.

Q. I am not just clear. You were inquired about certain payments made in 1938 and 1939 by the Dakota companies. Those payments were made by Northern Power & Light Co.? A. In 1938 and 1939?

Q. Yes. A. Yes.

Q. And I think also he inquired about part of the 1940. Was that made by North Dakota Power & Light or Northern Power & Light Co.?

A. That was probably by Northern Power & Light, or Dakota Public Service Co., which one was the merger of the two after the middle of the year.

Q. That was the merger after July 1, 1939? A. Yes.

Q. And your Exhibit 339 shows the separation prior to the merger, does it not? A. For which year is that?

Q. 1939.

A. 1939 shows the total amount paid that year, both before and after. It is listed as under Northern Power & Light Co., but it is the total amount received by the Northwestern Public Service Co. that year from the Northern Power & Light Co. and the successor.

G. R. McARTHUR

was called as a witness by the defendant, and being duly sworn, testified as follows:

Direct Examination, by Mr. Woods.

Q. Will you state your name, please?

A. G. R. McArthur.

Q. Your age? A. 55 next April.

Q. Place of residence? A. Huron, South Dakota.

Q. Business or occupation?

A. Vice president of the Northwestern Public Service Co.

Q. Have you been in the electric utility business for some years? A. Since April 1, 1930.

Q. Where has your place of residence been during all of that time? A. At Huron, South Dakota.

Q. Are you an engineer? A. No, sir.

Q. You had, I presume, some preliminary training before you went into business, education and experience?

A. I went through grade school, high school and college.

Q. You came to Huron in what year?

A. I came out to Huron, South Dakota in 1923.

Q. Did you have a position there at Huron at that time?

A. Yes.

Q. What was that business?

A. I came out to Huron to join the faculty of Huron College, as Professor of Economics, Business Administration.

Q. After being there for a time did you then join the offices of the utilities there at Huron? A. Yes, in 1930.

Q. Who made that arrangement with you?

A. Mr. Parker, who was then president of the Northwestern Public Service Co., North Dakota Power & Light Co., and Northern Power & Light Co.

Q. Did he have any talk with you about your employment, the nature of your work, at the time you went to work? A. Yes, we had a conversation.

Q. Just tell in a general [——] the nature of your work, and what your employment was to be?

A. Mr. Parker explained to me that in my employment that I was working for the Northwestern Public Service Co., North Dakota Power & Light Co. and Northern Power

& Light Co. My responsibility was to be those in connection with employee problems, employee relations, and in connection with customer service problems. General field of that which is known as public relations. I came to the organization with a fresh viewpoint—

Q. Did you have during your early years of your employment with those companies, customer difficulties in the area north of Bowdle, South Dakota? A. Yes.

Q. Do you know about when that first came to your attention?

A. I went to Eureka, South Dakota, which is north of Bowdle, along, as I recall it, in the late winter or early spring of 1932, and spent probably the better part of three months in working in that district headquarters at that time.

Q. Was that on account of trouble in the area? A. Yes.

Q. What was the character of the trouble?

A. Customer complaints as to service.

Q. Due to what?

A. Outages, voltage conditions, service levels.

Q. You say you stayed there some three months?

A. The majority of that period, yes.

Q. Were you at other towns or cities in that territory along about those years? A. Yes.

Q. In similar work? A. Yes.

Q. Will you name some of them?

A. I spent some time in Wishek, which was north of Eureka in that area. I spent some time in and out of Ashley, and some time at Napoleon.

Q. Will you tell the Court whether or not that was an area where the business was of value and desirable from the point of view of the companies?

A. The city of Eureka and city of Wishek were two of the largest towns in the area. In fact, two of the largest towns in the stretch of service area extending south from Steele to Bowdle. The towns of Napoleon and Ashley and adjacent thereto were likewise substantial towns as of that area.

Q. Do you have a classification of towns in the business as "B" towns?

A. We had the classification at that time of "B" towns. Subsequently we had "A", "B" and "C" towns.

Q. Did that indicate a town that had a good market for your product?

A. They represented classification of towns largely on volume of business and relationship in size, yes.

Q. Did you name the town of Ashley and Napoleon as towns in which there was trouble in those years, prior to 1936? A. Yes.

Q. What was the nature of that trouble?

A. Problems related to customer service, outages.

Q. Was that your job, to go out and try to straighten those things out?

A. My job was to make investigation of the situation that existed. Visit with the customers. Know what the facts were that related thereto. Bring the report back to the staff that would deal with it from there on out.

Q. At some time in the course of your work there for those companies, did you become acquainted with Mr. Sam White, of Chicago? A. I did.

Q. Can you tell the Court about when?

A. I think my contacts with Mr. Sam White probably began as early as 1932 or thereabouts.

Q. Do you know what occurred to bring him into the picture about that time?

A. Mr. Sam White was appointed receiver of the United Public Utilities Co., of which this property was a subsidiary, and the occasion for my meeting him was a visit to the property, as I recall it.

Q. You say this company was a subsidiary. I wish you would explain what you mean?

A. You are speaking as of the area of Northern Power & Light Co. I am thinking in terms of this particular service area, about Wishek, Eureka, Napoleon, Ashley, in the area of what was Northern Power & Light Co.

Q. And that is what you mean then? A. That is right.

Q. After Mr. White was receiver of the United Public Utilities Co., what was your understanding of the position that he occupied with respect to these companies or the parent company? A. Well, he was receiver—

Q. I said after he was receiver.

A. After they came out of receivership?

Q. That is right.

A. Then he was president of the survivor or successor

company, after the merger of the United Public Utilities Co. He was president thereof.

Q. Was that known as United Public Utilities Corporation? A. Yes.

Q. Who was the chief executive or administrative officer of that corporation, United Public Utilities Corporation?

A. Mr. Sam White.

Q. Did you have occasion to deal with him at varying intervals after termination of the receivership? A. Yes.

Q. Can you fix the date when he became president of United Public Utilities Corporation?

A. Not with any exactitude of date. As I recall, it was 1934 or 1935. 1935, I think.

Q. Can you tell the Court about how often you would see him in the course of each year?

A. In the early years, back in 1932, '33, '34, I probably saw Mr. White out there at least once in the spring, in May. I would see him again in the fall, perhaps in the month of September. And I saw him, perhaps, as often as two or three or four times in between.

Q. Did you continue to see him at frequent intervals until the Dakota Public Service property was separated from the Northwestern Public Service property? A. Yes.

Q. Now, did you, subsequent to your beginning with the company, come to have some offices or positions with these companies? A. Yes.

Q. Do you know when you first became an officer or director?

A. I first became a director of Northwestern Public Service Co. in January, I think, of 1935. I became an officer of Northwestern Public Service Co. in July, 1937, I believe. I became a director of North Dakota Power & Light Co. and Northern Power & Light Co. and Knife River Coal Mining Co. in August, I believe, 1937. I became vice president of those latter three companies, I think, at the same time, same date.

Q. Did you continue to hold those offices and directorships up to the [——] that the Dakota Public Service Co. was separated from Northwestern Public Service Co., in October, 1945? A. Yes.

Q. Now, over the years, was your work and were your

duties with the companies, changed from the duties and work that you described here a little while ago? A. Yes.

Q. What became the nature of your work?

A. Naturally, as I acquired experience in the organization and in the business, I was able to take on more responsibility, and the work became more and more of a supervisory and administrative nature. I became in due time, relatively soon, an assistant to Mr. C. J. Strike, who was general manager, and worked with him as his assistant through a number of years. Then, with progression and development or responsibility, I continued with public relations work and customer and employee relations problems, and likewise the field of activity spread out in more general operations as would naturally come, working in relationship as assistant to the general manager.

Q. Did you come to know the relationships with Samuel W. White, and the method of working with him and the office routine with respect to him? A. Yes.

Q. What means of obtaining information as to the operations of the United Public Utilities Corporation did he have, to you?

A. He had before him reports of various types that he would ask for, operating reports and things of that kind. He had communications and reports on specific problems as they came up from time to time. He had information that he got by direct inquiry and in personal visits. He kept in close contact with the operations of the property.

Q. I think there was some testimony he used the long distance telephone frequently in his contacts with you. Do you recall about that?

A. I don't recall as to the testimony, but as to the fact he did use it, yes.

Q. That is, did he? A. Yes, he did use the telephone.

Q. He invariably visited the property once a year?

A. Without exception once a year. I would say he visited more frequently than once a year.

Q. On those occasions when he visited the property did he go all over it? A. Yes.

Q. Did you upon occasion go over the property with him? A. Yes.

Q. Do you know whether you did every time he came out, or not?

A. No. I doubt if I went with him every time that he came out.

Q. Can you state what proportion of the time that he visited the properties from 1935 to 1945 you did go with him?

A. From 1935 to 1945 I would doubt that I missed a trip with him.

Q. You think you went with him every time?

A. I think I went with him every time from 1935 on. I may have missed one but I don't recall at the moment.

Q. Then did you visit every town, or every principal town in which the company had business or generation plants? How extensive were those visits?

A. Invariably we visited all of the division offices on the property that he was interested in and the major facility that was in process of construction or consideration incident to that particular kind. We would travel along the highways adjacent to the transmission lines, we would visit power plants and visit the mine.

Q. Did he note the condition of properties and discuss that on those trips? A. Yes.

Q. State whether or not he was an inquiring person and a fellow who made his investigation in a thorough way?

A. Yes.

Q. I think you have stated that he got reports regularly, that is, copies of reports that were made in the offices of the joint management went to him? A. Yes.

Q. Was there any rule about that?

A. Yes, there was a rule.

Q. State what it was?

A. That he should have all of the information that was available to him in reports. He was asking for those reports.

Q. And did he get them? A. He did.

Q. With respect to expenditures, or of amounts. Could anybody or could the executive officers at that time expend any amount that they saw fit, without his approval, or was there a rule he was to be advised and give his approval of expenditures of certain amounts?

A. I think I understand. There was a rule or understanding on his part, that those of us connected with the joint management agreement, as to expenditures relating to his property.

Q. State what it was?

A. I think it may have changed from time to time, but as I recall it, amounts in excess of $100.00 were referred to him, provided they were not a part of the regular budget of expenditures adopted each year, which he had opportunity to approve or go over as a budget, and if they were in the budget, my recollection is that he permitted expenditures up to $500.00, if covered in the budget he had previously approved and knew about.

Q. Is it fair to say he kept in close touch with the operations of those subsidiaries in South Dakota at all times?

A. Not only fair to say. It is a fact.

Q. Do you know whether Mr. White went over the road from Bowdle to Wishek along where the new transmission line was built? I think completed about 1936, at or about the time that it was being built?

A. Yes. He was in that territory on that spring trip and in inspection of those facilities at various points along the line. As a matter of fact I was with him on that trip.

Q. There is some testimony here with regard to relationships of these companies with Middle West Service Co. Were you familiar with that?

A. With the testimony or the relationship?

Q. Relationship. A. Yes.

Q. Did they furnish service for these United Public Utilities subsidiaries?

A. Middle West Service Co. was under contract to these companies.

Q. What character of service did they furnish?

A. Advisory, consulting service in a variety of fields. Engineering.

They were advising mostly with reference to advertising; with reference to public relations and on franchise procedures; accounting procedures; income taxes; tax work; merchandising.

Q. Now, then, with respect to any cases where there was a diversity of opinion between the subsidiaries of the United Public Utilities Corporation on the one hand, and Northwestern Public Service Co., can you tell the Court what happened in such cases, as to how they were handled? During the period of time from 1937 to October 19, 1945?

A. Whenever there were questions involving diversity

of interest in that period between 1937 and 1945, those questions were put squarely up to the owners of those respective companies for decision and handling.

Q. Mr. McArthur, you have testified that you were an employee of these companies from 1930 to 1945. Is that right? A. That is right.

Q. So you were there in all of the year 1936? A. Yes.

Q. Did you obtain any knowledge of the 1936 contract between these companies? That is the contract with respect to rates and charges? A. Yes.

Q. You learned about that? A. Yes.

Q. Were you an officer or director of any of these companies at that time?

A. I was director of Northwestern in 1936.

Q. Prior to the execution of that contract had a man named Lakin paid a visit to the property? A. Yes.

Q. Where did you first come in contact with Mr. Lakin?

A. Mr. Lakin was in attendance at Minneapolis at a meeting of the division managers. Our managerial conference was held in June of that year, for the assistance of division managers of the three companies.

Q. Did you learn the purpose of his visit? A. Yes.

Q. Do you know whether or not plans and arrangements were made for him to visit the property? A. Yes.

Q. What do you know about that?

A. Mr. Lakin came out to Minneapolis and attended the joint managerial conference we had, and then came out to the property, coming out to Aberdeen in company with Mr. Strike. We called a car from the joint office after he came back out to meet them at Aberdeen and they went out over the property. Mr. Lakin came back into Huron, to the joint office headquarters there after he had completed his trip, and spent some time there in the joint office. I visited with him in the joint office on his return. Then he left and went back east.

Q. Did you have occasion to see Mr. Samuel W. White after that? A. Yes.

Q. And before the contract was finally signed? A. Yes.

Q. Do you know what those occasions were, if there was more than one?

A. Yes. There was at least one I recall very definitely, and I am sure there were other occasions in between that

mid-summer and the managers' meeting at which I talked to Mr. White.

Q. I believe that is the year in which there were directors' [meeting] about April, and later in October, with respect to that contract. Do you recall about that?

A. I recall meeting in the spring and fall, yes.

Q. Can you state in a general way, whether or not the action, or part of the action, at the fall meeting was by reason of action taken at the April meeting? A. Yes, I can.

Q. To clear up, for counsel. Were you a director of Northwestern Public Service Co. in 1936?

A. I was director of Northwestern Public Service Co., in 1936.

Q. You were not of the northern companies at that time?

A. I was not of the northern companies in 1936.

Q. Do you recall the occasion of any connection of Mr. White with that action? A. I do.

Q. You may state what action was taken by Mr. White in connection with it.

A. After the action was taken by the directors of Northwestern Public Service Co. in the spring of 1936, drafting the interchange agreement, Mr. White objected in part to that agreement and [desire] revisions in some respect in it, and on the basis of that objection on his part, there was changes made to conform to the thought that he had in mind and his desires in connection therewith, and in the fall of 1936, the board of directors of Northwestern rescinded the action taken in the spring and approved the contract as it has been—

Q. Now, then, I don't believe you signed the 1936 contract as an officer of any company? A. I did not.

Q. Did you regard it as fair?

Mr. Fellows: Objected to as immaterial; calling for opinion and conclusion.

The Court: Sustained.

Q. You were a member of the board of directors of Northwestern Public Service Co. at that time?

Mr. Fellows: Objected to as repetition.

The Court: He has already answered that.

Mr. Woods: We offer to prove by this witness that he regarded this contract as fair and had that state of mind at the time that the minutes of the directors of Northwestern were made, approving the contract as entered into.

Mr. Fellows: Object to the offer for the reasons contained in the objection to the question.

The Court: Sustained.

Q. Now, do you recall some change or revision in the contractual relationship between these companies in about the year 1938? A. Yes.

Q. Do you recall whether or not you signed that contract? A. I did sign for Northern Power & Light Co.

Q. Prior to the time that you signed that contract had you been in touch with Mr. Samuel White, president of the United Public Utilities Corporation, and had you discussed that matter with him? A. I had.

Q. Can you tell the Court now whether it was once or more than once?

A. There was several occasions upon which I visited with him.

Q. Did you know at the time that you signed the contract whether or not it had his approval or consent?

A. Yes. I would not have signed the contract without his approval.

Q. I infer from that that it did have his approval and consent? A. It did.

Q. Do you recall a revision or some change in that contractural situation between Northwestern and the northern companies in the year 1939? A. Yes.

Q. Do you know the occasion for that change? A. I do.

Q. What was it?

A. That revision or change came about by reason of the merger of the two northern companies, Northern Power & Light Co. and North Dakota Power & Light Co., into what is known as its successor company, the Dakota Public Service Co.

Q. You may state if you know who worked that out?

A. The detail and technical work on that was worked out with me, Mr. C. L. Sandstedt, Mr. Karl Goldsmith, of Pierre. Mr. Scheetz of Philadelphia representing—

There were others besides those three.

Q. You may name the others?

A. Mr. White, himself, was a party to that adjustment of the contract, and representatives of the Middle West Corporation.

Q. You are referring to the contracts dated July 1, 1939, now, are you?

A. I don't recall the exact date of the contract, but I do recall the contract revision was made as of 1939, written in the language of Dakota Public Service Co. and Northwestern Public Service Co. as against the previous contracts written in the language of three companies.

Q. Now, then, with respect to those contracts of 1939, and the 1938 contracts, was there any formal approvals of those by directors' meeting, so far as you know?

Mr. Benson: We will admit there is no minutes in the minutes books with respect to any contract except the interconnection contract of 1936.

Q. Now, with respect to the 1941 contract, did you have knowledge of the execution of such a contract? A. Yes.

Q. Can you state what events led up to that?

A. Yes, I can.

Q. Calling your attention to the document which is in evidence as Exhibit 258 (R. p. 1230 supra), purporting to be a letter dated November 18, 1942, signed, A. B. Sanborn, addressed to Mr. S. W. White, I will ask you if you saw that letter at or about the time of the date noted in it?

A. I did.

Q. With respect to the 1941 contract, did you have a meeting, a joint meeting, at Detroit Lakes, Minnesota, prior to the execution of that contract? A. Yes.

Q. What kind of a meeting was it?

A. That was a meeting of the managers of the system, what we called our managerial conference. Mr. White was in attendance.

Q. Do you recall whether or not some work was done upon that contract, 1941 contract, at that meeting?

A. Yes, there was.

Q. And by whom?

A. There was controversy on that contract between Mr. White and members of the joint management staff, and

particularly as between Mr. White on the one hand and C. L. Sandstedt and Carl Goldsmith on the other hand.

Q. Was it subsequent to that time that the contract was placed in final form and signed? A. Yes.

Q. Prior to the time that the 1941 contract was signed, had there been some change in the financial and business situation of the companies that were being operated under that joint management, which were reflected in the contract itself? A. There were.

Q. Did Northwestern Public Service Co. at that time have some funds which had been obtained from the sale of properties in Nebraska? A. It did.

Q. Did the interconnected system at that time have need of capacity? A. It did.

Q. That is, generating capacity? A. It did.

Q. And in the negotiations that led up to the execution of the 1941 contract, do you know whether there was discussion of the building of capacity at Aberdeen for the interconnected system? A. I do.

Q. Was there? A. Yes.

Q. Do you recall about the signing of the supplemental contract in 1943, which has been discussed and mentioned as the 1943 supplement here? A. I do.

Q. And referring to that Exhibit 258, which I handed you awhile ago, I think you said you saw that at or about the date it bears? A. Yes.

Q. Subsequent to the writing of that letter, do you know of negotiations between Mr. White and others in the two organizations with respect to that supplement? A. Yes.

Q. What knowledge do you have of that? Just state.

A. Well, I had conversations directly with Mr. White, and at times when those arrangements were under discussion.

Q. You mean you discussed it with him? A. Yes.

Q. Do you know whether he approved of the 1943 supplement before it was signed or put into effect? A. Yes.

Q. And did he? A. He did.

Q. Do you know whether or not Mr. Samuel W. White took any interest or exercised any control in or over the dividend policy of the northern companies during the time that you were an employee of those companies?

A. Yes.

Q. You may state to what extent?

A. He kept track and had knowledge of funds and earnings that were available and discussed with the management staff of the companies that he was interested in any recommendations or suggestion that they made to him, and those things were cleared as between the officers or management of the companies he was interested in, and his office, and himself, personally.

Q. With respect to the operation of the fiscal affiairs of that joint management. Mr. Stokke was asked yesterday whether he was paid by Northwestern check, whether he received salary that way. I want to ask you if you know whether or not the joint management had any separate bank account for the payment of salaries of the joint management? A. No, not as between the three companies.

Q. As a matter of fact or practice how were those salaries paid?

A. Paid by Northwestern under the terms and conditions of the joint management contract.

Mr. Fellows: Move to strike the last part of the answer as not responsive.

The Court: It may go out, the last part.

Q. After payment of those salaries by Northwestern, as you have stated, was anything done to adjust the expense as between the companies, if you know?

A. I do know, and the answer is yes.

Q. You may state what was done in that regard?

A. There was an allocation or distribution of the expenses on the gross revenue percentage basis as between the companies.

Q. Did you in the course of your employment, either as an officer or director, have any intent to do anything or permit anything which would cause or permit Northwestern Public Service Co. to overreach or defraud Northern Power & Light Co., North Dakota Power & Light Co., or Dakota Public Service Co.? A. I did not.

Q. Did you, during your employment, ever see or observe any act or [ommission] designed to cause or permit overreaching by Northwestern of the other companies named?

A. I did not.

Q. Now, with respect to the rates and charges for capacity, energy, interconnection, and the basis or allocation of payment of joint management expense, did you or did you not regard those things, that is, those rates and charges, as fair and just at all times during the [court] of your employment there?

A. I sincerely believe them to be fair and just.

Q. Now, there has been some evidence here with respect to the control of the load dispatchers upon the interconnected system. Do you know what the control of those load dispatchers was? A. I do.

Q. Will you tell the Court what their instructions were or what the policy to be followed by them was?

By Mr. Fellows:

Q. That was not in your department at all?

A. As an executive officer of the company I would have knowledge or supervision.

Q. Did you have anything to do with the direction and control of the load dispatchers?

A. As an executive officer, shaping of policy, yes.

Q. Answer the question. Did you control or direct the activities of the load dispatchers?

A. As of the control, no. As of the shaping of policy, yes.

By Mr. Woods:

Q. You may state. A. The policy—

Mr. Fellows: We object to any evidence of policy in answer to that question, as not binding upon the plaintiff and as incompetent.

The Court: I think that objection is well taken.

Mr. Woods: I think the question calls for instructions and policy in regard to the handling of it. That is what I want to call for. Is the objection to the question in that form sustained?

The Court: Yes.

Q. Do you know what rule the load dispatchers were required to follow? A. Yes.

Q. Do you know what investigations were made by Montana-Dakota, plaintiff in this suit, during the year 1945, prior to the purchase of the stock and securities of the Dakota Public Service Co.?

A. Yes, I know investigations were made.

Q. Do you know whether investigations were made by accountants named Arthur Young & Co.? A. I do.

Cross Examination, by Mr. Benson.

Q. Mr. McArthur, did you say you were public relations man with Northwestern Public Service Co.?

A. I said I had charge of public relations, customer relations and employee relations.

Q. Did you have charge of the advertising campaign in the fall of 1941, when you were trying to get a new franchise at Aberdeen? A. I did.

Q. You prepared the advertising or saw the advertising that was used?

A. I did not necessarily prepare all of it, but I think I saw all of it.

Q. You approved it all before it was published?

A. I think so.

Q. On September 9, 1941, didn't you approve an ad in the Aberdeen paper, and which you thereafter paid for and which was published, stating that you solicited the votes of the voters of Aberdeen and asked them to vote because of the benefits which would accrue to Aberdeen, including (1) a million dollar expansion and construction program at the Aberdeen power plant of the Northwestern Public Service Co., (2) more jobs for Aberdeen people during construction and in its operation after construction; (5) a dependable supply of electric power for the next twenty years; (3) more income taxes for the schools and various city departments; (4) a substantial increase of freight and coal which, in turn, means steadier work for railroad men in Aberdeen?

Mr. Woods: Objected to as incompetent, irrelevant and immaterial; [nor] proper cross examination; not gone into on direct.

The Court: It will be received subject to objection.

A. May I see the ad?

Q. You did approve that ad, didn't you?

A. I think I approved an ad that contained in substance the material there.

A. P. LEARNED,

being recalled by the defendant, and having heretofore been sworn, testified as follows:

Direct Examination, by Mr. Royhl.

Q. I overlooked asking you on your direct examination some matters. Now, based upon your experience with rates and contracts concerning rates, in electric utilities and with electric utilities generally, to which you have previously testified, do you have an opinion as to whether or not the incremental cost of production is a [propr] cost basis upon which to establish a rate at which surplus energy produced by the seller is sold to the purchaser? Do you have an opinion? A. Yes.

Q. What is your opinion?

A. The incremental cost is a proper basis for the establishment of a rate for surplus energy.

Q. Have you examined the contracts involved in this case providing a rate of 5 mills per kilowatt hour for energy sold to the defendant by the plaintiff's predecessors, and which are Exhibits B, D, and F to the complaint, and have you examined the provisions of those contracts relating to surplus energy and the sale thereof? A. Yes.

Q. And have you examined Defendant's Exhibits 335 and 335-A received in evidence (R. pp. 1754 and 1755, supra)?

A. Yes.

Q. In considering the provisions of those contracts relating to surplus energy and the sale, and also the figures set forth in Defendant's Exhibits 335 and 335-A, do you have an opinion as to whether or not the 5 mills per kilowatt hour for energy so sold to the defendant by plaintiff's predecessors, during the period from January 1, 1936 to October 19, 1945, both inclusive, was a fair, just and reasonable rate for the sale of such energy? A. Yes.

Q. What is your opinion?
A. It is a satisfactory rate for the sale of surplus power.
Q. And in your opinion is that fair, just and reasonable?
A. Yes.

Cross Examination, by Mr. Benson.

Q. Mr. Learned, you say you have spent a good portion of your life in the utility business of various kinds, sewerage disposal, electricity, and everything else in the public utility business? A. Yes.

Q. If one company makes a capital investment to serve another company, they don't sell on incremental cost basis?

A. They probably don't sell firm power on incremental basis, but they would surplus power.

O. C. STOKKE,

being recalled by the defendant, and having heretofore been sworn, testified as follows:

Direct Examination, by Mr. Woods.

Q. Mr. Stokke, there seems to be some ambiguity in the record as it is set with respect to Plaintiff's Exhibits 31 and 35, and Defendant's Exhibits 340 and 341, which I hand you, and which I am told are called supplements to the interchange capacity contracts. They are also known here as Exhibit B's to the contract? A. Yes, they are.

Q. I want to ask you from what source were those exhibits which I have handed to you prepared at the time they were made up by the committee? To whom that work was delegated?

A. The operating committee prepared the information for these exhibits.

Q. From what source?

A. The company generating capacities on Exhibit B were prepared by the operating committee. The generating capacities for the respective companies.

Q. From what?

A. From our determination of the generating capacities of the respective stations for the respective companies.

The company system maximum demand were determined by the operating committee from special readings taken at the direction of the operating committee, special readings obtained from all power plants of the power pool companies. The thirty minute peak, coincident peak period demands, were obtained from the special thirty minute readings obtained from the various generating stations and from the readings obtained at the points of interconnection between the two parties, operating companies.

Q. And were they prepared from the load diagrams?

A. No.

WILLIAM M. DUNN was called as a witness by the defendant, and being duly sworn, testified as follows:

Direct Examination: by Mr. Woods.

Q. Please state your name? A. William M. Dunn.

Q. Age? A. 51.

Q. Place of residence? A. Huron, South Dakota.

Q. What is your business or occupation?

A. Treasurer, Northwestern Public Service Co., at the present time.

Q. How long have you been connected with the Northwestern Public Service Co., or the Northwestern and its associated companies, Northern Power & Light, North Dakota Power & Light and Dakota Public Service Co.?

A. Since January, 1933.

Q. In what capacity did you first go with them?

A. As travelling auditor.

Q. Was that as a member, then, of the joint management staff? A. It was.

Q. How long did you continue in that capacity?

A. Until the fall of 1936.

Q. Then what happened?

A. In 1936 I was made assistant secretary and assistant treasurer of the three electric companies and the Knife River Coal Mining Co., and still continued somewhat the duties of travelling auditor. Later in 1936 I was transferred to Columbus, Nebraska, as division manager of the Columbus, Nebraska, division.

Q. Where did you go from Columbus?
A. Yankton, South Dakota.
Q. In what capacity?
A. As division manager of the Yankton division.
Q. How long did you continue there?
A. Until the summer of 1944.
Q. Where did you go then?
A. I went to Huron, South Dakota.
Q. In what capacity?
A. As treasurer of Northwestern Public Service Co., Dakota Public Service Co. and Knife River Coal Mining Co., and a member of the board of directors of the companies.
Q. In 1934 did you have occasion to be up in the territory in North Dakota, in the vicinity of Wishek and at Wishek? A. I did.
Q. What was the occasion for your going there?
A. To make an audit of the finances of the city of Wishek.
Q. What I am getting at is whether there was trouble there so far as the power company supplying power was concerned? A. There was.
Q. Of what character?
A. The number of interruptions of service they were receiving at that time.
Q. Do you know whether or not there was agitation for municipal plants in that area at that time? A. Yes.
Q. Was there? A. There was.
Q. Now, in the course of your work for the several companies you have mentioned here, I want to ask whether your work was the same for all of the companies?
A. It was.
Q. Did you, in the course of your work for these companies were you guilty of any partiality in your work in favor of one company as against another?
A. I showed no partiality.
Q. Was that true with respect to the operations of the company and the personnel involved? A. It was true.
Q. Did you observe any partiality on the part of other officers in the course of your employment, as between these companies? A. I did not observe any.
Q. Did you have occasion to observe and do you know the attitude of the management of these companies with

respect to matters and instances where there was diversity of interest between the Northwestern on the one hand, and the northern companies on the other, and how those matters were handled in such cases? A. Yes.

Q. You may state?

A. In all matters affecting the interest of the several companies, when under discussion, they were referred to the officers of the parent company for settlement or negotiations.

Q. Have you ever met Samuel W. White? A. I have.

Q. Do you know when you first met him?

A. I believe in 1934.

Q. Did you know who he was? A. I did.

Q. Who was he at that time?

A. He was president of United Public Utilities Corporation.

Q. Did he continue to hold that office during all of the time that you were associated with him in business?

A. He did.

Q. Will you tell the Court how he kept in touch with the operations of the companies and the joint management staff at Huron?

A. Mr. White received the complete file of operating and financial reports. He received letters made by the joint staff. He kept in contact with the joint staff by telephone. And he visited personally with members of the staff who had occasion to be in Chicago. He attended the annual manager's meetings and he made at least one inspection trip all over the property.

Q. Then, I take it, you saw him frequently after you became a director of his companies. A. I did.

Q. Did he have any way of knowing about what funds were on hand with the treasurer of the companies?

A. He did.

Q. How did he get that information?

A. By receiving monthly financial statements, operating reports, communications from our office.

Q. You furnished those to him? A. I did.

Q. Did he advise or recommend with respect to the investment of surplus funds of those companies? A. He did.

Q. Do you know whether or not he had or exercised any control over work orders of those companies?

A. He did exercise authority over work orders.

Q. In what respect?

A. Work orders up to a certain amount, not included in the budget, were required to receive his approval before the expense were incurred. Work orders of a larger amount, included in the budget, over and above a larger amount included in the budget, were required to receive his approval before the expense was incurred.

Q. I take it budgets were made periodically? A. Yes.

Q. Was he furnished copies of those? A. Oh, yes.

Q. In all instances? A. I believe he was in all instances.

Q. Who determined the dividend policy of the company? A. Mr. White.

Q. Did he have anything to do with the deposit of surplus funds or handling the investment of surplus funds?

A. He did.

Q. Did he direct that? A. He did.

Q. Were his instructions followed in all instances?

A. They were.

Q. Can you tell the Court any specific instances after you became treasurer and director of these companies in which a controversial matter was referred to the officers of the parent companies? A. I can.

Q. What one?

A. Renegotiation of a coal contract between Knife River and Northwestern.

Q. Can you tell the Court who worked that out?

A. That was worked out by Mr. White and Mr. Purchas of the Middle West Service Co.

Q. About when? A. That was in the winter of 1944-1945.

Q. Mr. Dunn, prior to your becoming associated with these companies did you ever hold any public office?

A. I did.

Q. What?

A. County Auditor of Yankton County, and State Auditor of South Dakota.

Q. During what period of time?

A. State Auditor, 1929 to 1932. County Auditor from 1925 to 1929.

Q. Do you know, Mr. Dunn, whether or not the plaintiff, Montana-Dakota, prior to October 19, 1945, made investigations of the Northwestern Public Service Co. and Dakota Public Service Co. and their records? A. Yes.

Q. And also other properties? Not only their records but over the properties? Or is your knowledge confined to investigations or records at Huron?

A. I don't recall of knowledge of their being out on the property. I am referring to examination of records at Huron.

Q. Do you know whether they had agents in there for that purpose? A. I do.

Q. Over how long a period of time?

A. For a number of months.

Q. Can you tell the Court who those agents were?

A. Representatives of Arthur Young & Co. Day & Zimmerman. Montana-Dakota attorney. I believe his name to be Higgins, representing the legal staff of Montana-Dakota. Some of their auditors and other employees.

Q. Was Mr. Elvig among those? A. He was.

Q. Day & Zimmerman, Inc., metioned by you, is that an engineering concern?

Mr. Morrison: Objected to as immaterial, and for all of the reasons stated in the objection to the other question.

The Court: Sustained.

Q. Do you know whether or not it was the general rule to obtain the consent of Mr. Samuel W. White prior to the transfer of any so-called key personnel from one property to another?

Mr. Morrison: Objected to as immaterial.

The Court: We will take an answer.

A. Yes

Q. Was it?

Mr. Morrison: Objected to as immaterial.

The Court: Received subject to objection.

A. It was the rule.

Q. Do you know whether or not Northwestern Public Service Co. furnished the office equipment and automotive equipment for the joint management staff without charge during all of this time? A. Yes.

Q. And did they?

Mr. Morrison: Objected to as immaterial.

The Court: Received subject to objection.

A. They did.

Q. Now, Mr. Dunn, as a common officer and director of the Northwestern Public Service Co. and the Dakota Public Service Co., did you ever take or cause or permit to be taken by the defendant, Northwestern Public Service Co., fraudulently, unreasonably, unfairly, unlawfully or without consideration anything whatever—

Mr. Fellows: Just a minute. We object to that. There is no claim Mr. Dunn ever took anything. Covering the same question he was inquiring about some time ago. We don't claim Bill Dunn took a dime or did anything.

Mr. Royhl: They allege in the complaint that this man as a common officer and director caused to be taken or permitted to be taken, wrongfully and unlawfully—

Mr. Fellows: Unlawfully as directors and officers.

The Court: The witness may answer subject to objection.

A. I did not.

Q. Did you ever intend that the Northwestern Public Service Co. should take or cause to be taken from the Dakota Public Service Co., anything wrongfully or unlawfully whatever? A. I did not.

A. B. SANBORN, being called as a witness by the defendant, and being first sworn, testified as follows:

Direct Examination: by Mr. Woods.

Q. Please state your name? A. A. B. Sanborn.
Q. Your age? A. 56.
Q. Place of residence? A. Huron, South Dakota.
Q. Business or occupation?
A. I am president of Northwestern Public Service Co.
Q. How long have you held that position?
A. Since July 1, 1938.

Q. From that date, until some time in 1945, did you have some position with North Dakota Power & Light Co., Northern Power & Light Co., Knife River Coal Mining Co., and later, Dakota Public Service Co.?

A. I was president and director of all of the companies you mentioned. I should add also that I was director of Northwestern since July 1, 1930.

Q. Your connection with the so-called northern companies and the coal mine terminated when, if you know?

A. My connection with the coal mine terminated a little indefinitely. My connection with the northern companies terminated at the conclusion of the sale to Montana-Dakota on October 19, 1945. My connection as officer and director of the mine until sometime in February, 1946. We continued to manage for Montana-Dakota, the northern property.

Q. I would like to ascertain a little bit about your education and background. After getting out of high school what education did you have?

A. I entered the Naval Academy in 1908 and graduated in 1912. I was commissioned as ensign in the United States navy in 1912. I resigned my commission as lieutenant commander, temporary, in 1920.

Q. I take it you continued in the navy from the time of your graduation from United States Naval Academy for ten years, through the first world war?

A. A little over eight years. I resigned in 1920.

Q. Did you get any degree from the naval academy or did they give any degree at that time?

A. No, they didn't give degrees in the naval academy at that time.

Q. What character of education did they give or provide? A. Predominantly and almost wholly engineering.

Q. After leaving the navy, what business did you [engaged] in?

A. I came directly into the utility business in British Columbia, Canada, and stayed in British Columbia, Canada, for eighteen years, until July 1, 1938, when I came down to South Dakota to this job.

Q. What character of work did you do in the utility business in Canada?

A. I went with the Department of Columbian when that

company was a dream in the promoter's eye. During the time I was there they built two electro-hydro plants, and one steam plant, and built a load up to 1 million kilowatt hours a year. Then I came to South Dakota on this job I am in now.

Q. Now, with regard to your coming to the South Dakota companies, how did you first contact in that regard?

A. Mr. Kruesi asked me to come in and see him in Chicago, through a friend of mine in Ashland, Wisconsin, my home at that time. My father and mother's home, it was. I met Mr. Kruesi in Chicago at his office, talked to him for a few minutes, not over ten or fifteen or twenty, and he suggested I go in and see Mr. White.

Q. Was that the same building?

A. That was in the same building.

Q. What did you learn about the character of this operation at that time or about that time?

A. I was told definitely that this operation was one of a combined operation of three utilities that were owned by two separate corporate entities, and that I had to be extremely careful in my operation out here not to lean towards one company or another and to continue a fair relationship at all times. I was told by Mr. White and Mr. Kruesi that there was a possibility that the time might come that I would have to defend my actions on these properties and I should not let the finger of blame point at me.

Q. About how long was it after you visited with them that you came to the property and took up residence in Huron?

A. About three or four months, as I remember. I know I had an opportunity to drive through South Dakota on my way back to British Columbia. I spent some time back there. I think my first contact with Mr. Kruesi and Mr. White was sometime early in the spring or late in the winter of 1938.

Q. When you came to actively take up that job, did you learn anything about a contract between the companies in the process of negotiation? A. Yes.

Q. What did you learn about that?

A. I learned that for some months Mr. Strike and Mr. Sandstedt had been talking to Mr. White and Mr. Kruesi

and to the members of the service company staff, and that Mr. Scheetz had prepared a contract for the interchange of energy capacity and line rental between the three companies involved.

Q. What, if anything, did you do about that?

A. I reviewed the studies and the negotiations and inasmuch as Mr. Sandstedt had been in the negotiations since the start, I instructed him to continue the negotiations and do what he could to see that all parties were properly served and the contract come to a satisfactory answer.

Q. Now, do you know whether or not contracts were completed in 1938?

A. I do. As I remember it, they were completed late in the fall or early winter of 1938.

Q. Did you sign such contracts?

A. I signed for Northwestern after I had been assured that the contract was satisfactory to Mr. White, acting for United Public Utilities Corporation, and Mr. Kruesi, acting for the owners of Northwestern.

Q. Did you, as president of these companies, know about the revision of those contracts in 1939? A. Yes.

Q. Do you know who worked that out? A. Yes.

Q. Who?

A. The essential terms of the revision were worked out between the attorneys of United Public Utilities Corporation and attorney for the joint management staff of the joint companies. I am referring to Mr. Carl Goldsmith, of Pierre, and Mr. Scheetz, acting as officer for Mr. White. The reason for that was—

Q. What was the occasion for that revision?

A. It was occasioned by the merger of Northern Power & Light Co. and North Dakota Power & Light Co. and the change of name of the surviving corporation to Dakota Public Service Co.

Q. Now, I want to ask you a few general questions about how Mr. White kept in touch with United Public Utilities Corporation subsidiaries in North Dakota and somewhat in South Dakota. How did he maintain that contact?

A. In every way and by every avenue that was open to him.

Q. Will you name some of them?

A. Reports, as has been testified before, were sent to him. Financial reports, operating reports, special studies, bank reports. In addition to that, Mr. White always made one trip to the property and went over a portion of the property on that trip as much as time would allow. He always attended our management [meeting], which were held once a year. I don't believe there was any officer of the company that went into Chicago that didn't confer with Mr. White and visit with Mr. White, on the operations of the company. I know in my case I was in Chicago five or six times a year. Other officers, I know, were in there, perhaps not quite as much, but at least three or four times a year. I assume his direct [contract] with the officers of the joint staff was at least ten or twelve times a year in addition to his visits to the property and his attendance at the managers meetings.

Q. As I understand, his visits to the property came usually in May, and the managers meetings usually were in the fall?

A. That is correct as far as the time I was on the property. Prior to that, I believe, some times the managers meetings were held in the spring and Mr. White visited us sometime later.

Q. Now, with regard to the transfer of key employees during the time you were on the property there, was that done without Mr. White's knowledge and consent?

A. It was not.

Q. In the matter of differences between the companies, those cases where there was a diversity of interest, how were such matters handled while you were on the property?

A. It was in each case, in every case, the matter was passed up to the owners of the two properties. I refer particularly to the contract under litigation here. I refer also to the contract between Knife River Coal Mining Co. and Northwestern Public Service Co. for coal. I refer to such matters as transfer of key personnel. As I see it, the only job I had was to determine in my own mind when such a conflict did exist.

Q. Do you know who determined the dividend policies of those companies?

A. Mr. White, in conference, of course, with the execu-

tive officers and treasurer of the companies in which he was interested.

Q. Mr. Dunn has testified he kept in touch with the financial affairs of the companies. Did you observe whether or not that was true?

A. I can remember on several occasions getting telegrams from Mr. White in regard to investment of corporation's funds in U. S. securities.

Q. Did you heed those telegrams? A. Quickly.

Q. In every instance? A. In every instance.

Q. And I think you have seen something of the fact about transfer of funds to eastern banks. Did he exercise control over such matters?

A. Mr. White was very much interested in where our funds were. He took over the receivership at the time when some banks were closing and he was very careful as to how the funds were handled.

Q. Did I ask you whether you signed the 1939 contracts?

A. No, I don't believe you have asked me when I signed any contract.

Q. I think you said you signed the 1938 contract as president of Northwestern. With respect to the 1939 contract, did you sign that? A. I did.

Q. Do you know whether or not it had the approval of Mr. White, as president of United Public Utilities Corporation, prior to signing it? A. I know it did.

Q. And was that true of both the 1939 contracts?

A. That was true of both of them.

Q. What was the next change in the contractual relations between Northwestern and other company or companies? A. The 1941 contract.

Q. Will you tell the Court what events led up to that change in that contractual relationship?

A. The reason the 1941 contract, the conditions of the 1941 contract became necessary, was that it became evident the interconnected system required additional capacity. An examination was made by engineers to determine at what point the capacity should be placed. Aberdeen was picked and it met the approval of Mr. White. At that time it so happened that Northwestern had funds available, that were made available through the sale of properties in Nebraska, and for that reason, with the approval

of Mr. White, an investment which was thought at that time to be about $750,000.00, was determined upon at Aberdeen. The contract was inadequate as it stood to take care of the permanent investment of that amount of money, and it was thought, for the proper protection of Northwestern a longer term contract was necessary. For that reason, the 1941 contract was changed to ten year contract, without cancellation provided.

Q. Who worked that contract out?

A. That contract was worked out primarily by Mr. White and Mr. Kruesi. Mr. White acting for United Public Utilities Corporation and Mr. Kruesi acting for the owners of Northwestern Public Service Co., and by the office of Mr. Scheetz, and I believe that the office, also, of the engineering staff of Middle West engineering service, who was under contract to both U. P. U. subsidiaries and Northwestern.

Q. Did you sign that contract also?

A. I did. There were other matters that came up. Of course, in our net return for the entire term, Mr. White directed amortization of the interconnecting facilities.

Q. Do you know whether or not that contract had the approval of Mr. White, prior to signing it? A. I do.

Q. Did it? A. It did.

Q. You made mention of the watch he kept of the financial affairs of the North Dakota subsidiaries. Were there instances when the joint management desired money for improvements when Mr. White did not agree to such appropriations? A. There were.

Q. Can you state some of those instances? A. I can.

Q. Will you do so?

A. For the last four years prior to the sale of the property to Montana-Dakota there was a question of an additional Diesel [enginer] in the Dickinson plant to take care of that area load properly, and also to bolster up the capacity of the North Dakota system. Mr. White felt he had made a considerable investment in the Beulah boiler and a considerable investment in the Bismarck turbine and boiler, and that was as far as he could go at that time. In that length of time there had been talk of connecting the line from Kildare to Dickinson, so as to help along the Kildare-Beulah line. We were never able to obtain money to do that. In addition to that, there was a line west of

Mobridge out to Lemmon that required changing and we got a portion of that done, but not the whole of it. In addition to that there was a very weak 22 KV line from Wishek and from Hoven and Merango into Ellendale that we hoped to rebuild but we could not get money in the time we had to do it. Many of those items were in the [budger] the year Montana-Dakota acquired the property.

Q. I want to ask you this, whether or not you know if Northwestern had carrying charges on the inter-connection facilities that existed between it and the Dakota Public Service Co.?

A. Northwestern carried its half of the investment, its half of the amount set up in the contract, which amounted to Northwestern to about 151 thousand dollars.

Q. Were the Bowdle and Wishek line, and Bowdle and Ipswich line, interconnection facilities?

A. My interpretation is they were not.

Q. Do you know of the policy or requirement that work orders for the United Public Utilities Corporation subsidiaries had to have the approval of Mr. White over certain amounts? A. Yes.

Q. And that was the rule, was it? A. That was the rule.

Q. Did Northwestern Public Service Co. furnish the office equipment and automotive equipment for the joint management staff without any charge to United Public Utilities subsidiaries?

A. There was no charge whatever on office equipment. There was no charge in interest in money invested in automotive equipment.

Q. I don't know whether I have covered the proposition, that is, whether or not the members of the board of directors of United Public Utilities Corporation were ever out or ever went over the properties while you were there?

A. Only two members of the board at the time I was there. One was Mr. White, who went over the properties every year, and on one occasion Mr. Lakin came along. Mr. Lakin was also at that time a member of the board of United Public Utilities Corporation.

Q. There has been some question raised about the time of delivery of the minute books, stock books, and resignations of the officers and directors of Dakota Public Service Co. Do you know when that was?

A. Some time in October, 1945.

Q. And at whose direction was delivery of those things made?

A. I was directed by Mr. White to deliver the material that he specified to the office of Faegre & Benson, in Minneapolis.

Q. The office of the attorneys for the plaintiff in this suit? A. One of the many.

Q. Did you do that? A. I did.

Q. Some time in October, 1945?

A. That is right, as far as my recollection goes, some time in October.

Q. Do you know what the rule or policy with respect to the load dispatchers was? A. I do.

Q. During the period of time you were president of these companies? A. I do.

Q. Was that in writing? A. I believe it was not.

Q. You may state what the policy or rule with respect to handling of these loads was.

A. The load dispatchers were instructed to utilize the lowest cost producers on the system, regardless of ownership of those producers, to the utmost. When the lowest cost producer was loaded to go down the line and load up the next lower cost producer.

Q. So far as you know, was that policy followed regularly?

A. It was followed—It was not always followed far enough to the satisfaction of Mr. White.

Q. Do you mean by that that he made some criticism?

A. Mr. White criticized us for some load we were carrying in the Aberdeen plant when the Beulah plant was not fully loaded.

Q. Now, during the time you were an officer and director of Northwestern Public Service Co., Northern Power & Light Co., North Dakota Power & Light Co. and Dakota Public Service Co., did you ever intend to cause or permit Northwestern Public Service Co. to overreach or defraud the others named in any respect? A. I did not.

Q. Do you regard the several contracts between the companies named, with respect to rates and charges and allocation of expense, including those rates, as fair and just? A. I do.

Q. Did you at the time they were made? A. I did.

Q. Did you ever as an officer or director of the compa-

nies I have just mentioned, intentionally cause or permit the Northwestern Public Service Co. to take or charge anything against the other companies without consideration, unjustly, unreasonably, unlawfully, or fraudulently?

A. I did not.

Q. Mr. Sanborn, I neglected to ask you about the events leading up to the execution of the so-called 1943 supplement to the interconnection contract. Calling your [attentiont] to this photostatic copy marked Defendant's Exhibit 258, did you write the original of that? A. I did.

Q. Is that your signature on it? A. That is.

Q. On or about what date?

A. November 18, 1942 was the date of the letter.

Q. Was that transmitted to Samuel White about that time? A. It was.

Q. Subsequent to the writing of that letter was something done with the existing interchange contract of the company?

A. Yes. Mr. White, as I suggested in the letter, got in touch with Mr. Kruesi and they say that Northwestern was unable, as contemplated—

Q. Calling your attention to the language in that letter, to the effect Northwestern Public Service Co. would not be able to build the capacity which it had contemplated, what event had created that situation?

A. The war and W. P. B.

Q. Was it, as a result of that, impossible for Northwestern Public Service Co. to obtain the generator it had contemplated? A. It was.

Q. After that you wrote that letter? A. That is right.

Q. Who worked out the details of that 1943 supplement which you say was worked out subsequent to that letter?

A. At Mr. White's invitation the first draft was worked out in the Huron office and sent to Mr. Goldsmith for his comments and then sent to Mr. White. He tried to work out a supplement and was unable to do so and he sent it along to his legal officer and that draft came back into Huron, and to our suggestion, some of them were made and send back to Chicago. Mr. White and Mr. Kruesi got together with Mr. Stevenson, legal officer, Middle West, and a draft of the supplement as finally completed was completed in the Chicago office.

Q. Did you sign it? A. I did.

Q. Prior to the signing of it, do you know whether or not it had the approval of Mr. Samuel White, president, United Public Utilities Corporation? A. I do.

Q. Did it? A. It did.

Q. Did you regard the provisions of the 1943 supplement as fair so far as they affected the Dakota Public Service Co.? A. I did.

Q. There was some testimony this morning with regard to the negotiation of a new coal contract between Northwestern Public Service Co. and the Knife River Coal Mining Co., and I want to ask you what events led up to that occurrence?

A. I asked Mr. White to act for United Public Utilities Corporation and I asked Mr. Kruesi to act for Northwestern in forming a new contract for the supply of coal from Knife River Coal Mining Co. to the Aberdeen plant of Northwestern.

Q. That was in the winter of 1944 and 1945, was it?

A. As I remember it was either March or April, 1945.

Q. Were you present at any time when that contract was under discussion?

A. I was present as an observer. Mr. Kruesi did not act for Northwestern. He appointed Mr. Purchas to act as his representative.

Q. He did act?

A. Mr. White and Mr. Solberg, sales manager for Knife River Coal Mining Co., and Mr. Mont, mine manager, for Knife River, acted for Knife River. Mr. Purchas acted for Northwestern.

Q. I don't believe you have stated where those negotiations took place?

A. In the coal mining office in Bismarck, North Dakota.

Q. And after those negotiations was the contract made?

A. The contract was signed.

Q. Did you know before it was signed whether or not it had the approval and consent of Mr. Samuel White?

A. It did. He negotiated it.

Q. Did you sign that? A. I signed it.

Q. Now, I want to ask you in regard to Defendant's Exhibit 215, whether you have seen that before?

A. Yes, I have seen it before.

Q. The names of Bayles and Gazin have been mentioned

in connection with the exhibit, as I understand it. Who were they?

A. Mr. Gazin was assistant chief engineer of Middle West. Mr. Bayles, at the time this exhibit was made, was superintendent of transmission and distribution of the joint companies, the joint staff in Huron, South Dakota.

Q. Do you know who worked that out?

A. Mr. Gazin and Mr. Bayles between them worked it out.

Q. And prepared those papers there, did they?

A. Yes. They prepared the information from which these papers were taken.

Q. Is there a figure there on those papers that was used in connection with a subsequent contract relating to the interconnection facilities?

A. The column headed "Portion for interconnection with Dakota Public Service [Eo.]" adds up to 303 thousand some odd dollars and cents, which figure was used for the basis of the amortization clause in the 1941 contract, and half of the figure was used as the figure for the value of half of the interconnection facilities in the 1943 supplement to the 1941 contract.

Q. I want to ask you whether you ever told Mr. R. M. Heskett, president of the plaintiff, that the interchange contract between the defendant and the Dakota Public Service Co. was cancellable on ninety days notice, or substantially that? A. I did not.

Cross Examination, by Mr. Fellows.

Q. When you detailed your connections and the proceedings that led up to your connection with Northwestern Public Service Co., I believe you stated you were sent to their office in Chicago by somebody in Ashland, Wisconsin?

A. That is right.

Q. Who was that?

A. Walter Hodgkins, whom I have known for a good many years.

Q. At least you were sent to the Middle West Corporation? A. Middle West Service Co.

Q. Did you know what connection Middle West Service Co. had at that time with the defendant company?

A. I found out later.

Q. If you know, will you state?

A. What time are you talking about?

Q. At the time you went to work for the company.

A. Middle West Service Co. had a service contract with Northwestern and with Northern Power & Light and North Dakota Power & Light.

Q. Now, at that time the Middle West Corporation owned the stock of the Northwest Utilities Co.?

A. That is correct. That is as I understand it.

Q. You also know, do you not, that in turn the Northwestern Utilities Co.—going back a little, the Middle West Corporation you have stated, owned the stock of Northwestern Utilities Co. A. I understand so.

Q. And the Northwestern Utilities Co. owned the stock of the defendant company?

A. That was a fact. Common stock.

Q. During all of the time from 1938 until the sale of the northern companies to the plaintiff, you were not only an officer but you were a director in both the defendant company and in the northern companies, weren't you?

A. That is correct.

Q. And president of both companies?

A. President of first three companies, and then two companies.

Q. And president of the defendant company, too?

A. That is correct.

Q. Did you own some stock during that period of time in the northern companies?

A. There wasn't any stock available.

Q. You held your office as director without any stock ownership? A. Correct.

Q. Do you own any stock in the defendant company?

A. There wasn't any stock available in the defendant company.

Q. You likewise hold your position as director and officer without any stock holding?

A. I had one share of stock in trust. It was not my stock.

Q. That was in the defendant company?

A. In the defendant company.

Q. You did sign Exhibits C, D and E and F to the complaint as president of the northern companies, did you and the supplement of July 1, 1941?

A. What are the exhibits?

Q. Did you sign the contract, Exhibit C, of January 1, 1938? A. If that is the 1938 contract, I did.

Q. And also the one of July 1, 1939? A. I signed that.

Q. And the other one, July 1, 1939? A. I signed that.

Q. And the one of July 1, 1941?

A. I believe I signed that.

Q. You signed those as president of the northern companies, did you not?

A. I think I signed them as president of Northwestern.

Q. Do you know who signed on behalf of the northern companies?

A. I haven't refreshed my memory on that. I will be glad to do it if you will show me the contracts. My understanding is Mr. Sandstedt signed—

Q. Here is Exhibit C to the complaint. On whose behalf did you sign that?

A. On behalf of Northwestern Public Service Co.

Q. Who signed on behalf of the northern companies?

A. C. L. Sandstedt signed on behalf of North Dakota Power & Light Co. and G. R. McArthur signed on behalf of Northern Power & Light Co.

Q. He was also a dual officer and [directors]?

A. That is correct.

Q. And Mr. Sandstedt was, too? A. That is right.

Q. Where was this signed? A. At Huron.

Q. That is the place where all of you people were operating? A. That was the joint office.

Q. That is true of Exhibit D, is it not?

A. If signed by dual officers, yes.

Q. You signed as president of Northwestern?

A. I signed for Northwestern. Mr. Sandstedt signed for Dakota Public Service Co.

Q. And Exhibit E?

Mr. Royhl: This is all admitted in the pleadings.

A. I signed for Northwestern. Mr. Sandstedt signed for Dakota Public Service.

Q. When they got ready to be signed did you call Sandstedt in and tell him what company he was to sign for and tell him you were signing for the other one?

A. I don't know how we settled who we were going to sign for.

Q. How did you determine which one would sign for one company and which would sign for another company?

A. I haven't the slightest idea. There was no system to it. I don't know as it ever occurred to us.

Q. It was just a matter of getting it signed by two fellows, one on behalf of one company and one for the other?

A. Two people that had authority to sign.

Q. Was it just a question of who signed for one company and who for the other? A. That is right.

Q. All of you being directors of both companies and officers of both companies? A. That is right.

Q. Mr. White was not there, was he? A. No.

Q. Since you were an officer in both companies why didn't you sign for both companies?

A. I would not know that. I think it would have been just as legal if I had.

Q. At least, when you signed, it didn't make any difference to you which one you signed for, as long as you signed for one of them?

A. Not as long as the owners approved of the contract.

Defendant offered in evidence a portion of the testimony by deposition of adverse witness R. M. HESKETT, an officer of plaintiff, which testimony was received in evidence as follows:

Q. Your name is R. M. Heskett? A. Yes, sir.

Q. Where do you live, Mr. Heskett? A. Minneapolis.

Q. What street, please? A. 2127 Pleasant Avenue.

Q. Are you the president of the Montana-Dakota Utilities Co., the plaintiff in this action? A. Yes.

Q. How long have you been president of that company?

A. Well, I think it was '43. I would not be sure.

Q. Were you connected with the company prior to that time? A. I was vice-president.

Q. Vice president. Are you a director of that company?

A. Yes.

Q. How long have you been a director?

A. Since the company was organized.

Q. When was that, approximately? A. In '24.

Q. 1924. You have been continuously a director since that time? A. Yes.

Q. You own stock in the company? A. Yes, sir.

Q. How much stock do you own in the Montana-Dakota, approximately?

A. Well, approximately, I would say, 50,000 shares.

Q. And what percentage is that 50,000 shares of the total? A. There is 900,000 shares.

Q. 900,000 outstanding? A. Yes.

Q. You own 50,000 shares? A. I say about that.

Q. About 50,000? A. Yes.

Q. That's as of the present? A. Yes.

Q. The members of your family own any other stock?

A. Yes, they do.

Q. Now, the 50,000 shares you own now, did you own them during 1945? A. '45, yes, yes.

Q. Now, do Montana-Dakota Utilities Co. own any shares of its own stock?

A. Oh, they may, I would not be sure about that. If it does, it is quite a small amount.

Q. How about in 1945, did they own any stock?

A. If it did it would be a very small amount.

Q. This morning, Mr. Heskett, you said you would endeavor over the noon hour to ascertain the amount of stock that you owned? A. Yes.

Q. Were you able to do that?

A. I have January, '48, and September '45 that's about what you wanted?

Q. What does September, 1945, show? A. I have 49,793.

Q. Does that reflect any additional shares held by members of your family?

A. No, I am going to give you that separate. Mary G. Heskett, my wife, has 18,890.

Mr. Benson: You mean had as of that date.

The Witness: Yes. David M. Heskett, a son, had 11,050. Robert G. Heskett had the same amount. Jean Heskett Feidt, a daughter, 11,050, and Mary Lou Heskett had 11,050. That's of '45.

Q. (By Mr. Stafford) Yes, sir.

A. Now of today's ownership or January 1st, I had 56,702 Mrs. Heskett had 19,290, David Heskett had 11,298, Robert Heskett had 11,250, Jean Heskett Feidt had 11,250, Mary Lou Heskett had 11,250.

Q. And that's a complete list of the stock owned by yourself and members of your family? A. Yes.

Q. That's common stock? A. Yes.

Q. Did you have preferred holdings too?

A. I didn't have any preferred in '45. I now have 100 and Mrs. Heskett had 609 and now she has got 610. I don't know where that one share came from.

Q. She had 609 in '45?

A. Yes, and now she has 610. The children have no preferred.

Q. At either date? A. No.

Q. What were you endeavoring to purchase from Mr. White, the utility properties of the Dakota Public Service Service Company and the mine properties of the Knife River? A. Yes.

Q. But Mr. White sold you stock and securities, how did that come about? You wanted the properties, if I understood you?

A. No, not necessarily properties, we wanted to get the property but buying the stock was simply a step.

Q. Why did you want to get the property, so you could integrate that with the Montana-Dakota?

A. Yes, certainly.

Q. So as to make an integrated—?

A. Merge it with our company.

Q. So you have one system of public utility properties?

A. Yes.

Q. But you had to buy the stock and the securities in order to—as a step in order to achieve that result, is that correct?

A. That's the way he wanted to sell it. Of course, as far as we are concerned we could have bought the property.

Q. Mr. White had a tax problem or some problem of his own?

A. I would not be surprised, I don't know whether he wanted to sell the stock.

Q. And you would have just as soon have bought the properties? A. Oh, yes.

Q. You recall when you agreed upon the price with Mr. White? I take it you did agree on the price with Mr. White? A. Yes.

Q. You recall when that happened?

A. That I have testified it is either in the early summer or in the spring of '45.

Q. It was prior to the time that the formal contract was drawn and signed? A. Yes.

Q. Some time prior to that? A. Yes.

Q. And there wasn't any deviation from that price that was agreed upon and the one in the contract?

A. I don't believe there was, I think that carried out the contract.

Q. If I said to you that you agreed informally on that $7,500,000.00 plus earnings, with Mr. White, about April 24, 1945, would that be incorrect?

A. I would not dispute it.

Q. You would not dispute it? A. No.

Q. It could have been agreed upon at that time?

A. Yes.

Q. Who else did you deal with in connection with acquiring these Dakota Public Service Company properties other than Mr. White?

A. Why, I never dealt with anybody.

Q. Anybody else in the United Public Utilities Corporation organization? A. Not about that property.

Q. When you said "they" did something a minute ago, who did you mean by "they"?

A. I mean the Northwestern.

Q. And you said they had control of both companies?

A. Yes.

Q. So your testimony is that Northwestern Public Service Company had control of itself and of Dakota Public Service Company? A. Yes.

Q. Do you recall that I interrogated you a few moments ago about allegations in the Federal Power Commission complaint filed by Montana-Dakota Utilities Co. alleging domination and control by Middlewest Corporation of Northwestern Public Service Company and of Dakota Public Service Company? A. Yes.

Q. But you are now testifying that Northwestern Public Service Company had control of—

A. Well, they had—they are the only company that I was in contact with.

Q. Who is "they"?

A. The Northwestern. I don't attempt to follow that tier of ownership about the Northwestern. I don't remember the connection.

Q. Well, you say Northwestern Public Service Company had control of Dakota Public Service Company?

A. Well, I thought so. They had an operating contract.

Q. Well, when you negotiated for the acquisition of the securities of Dakota Public Service Company, did you deal with the Northwestern Public Service Company?

A. Well, no, you know—

The Witness: I dealt with the owner.

By Mr. Schiff:

Q. What was the answer?

A. I said you know I dealt with White.

Q. I so understood your testimony, yes. A. Yes.

Q. And you dealt with Freeman with reference to the proposed acquisition of Northwestern Public Service Company? A. Yes.

Q. Now, after the conversations with Mr. White in April or the spring of 1945, were any investigations made by the personnel of the Montana-Dakota Power Utilities Co. of the Dakota Public Service property records and so forth? A. Yes, there were.

Q. Under whose supervision were those investigations made? A. Mr. Gamble and Mr. Elvig.

Q. Mr. Gamble and Mr. Elvig. Was that at your direction, Mr. Heskett? A. Yes.

Q. What instructions did you give Mr. Gamble and Mr. Elvig in connection with these investigations?

A. Well, we had a balance sheet. They principally used their own judgment.

Q. Well, what information were you expecting them to get from these investigations?

A. Well, I left that largely to them.

Q. Well, how was it, did you give them the authority

and instruct them to make the investigations to satisfy themselves as to what you were purchasing? A. Yes.

Q. Have you or anyone in your staff, to your knowledge, any information with reference to that contract prior to your purchase of the Dakota Public Service Company stock? A. Well, I had notice of it.

Q. And in your opinion—

A. I knew about it when I went over the property with Mr. Sanborn and I discussed it with him to some extent. I asked him, I remember, when it expired, that is, cancellation, and he told me in three months after notice. Now at this time we knew that was not correct of course.

Q. In your discussion with Mr. Sanborn, can you recall anything else that was discussed with reference to that contract?

A. I think the only thing I asked him was the cancellation clause.

Q. And you have no familiarity with the terms of the contract? A. Yes, I already knew that.

Q. Prior to your discussion with Mr. Sanborn? A. Yes.

Q. Had you ever seen those contracts?

A. No, I don't think I had ever seen them.

Q. But you knew about them? A. Yes.

Q. Do you recall you knew about them, not having seen them?

A. I think Mr. White—I am not sure but I think Mr. White told me that they had an operating contract and the expenses were divided according to the gross income.

Q. Well, was that the management contract?

A. Yes, that was the management contract.

Q. Did Mr. White ever discuss with you what is called the interchange contract, in this prospectus?

A. He mentioned—of course I knew that they had that, we discussed it, but I don't remember just in how much detail.

Q. Had you ever made complaint with reference to the contract to Mr. White? A. No.

Q. Or to Mr. Freeman? A. No.

Q. Or to Mr. Sanborn?

A. I don't think so. I think the first complaint I made was in that letter.

Q. And by "that letter" you mean the July 8th letter of 1946 (R. p. 1600, supra)? A. Yes.

Q. And that is true although you have yourself been dissatisfied with that contract for some period of time prior to July 8th?

A. I considered it a one sided contract quite a while but I didn't appreciate its seriousness until later.

Q. Did you appreciate its seriousness before or after the termination notice of February 27th?

A. Oh, I wouldn't be able to say. The contract on its past performance didn't look bad in the early days up until the time we got in.

Q. Then you mean by that—

A. The contract that one company pays a very small amount for power and the other side pays much larger don't strike me as equitable.

Q. And that is your view of the contract? A. Yes.

Q. But you hadn't arrived at that view at October 19, 1945? A. October?

Q. Yes? A. That is when we bought the property?

Q. Yes.

A. Yes. I thought it was a little out of key but I didn't think it was so serious but what we could buy the property, and it would depend [it] good bit on how it was exercised.

Q. Well, I think that was a different inquiry. I was trying to place the time at which you thought it was a one-sided contract, and it is my recollection that you said in substance that the contract over a period of years had worked fairly. That is what I thought your testimony was. If I am in error I would like to have it corrected.

A. I didn't say fairly. I said it didn't seem to be any particular burden on either one. There wasn't much money transferred.

Q. Well, now, "it wasn't any particular burden on either one", by that you mean on Northwestern or Dakota Public Service Company?

A. Well, I said there wasn't much money. It was settled by interchange of power.

Q. And you are then speaking of the period prior to October 19th? A. As shown in those reports.

Q. Is the effect of your testimony that there wasn't much money involved between Dakota and Northwestern?

Mr. Schiff: As of what period were you speaking?

A. I was referring to the three or four years that are

shown in the reports of the operation of the two companies, between the two companies.

Q. That would include the period of three years and four months covered by the Arthur Young & Company statement? A. Yes.

Q. This is a question on another subject, Mr. Heskett. Did you when you bought the Dakota Public Service Company securities know of the construction of a so-called Aberdeen improvement by Northwestern Public Service Company? A. Yes.

Q. And it was then under construction?

A. Yes, almost complete, I think.

Q. I would like now to address some attention, Mr. Heskett, to the question of when you first knew of the fact whether there was at times common directors between Northwestern Public Service Company and Dakota Public Service Company? A. I could not tell you when that—

Q. You have no recollection at all of when you first knew there were common directors, there were some common directors between those two companies?

A. Well, I think I had that impression for a long time but I don't know when I knew, had positive information.

Q. By a long time, I am trying to see what period is encompassed?

A. Well, I would say several years, as far as that goes.

Defendant offered in evidence a portion of the testimony by deposition of adverse witness CECIL W. SMITH, an officer of plaintiff, which testimony was received in evidence as follows:

Q. Will you state your full name, Mr. Smith?

A. Cecil W. Smith.

Q. And where do you live?

A. 1320 West Minnehaha Parkway in Minneapolis, Minnesota.

Q. Mr. Smith, are you at present connected with the plaintiff in this case, Montana-Dakota Utilities Co.?

A. I am.

Q. And in what capacity are you connected with that company? A. Vice president.

Q. And are you a director of that company?

A. And a director.

Q. How long have you been vice president of that company, approximately?

A. About four years, I believe.

Q. What position did you hold in the company prior to that time?

A. I was chief engineer and assistant vice president.

Q. And how long have you been with the company?

A. Since 1927.

Q. And have you been associated in an active capacity with the company since 1927 in some capacity or other?

A. I have.

Q. And how long have you been a director, Mr. Smith?

A. I don't recall just how long it is. I imagine six or eight years, somewhere along in there. I don't recall exactly.

Q. That's sufficient. Mr. Smith, would you tell us please your duties or functions as vice president of Montana-Dakota Utilities Co.?

A. I have been in charge of operation and construction, particularly.

Q. By operation, you mean the actual running of the company's operating facilities, such as its gas and electric and other facilities of that nature? A. That is correct.

Q. You own any stock in Montana-Dakota Utilities Co.?

A. I do.

Q. How much, please, approximately?

A. Oh, I imagine around four or five thousand shares.

Q. How many did you own in 1945? A. Probably—

Q. Was it about the same?

A. About the same, some less.

Q. Now, prior to the acquisition of the properties of Dakota Public Service Company in 1945, was there any investigation made by engineers of Montana-Dakota Utilities Co. of the properties of Dakota Public Service Company, if you know? A. Yes, there was.

Q. Who made such investigation?

A. My recollection is that the company engineers looked over the power plants and transmission lines of the company and subsequently I believe Day & Zimmerman made examination of the physical properties of the company.

Q. Now, could you fix the date, or approximately the dates upon which the company's engineers looked over the plants and transmission facilities of Dakota Public Service Company?

A. I believe it was in July or August.

Q. Of 1945? A. Of 1945, that's right.

Q. Who were the employees that looked over these facilities?

A. Well, I looked them over and Mr. A. P. McDonald, electrical engineer, looked over the plants.

Q. Were you afforded full access to look at any of the properties of facilities that you desired to see at that time?

A. Yes.

Q. Now, Mr. Smith, it has already been testified by Mr. Gamble, I am certain, and I believe also by Mr. Heskett, that Day & Zimmerman made an investigation of these properties of Dakota Public Service Company and prepared and furnished a report on the integration of these properties which has been marked and offered in evidence as Defendant's (Minneapolis) Exhibit 4. Do you recall whether or not you have ever seen that report?

A. Yes, I believe I have.

Q. When, could you say, Mr. Smith?

A. Shortly after it was completed. I don't recall the date of it.

Q. Now, you state that you have seen it shortly after it was furnished to Montana-Dakota; would that be prior to the actual closing of the purchase of the securities of Dakota Public Service on October 19, 1945?

A. Yes, I believe it was.

Q. Did you make a study or review of that report at that time?

A. Yes, I went over it. I don't recall what its contents are now.

Q. Now, you have also testified that during that same period an investigation was being made of Northwestern properties by Day & Zimmerman. Was any investigation made of Northwestern properties by yourself or Mr. McDonald?

A. No, Mr. McDonald didn't make any investigation, and as I recall it, I went over part of the Northwestern properties, not all of them.

Q. Would this be during this same period or after the acquisition of Dakota Public Service Company on October 19th?

A. That was prior to the acquisition of Dakota. As I recall it was in July or August of '45.

Q. Did you visit the Aberdeen plant of Northwestern Public Service Company during that period? A. Yes.

Q. Did they have under construction at that time a new generating unit?

A. Yes, they were installing a new turbine and a new boiler at the time I was at that plant.

Q. Did you have occasion to see the unit at all during its installation? A. Yes, I saw it.

Q. Was it a modern type of generating unit and boiler, turbine, rather?

A. Yes, it was a new General Electric turbine.

Q. Well, now, just what did the term fraudulently mean to you, Mr. Smith?

A. Well, I think under the conditions there it might mean that as far as the Northern Power & Light was concerned they were being taken advantage of in that situation.

Q. Who was taking advantage of Northern Power & Light?

Mr. Fellows: We object to that as incompetent.

The Court: I don't think it is competent. Sustained.

Q. Was that payment which you state Northwestern had exacted from Northern Power & Light, received pursuant to any contract in force and effect between those parties?

A. I believe in pursuance to the contract cited in that paragraph.

Q. How was that contract unfair, Mr. Smith?

Mr. Fellows: Objected to as conclusion of the witness.

The Court: Sustained.

Q. I don't think you covered this in Mr. Robinson's interrogation this morning so I will ask you now, do you recall now when you first knew who the directors were of Northwestern Public Service Company?

A. Of Northwestern Public Service Company?

Q. Yes, the defendant in this action.

A. I believe the first information that I had as to the directors of Northwestern Public Service Company was from Mr. Sanborn when I was out on the property in July.

Q. Of 1945? A. Of 1945.

Q. Now about directors of Dakota Public Service Company? What is your best recollection as to when you first knew who those directors were?

A. I think about the same time.

Q. About the same time and the source of your information was the same? A. That's right.

Q. That's in July of 1945? A. Yes.

Defendant's Exhibit 343 was received in evidence. It consists of the minutes of the special meeting of the directors of plaintiff held July 11, 1945.

At that meeting, among other things, said directors approved, ratified and confirmed the execution of the contract with United Public Utilities Corporation dated July 2, 1945, relating to the purchase by plaintiff of all of the outstanding securities of Dakota Public Service Company and Knife River Coal Mining Company, which is Defendant's Exhibit 282 (R. p. 1333, supra).

Defendant's Exhibit 344 was received in evidence. It is as follows:

Defendant's Exhibit 344.

United States of America
Federal Power Commission

Before Commissioners:

Nelson Lee Smith, Chairman; Claude L. Draper and Leland Olds.

September 2, 1947

In the Matter of	
Montana-Dakota Utilities Co. and Northwestern Public Service Company.	Docket No. IT-6004 and (Waiver of Notice for Filed Rate Schedules)

Order Allowing Rate Schedules to Take Effect and Dismissing Complaint.

It appears to the Commission that:

(a) On August 12, 1946, Montana-Dakota Utilities Co. (hereinafter "complainant") filed a complaint with this Commission against Northwestern Public Service Company (hereinafter "defendant") alleging among other things, that, under the agreement between it and defendant, dated July 1, 1941, and supplemented by an agreement, dated March 13, 1943:

> "The rates and charges exacted from complainant by defendant . . . are unjust and unreasonable and complainant should not be required . . . to pay to defendant anything on account of the transmission line amortization . . . or anything on account of the capacity of the Aberdeen generating station in excess of 6,000 kw capacity; and should be paid by the defendant not less than 6½ mills per kilowatt-hour for all energy furnished by complainant to defendant."

(b) On January 21, 1947, defendant filed a proposed Notice of Cancellation of the aforementioned agreements be-

tween it and the complainant, to become effective as of August 31, 1947, in accordance with a Notice of Termination served by complainant upon defendant under the terms of the aforementioned agreements.

(c) On February 20, 1947, complainant amended its complaint of August 12, 1946, by requesting that the Commission order the maintenance of the facilities interconnecting it and defendant and fix the rates for power to be interchanged by complainant and defendant.

(d) On August 20, 1947, complainant and defendant made application requesting that the following rate schedules, providing by their terms for temporary emergency interchange service be allowed to take effect at midnight August 31, 1947:

Name of Seller	Rate Schedule Designation	Rate Schedule Superseded	Name of Purchaser
Northwestern Public Service Company	FPC No. 7	FPC No. 6, as amended	Montana-Dakota Utilities Co.
Montana-Dakota Utilities Co.	FPC No. 4	FPC No. 3, as amended	Northwestern Public Service Company

(e) By the terms of the agreement filed August 20, 1947, the issues involved in the complaint, as amended, have become merely moot and the public interest will be served by dismissing the same.

The Commission orders that:

(A) The aforesaid rate schedules be and they hereby are allowed to take effect at midnight August 31, 1947;

(B) The aforesaid rate schedules shall be deemed to have been filed and published in compliance with the Federal Power Act;

(C) Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided for in the above-designated rate schedules, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;

(D) The foregoing provisions of this order are without prejudice to any findings or orders which have been or may hereafter be made by this Commission in any proceeding now pending, or hereafter instituted, by or against the applicants.

(E) The complaint filed on August 12, 1946, and as amended on February 20, 1947, by Montana-Dakota Utilities Co. against Northwestern Public Service Company be and it is hereby dismissed.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: September 4, 1947.

FRED GAMBLE, being called as an adverse witness by the defendant and being first sworn, testified as follows:

Cross Examination, by Mr. Royhl.

Q. Your name is Fred Gamble? A. Yes.

Q. You are an officer and director of the plaintiff company? A. I am.

Q. And for how long have you acted in that capacity?

A. As an officer since 1925. As a director since 1936 or 1937.

Q. What office do you hold at the present time?

A. I am Treasurer of Montana-Dakota, and assistant secretary.

Q. How long have you acted in those capacities?

A. I have been assistant secretary since 1925. I have been treasurer of the company, I am not sure of the date, 1932, 1933, approximately.

Q. Do you know where Ellendale, North Dakota is on this system of the Dakota companies? A. Yes, I do.

Q. Since October 19, 1945, has the plaintiff installed generating equipment there?

Q. What installation has the plaintiff made of generating capacity at Ellendale?

A. They have made installation of Diesel engines similar

in character as the ones described by Mr. Helmick in his testimony.

Q. At Ellendale? A. Yes.

Q. Of what capacity?

A. Net capacity or gross installed?

Q. Gross installed capacity?

A. I believe the ratings were two 1750 KW units.

Q. That would be 3500 KW? A. That is gross.

Q. What installation has been made by the plaintiff at Gettysburg, South Dakota?

A. We have made no installation of capacity at Gettysburg.

Q. What installation, if any, has been made by the plaintiff at Mobridge, South Dakota?

A. Identical equipment with that installed at Ellendale.

Q. That would be 3500 additional KW at Mobridge?

A. That is correct.

Q. Did you make any additional installations other than the 3500 at Ellendale and 3500 at Mobridge?

A. We are in the process of making additional installations.

Q. Where?

A. At Columbus, North Dakota, just north and west of Mandan, and at Bismarck, North Dakota.

Q. What additional are you making at Bismarck?

A. We are installing additional boiler and generating capacity. Generating capacity of 5000 KW.

Q. Any other?

A. Yes, we are installing generating capacity at Sheridan, Wyoming.

Q. That is not on the North Dakota property?

A. Part of the Montana-Dakota property.

Q. Are you installing any additional capacity at Dickinson, North Dakota?

A. No. We have taken generating capacity out of that station.

Redirect Examination, by Mr. Benson.

Q. Mr. Gamble, are you familiar with the general increase of electrical consumption over the whole of the ... ted States since the first of January, 1936?

Mr. Royhl: Objected to as not proper cross examination; immaterial.

The Court: I think he can show by this witness, if he is competent to testify, there has been a general increase in demand for electric power all over the country. Within reasonable limitations the witness may answer.

A. Yes, I believe I am.

Q. How many years have you been in the utility business? A. Since 1920.

Q. Has there been a period that you know of in the utility business from the time you have been in it, when there has been such an increase in demand for energy as began about January 1, 1936?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. No.

Q. Do you know whether the defendant company has installed any additional generation on its system? A. Yes.

Q. Where?

Mr. Royhl: Same objection.

The Court: Same ruling.

A. At Mitchell, South Dakota.

Q. Do you know how much? A. I believe 7500.

Q. KW? A. Yes.

Mr. Royhl: Defendant rests.

Mr. Fellows: Plaintiff rests, and I want to ask leave of the Court to amend the complaint in certain particulars to conform to the proof, and the amendment has to do with the amount of underpayment current, for energy, and based on figures which now appear as our cost of production of current.

We ask leave to amend Paragraph II of the second cause of action, by changing that paragraph to read as follows:

"From the 1st day of September, 1935, to July 1, 1939, the defendant, through its officers and directors, who were officers and directors in common with Northern Power and

Light Company and North Dakota Power & Light Company, caused said North Dakota Power & Light Company to generate in the State of North Dakota and transmit to Northern Power & Light Company at Keldron, South Dakota, and at Driscoll, North Dakota, electrical energy which was in turn by Northern Power and Light Company transmitted to defendant at Gettysburg, Barnard, Ipswich and Aberdeen, South Dakota, and at said points purchased for resale by defendant. The amount of such energy was 12,550,381 kilowatt hours and said energy was of the just and reasonable value of One Hundred Two Thousand Two Hundred Eighty-five and 61/100 Dollars ($102,285.61), but defendant, through its officers and directors aforesaid, paid to said Northern Power and Light Company only the sum of Sixty-two Thousand Seven Hundred Fifty-one and 90/100 Dollars ($62,751.90), which was unjustly and unreasonably and unlawfully low price therefor, to the damage of North Dakota Power & Light Company and Northern Power and Light Company in the amount of Thirty-nine Thousand Five Hundred Thirty-three and 70/100 Dollars ($39,533.70)."

Amend Paragraph III so that the last sentence of said paragraph will read as follows:

"That by reason of the facts hereinbefore alleged, the defendant became indebted to and liable to said North Dakota Power & Light Company and Northern Power and Light Company in the sum of Thirty-nine Thousand Five Hundred Thirty-three and 70/100 Dollars ($39,533.70), no part of which has been paid."

Amend the Fourth Cause of Action by amending the last paragraph of Paragraph VI of said Cause of Action to read as follows:

"The net energy sold as aforesaid by Dakota Public Service Company to Northwestern Public Service Company from July 1, 1939 to July 1, 1941, under the terms of said original of said Exhibit 'D' was fairly, justly and reasonably of the value of Ninety Thousand Nine [Hundred] Seventeen and 65/100 Dollars ($90,917.65) but the defendant, through its officers and directors aforesaid, paid to said Dakota Public Service Company and caused said

Dakota Public Service Company to receive for said energy only the sum of Fifty-nine Thousand Three Hundred Forty-five and 74/100 Dollars ($59,345.74) which was an unjustly, unreasonably and unlawfully low and inadequate price therefor."

Amend Paragraph VII of the Fourth Cause of Action to read:

"By reason of the facts hereinbefore in this cause of action alleged, defendant became liable to and indebted to Dakota Public Service Company in the amount of Seventy-one Thousand, Five Hundred Seventy-one and 91/100 Dollars ($71,571.91), no part of which has been paid."

Amend the Sixth Cause of Action by amending Paragraph IX to read as follows:

"From the 1st day of July, 1941, to the 19th day of October, 1945, the defendant, through its officers and directors, who were officers and directors in common with Dakota Public Service Company, caused said Dakota Public Service Company to generate electrical energy in the State of North Dakota and transmit the same to the defendant at Gettysburg, Barnard and Ipswich, South Dakota, and there to resell the same to the defendant and defendant transmitted the same and resold the same to its public utility customers in the State of South Dakota, and the net energy thus generated, transmitted and sold by Dakota Public Service Company to defendant was fairly, justly and reasonably of the value of Three Hundred Seventy-seven Thousand One Hundred Eight and 6/100 Dollars ($377,108.06), but the defendant, through its aforesaid officers and directors, paid to said Dakota Public Service Company and caused said Dakota Public Service Company to receive for said energy only the sum of Two Hundred Eighteen Thousand Nine Hundred Ninety-four and 23/100 Dollars ($218,994.23), which was an unjustly, unreasonably and unlawfully low price therefor."

Amend Paragraph X of the Sixth Cause of Action to read as follows:

"By reason of the facts hereinbefore in this cause of action alleged, defendant became indebted to the Dakota

Public Service Company in the amount of Three Hundred Thousand Four Hundred Dollars ($300,400.00) no part of which has been paid."

Amend the amended prayer to the complaint so that Paragraph (5) thereof will read as follows:

"(5) For the sum of Five Hundred Fifty-six Thousand One Hundred Twenty and 77/100 Dollars ($556,120.77), with interest at the rate of six per cent (6%) per annum from the date of each payment of each portion thereof by North Dakota Power & Light Company, Northern Power and Light Company and Dakota Public Service Company to the defendant, and with interest on all underpayments by defendant for electrical energy at the rate of six per cent (6%) per annum from the date of each monthly underpayment on account of such energy."

Mr. Royhl: To which the defendant objects for the reason that such application comes too late; it is not timely made; and the defendant having completed the trial of the action, both sides having rested, is surprised; prejudicial and can't meet such additional issues; improper and prejudicial to the defendant, and no proof upon which to make such offer exists.

The Court: I don't see there is any additional issues presented. He has merely made a motion to amend the complaint to conform to the testimony now in the record. As to whether or not the evidence before the Court, the record of the case so far would prove the allegations of the complaint is a matter I am not prepared to pass upon at this time, but I think, if the evidence before the Court is conclusive enough to justify the allegations in the proposed amendment, I think counsel should have a right to amend his complaint to conform to the evidence as it now stands. I don't think there is any question about that, but I would not want to pass upon the motion at this time.

Mr. Royhl: May we have an exception to the ruling?

The Court: Certainly. I will take the matter under advisement and I may rule the other way in the future, but if the evidence in the case will prove the allegations in

the proposed amendment then there is no question but what he has a right to amend the complaint to conform to the facts.

(Opinion.)

The Court: Gentlemen, I have made a careful study of the briefs submitted in this case; I have examined a good deal of the evidence; I have listened with a great deal of interest to the oral presentation of your several positions, and I am convinced that perhaps I am as well, if not better, prepared to decide the case now than I would be if I made a further study of it.

As far as the law of the case is concerned, I have already passed upon the question as to the jurisdiction of the Court.

The next question, as I remember [is], raised by the proof, is the contention of the defendant that the action is barred by the equity rule which prohibits a stockholder, who was not a stockholder at the time of the alleged wrong in the conduct of the board of directors of a corporation, from maintaining a suit for or resulting from the wrongdoing, unless he was a stockholder at the time of the wrongful act, or unless his ownership of the stock was due to legal possession of it. While I have no quarrel with the authorities submitted in support of defendant's contention, this is not a law suit that I think that law is applicable to at all. This is not a suit by a stockholder upon a so-called derivative cause of action. This is a suit by an assignee of the cause of action, and I don't think the equity rule contended for by the defendant is applicable at all.

The next law question, as I recall it, as raised by the proofs, is that of the statute of limitations. I don't think the statute of limitations has anything to do with this case.

That leaves only, as I recall it, the main questions of fact to be determined. As to a good many of the essential facts in the case there seems to be no dispute. As I recall the evidence and contention of counsel, there is no dispute as to the figures representing the amount of money which it is contended the plaintiff paid to the defendants for the services contended for by the defendant in the action.

The next question is whether or not those amounts, collected from the plaintiff by the defendant were collected under legal rate schedules and legal contracts under the provisions of the Federal Power Act.

As to the first proposition, that of the alleged deficiency in the rate, there isn't any dispute, as I recall it, as to the amount paid under that agreement.

As I view the law, the Powe Act contemplated that corporation or individuals engaged in the interstate transportation of electric energy, as were the parties to this suit, should file with the Commission, prior to the time that any rate went into effect, not only the proposed rate, but all contracts, charges or other agreements that in any way affect the rate. Under the evidence, as I view it, this rate and these various contracts and agreement were never filed properly, within the contemplation of the statute. It is true, the Power Commission, by orders, permitted the filing of the rates that had been withheld from the record and been in force between these parties for as long as two years, if I recall correctly. They permitted the filing of the rate without the filing of other contracts or agreements or charges or information which, under the contemplation of the law, should have been filed. There is no explanation in the evidence, so far as I am able to recall it, which would in [anyway] tend to excuse or justify the defendant company in withholding from the Power Commission, the rate and contracts affecting it, for a period of two years. That is contrary to the real purpose and intent of the law that a thing like that should occur. The fact that the rates were filed in this haphazard manner, coupled with the fact that the necessary information which should have accompanied them was not filed before the Commission, notwithstanding the fact that the Commission, under specific authority granted to it by the Power Act authorized the filing of the various instruments, some of them at least, at a specified time after they went into effect, contrary to the whole spirit and purpose of the Power Act.

That fact in itself, when you take into consideration that it was a rate, established and promulgated in transactions between two or more corporations which were managed and operated by the same board of directors, is enough to create a presumption of unfair dealing.

As I indicated to counsel a few moments ago, I have no thought that any of the men who were directors and officers of the defendant company, who participated in these contracts and agreements were guilty of any lack of personal integrity or personal honor. That is not the question. The question is not whether these men were honest, or whether they were self-respecting citizens. The question is whether or not the rates which they promulgated and which were put into operation by them between these companies, the contracts which were entered into by these companies, whether or not those contracts were absolutely fair and reasonable in every way; whether or not they gave to one of the companies an unfair advantage over another; whether or not one of the companies by the promulgation of these rates and contracts profited materially to the disadvantage of the other company. That is the question before the Court.

Under the facts in this case, as I view them, Gentlemen, I cannot come to any other conclusion in the matter than that these contracts were entered into by this joint board of directors, and that the result of that was of material advantage to the defendant company and to the disadvantage of the predecessors of the plaintiff in this case.

It is argued that all of these acts were permitted, ratified and approved by Mr. White. Mr. White must have been a very busy man. As I recall the evidence, he had charge not only of the operations involved in this suit of some two or three public service corporations who were engaged in the manufacture and distribution of electric energy over a wide stretch of territory, but he had some six or seven public utilities companies under his charge and supervision. The evidence shows that he made several visits to this territory; that he talked to the officers of the company; that he talked to men employed, and [gain] such information as anyone would be expected to gain by that visit and talking with these men, but I don't think that he had that intimate understanding and knowledge of the transactions or details that would enable him to approve a contract in such a way as to be of very much benefit to anybody. Mr. White, as I say, was engaged in the management of some six or seven corporations, all held by the same holding company,

United Public Utilities Corporation. I have no doubt but what Mr. White used his best judgment and his energies in an effort to so conduct those companies as to produce for the holding company, United Public Utilities, the greatest profit that he could, but I am convinced from the evidence in this case that in passing upon the conduct of these joint directors and officers in the transactions between the corporations which were controlled by them and which were operated by them, that he also had in mind the benefit which might accrue to some other corporation that he had. The evidence shows that nothwithstanding the fact that he knew that the production of electricity at Beulah was being sold to the Northwestern Public Service Company at a rate which exceeded the cost of production, that he was anxious that they run to capacity because it benefitted the Knife River Coal Company, and Knife River Coal Company, if he could keep that plant running 24 hours a day, and they furnished all of the coal, the Knife River Coal Company could dispose of coal which otherwise might be surplus.

I don't think Mr. White had that particular interest in the welfare of the individual corporation involved in this case that he had in the success of the aggregate of the corporations which were under his control, and even if he did, I don't think Mr. White's approval or disapproval of the conduct of the Board of Directors of these northern companies has anything to do with it.

The officers of the northern companies were the officers charged with the duty of operating this corporation. There is nothing in the law that I know of that made it necessary for Mr. White to approve or disapprove of their conduct. His board of directors, as he calls them, the Board of Directors of the holding company, United Public Utilities Co., knew nothing about the transactions between the companies involved in this law suit, or their predecessors, except what Mr. White told them. Mr. White knew nothing about it except what somebody connected with the transactions involved in this law suit told him. I don't regard the approval of the United Public Utilities Co. as in any material way affecting the equities in this case.

It is true the record shows the whole board of directors

of the United Public Utilities Co. came out to South Dakota once and looked these properties over. I don't know how much time they put in; how much in detail they went in the examination of the records, or manner in which it was conducted and contracts entered into or contemplated at that time. I don't recall that the record indicates how long they stayed here; whether they were out here primarily as a vacation or whether they came out to find out what they could about the plant. I only know that as a matter of common knowledge it is not unusual for a board of directors of a big holding company like this to plan a trip to San Francisco to a Worlds Fair, where they can transact some company business. I have heard of a board of directors of a corporation planning a trip to South Dakota during the pheasant season. I don't know what these men came out here for, but there isn't anything connected with their trip out here, as far as the record goes, that shows they found out anything particularly about the conduct of these corporations. So I don't think their approval in any way affected the activities of any of the companies.

As I say, there is no contest, as I recall it, as to the figures affecting the amount which it is claimed by the plaintiff was wrongfully collected by the defendant. The only question in dispute then would be as to whether or not these rates and contracts were unfair and unreasonable; whether or not they have been properly and duly filed with the Power Commission. From the evidence, I can't view it in any other way than that the contracts that were entered into, the rates and schedules and everything that was entered into, operated by this joint board of directors and officers, primarily were of material benefit to the defendant company and to the material detriment of the plaintiff's predecessors.

As I say, I don't think any further study would change my mind in regard to it.

It is the judgment of the Court that the plaintiff shall recover, and upon presentation of findings and judgment to that effect, the same will be signed and entered of record.

Mr. Woods: We would like to have a little time to make some requests for findings and conclusions.

The Court: That is entirely satisfactory to me. You may have until September 15th. We will set it for that date or as soon thereafter as counsel can be heard.

(Indorsed)—Filed Aug. 27, 1948, Roy B. Marker, Clerk. By Helen S. Lambert, Deputy.

Requests by Defendant, Northwestern Public Service Company, for Findings of Fact and Conclusions of Law.

Now comes defendant, Northwestern Public Service Company, pursuant to leave of Court and respectfully submits the following findings of fact and conclusions of law and requests that the Court adopt and enter each of said findings of fact and each of said conclusions of law as the findings of fact and conclusions of law of the Court in this cause.

Findings of Fact.

I. *Findings Applicable to All Causes of Action.*

1. Plaintiff was prior to the commencement of this action and at all times thereafter has been and now is a Delaware corporation and a citizen of said state, continuously qualified as a foreign corporation in the State of South Dakota since June 27, 1935 and in the State of North Dakota since July 2, 1935.

2. Defendant was prior to the commencement of this action and at all times thereafter has been and now is a Delaware corporation and a citizen of said state and has been continuously qualified to do business in the State of South Dakota since December 23, 1923.

3. The amount in controversy in each of the ten causes of action in the complaint, as amended, exclusive of interest and costs, exceeds $3,000, except that the amount in controversy in each of the seventh and eighth causes of action does not exceed $3,000, exclusive of interests and costs.

4. Northern Power & Light Company (hereinafter called "Northern") was a Delaware corporation continuously

from prior to January 1, 1928, to July 1, 1939 and was qualified to do business in the states of N 'h Dakota and South Dakota during said period.

5. North Dakota Power & Light Company (hereinafter called "North Dakota") was a Delaware corporation continuously from prior to January 1, 1928 to July 1, 1939 and was qualified to do business in the State of North Dakota during said period.

6. On July 1, 1939 Northern and North Dakota, pursuant to the laws of the State of Delaware, merged into one corporation, the surviving corporation being North Dakota, which changed its name in said merger proceedings to Dakota Public Service Company (hereinafter called "Dakota").

7. From July 1, 1939 to and after October 19, 1945 Dakota was a Delaware corporation, and since July 13, 1939 and to and after October 19, 1945 was qualified as a foreign corporation in the State of South Dakota and since July 1, 1939 and to and after October 19, 1945, in the State of North Dakota.

8. Pursuant to the terms of said merger, Dakota became the owner of all the public utility business of Northern, in addition to the properties on the date of said merger owned by North Dakota; and thereafter Dakota owned and operated as a public utility the properties formerly owned by it (as North Dakota) and the properties on the date of said merger owned by Northern.

9. The corporation laws of the State of Delaware provide that when two corporations of said state merge pursuant to the provisions of said corporation laws, then the surviving corporation shall, among other things, be subject to all of the restrictions, disabilities and duties of each of the corporations so merged; and, further, that in the case of such merger all debts, liabilities and duties of the respective constituent corporations shall upon said merger attach to the surviving corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

10. The following persons were directors and officers of defendant and at the same time directors and officers of

Dated at Deadwood, South Dakota, this 15th day of September, 1948.

By the Court:

A. LEE WYMAN,
Judge.

Attest:

ROY B. MARKER, (Seal of Court)
Clerk.

(Indorsed)—Filed Sept. 15, 1948. Roy B. Marker, Clerk.

(Memorandum relating to Order of District Court fixing Amount of Bond on Appeal, and depositing amount thereof in Cash by Defendant with Clerk of District Court.)

On September 20, 1948, the District Court entered its order fixing the security for stay and supersedeas upon appeal in the amount of $780,000.00, which amount was deposited in cash by defendant with the Clerk of the District Court on September 22, 1948.

(Motion of Defendant to Amend and Supplement Findings of Fact, Conclusions of Law and Judgment of District Court.)

Under date of September 24, 1948, defendant served and filed its Motion to Amend and Supplement the Findings of Fact and Conclusions of Law made by the District Court and to Amend Judgment thereof. By this motion defendant resubmitted to the consideration of the District Court the points and matters included in its Request for Findings of Fact and Conclusions of Law filed on September 15, 1948, and in its Motion to Dismiss the action for want of jurisdiction over the subject matter (R. p. 1888 and 106, supra).

(Order denying Motion of Defendant to Amend and Supplement Findings of Fact and Conclusions of Law and Judgment, October 5, 1948.)

The defendant's Motion to Amend and Supplement Findings of Fact and Conclusions of Law and to amend the Judgment herein came on for hearing before this Court in the Federal Building in Pierre, Hughes County, South Dakota, on October 5th, 1948, at 10 o'clock A. M., the parties appearing by their attorneys of record. The Court being fully advised in the premises it is,

Ordered,

That defendant's Motion be and the same is hereby denied.

Done in Open Court this 5th day of October, 1948.

By the Court:

A. LEE WYMAN,
Judge.

Attest:

ROY B. MARKER,
Clerk.

(Seal of Court)

(Indorsed)—Filed Oct. 5, 1948. Roy B. Marker, Clerk.

(Motion of Plaintiff to further Amend its Amended Complaint to conform to the Evidence, Findings of Fact, Conclusions of Law and Judgment.)

Comes now the plaintiff in the above entitled cause and moves the Court for leave to further amend its heretofore amended complaint on the ground that the amendments included in this motion will render said complaint conformable to the evidence, the findings of fact and the conclusions of law herein and the judgment herein, and accordingly moves that the aforesaid complaint be amended in the following particulars, to-wit:

1. By inserting in paragraph IX of the first cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Northern Power and Light Company which defendant, through its Board of Directors and officers, had caused said Northern Power and Light Company to enter into with defendant, and such agreement provided, among other things, that Northern Power and Light Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Northern Power and Light Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

2. By inserting in paragraph III of the third cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Northern Power and Light Company which defendant, through its Board of Directors and officers, had caused said Northern Power and Light Company to enter into with defendant, and such agreement provided, among other things,

that Northern Power and Light Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Northern Power and Light Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

3. By inserting in paragraph VI of the fourth cause of action of plaintiff's original complaint, immediately following the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Dakota Public Service Company which defendant, through its Board of Directors and officers, had caused said Dakota Public Service Company to enter into with defendant, and such agreement provided, among other things, that Dakota Public Service Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement for the payment of the portion of the salaries and expenses of load dispatchers and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Dakota Public Service Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defend-

ant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

4. By inserting in paragraph III of the fifth cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Dakota Public Service Company which defendant, through its Board of Directors and officers, had caused said Dakota Public Service Company to enter into with defendant, and such agreement provided, among other things, that Dakota Public Service Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement for the payment of the portion of the salaries and expenses of load dispatchers and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Dakota Public Service Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

5. By inserting in paragraph III of the sixth cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Dakota Public Service Company which defendant, through its Board of Directors and officers, had caused said Dakota Public Service Company to enter into with defendant, and such agreement provided, among other things, that Dakota Public Service Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement for the payment of the portion of the salaries and expenses of load dispatchers and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Dakota Public Service Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

Dated September 25, 1948.

PAT MORRISON,
Mobridge, South Dakota,
H. F. FELLOWS,
Rapid City, South Dakota,
JOHN C. BENSON,
Minneapolis, Minnesota,
Attorneys for Plaintiff.

Notice of Motion to the Defendant Above Named and Its Attorneys.

Please Take Notice That the above motion will be brought on for hearing before the above named Court at the Court Room thereof in the United States Court and Post Office Building at Pierre, South Dakota, on the 5th day of October, 1948, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard.

Dated September 25, 1948.

PAT MORRISON,
Mobridge, South Dakota,
H. F. FELLOWS,
Rapid City, South Dakota,
JOHN C. BENSON,
Minneapolis, Minnesota,
Attorneys for Plaintiff.

(Indorsed)—Filed Oct. 5, 1948. Roy B. Marker, Clerk.

(Objections of Defendant to Motion of Plaintiff to Further Amend Its Amended Complaint, etc.)

Now comes the defendant in the above entitled cause and objects to the motion heretofore filed herein by plaintiff seeking leave to further amend the amended complaint on the ground that the amendments included in said motion will render said complaint conformable to the evidence, the findings of fact, the conclusions of law and the judgment heretofore entered herein for the following reasons, to-wit:

1. The Federal Rules of Civil Procedure do not permit pleadings to be amended in order to conform to the findings of fact and the conclusions of law entered by the court; nor to conform to the judgment rendered by the court. Said Rules restrict the right to amend after judgment to "conform to the evidence" (Rule 15 (b)).

2. The proposed amendments to plaintiff's amended complaint do not conform to the evidence for the following reasons:

(a) The proposed amendment of Paragraph IX of the First Cause of Action of plaintiff's original complaint does not conform to the evidence in the following particulars, to-wit: There is no proof in the record that at all times mentioned in plaintiff's First Cause of Action subsequent to January 1, 1936 there was in existence an agreement between defendant and Northern Power and Light Company which defendant, through its Board of Directors and officers, had caused Northern Power and Light Company to enter into with defendant; nor that any agreement between said parties provided that Northern Power and Light Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant; nor that any payments were made pursuant to such agreement; nor that such agreement and the payments to the defendant on account of the load dispatchers' salaries and expenses affected the rates and charges made by defendant against Northern Power and Light Company; nor that each schedule, rate and contract alleged in plaintiff's First Cause of Action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with said Commission; nor that each such rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act.

(b) The proposed amendment of Paragraph III of the Third Cause of Action of plaintiff's original complaint does not conform to the evidence for each of the reasons heretofore stated in subparagraph (a) hereof, which reasons are incorporated herein by reference and made a part hereof.

(c) The proposed amendment of Paragraph VI of the Fourth Cause of Action of plaintiff's original complaint does not conform to the evidence for each of the reasons heretofore stated in subparagraph (a) hereof and said reasons are incorporated herein by reference and made a part hereof except that where reference is made to North-

ern Power and Light Company in said subparagraph (a) the same shall refer to Dakota Public Service Company in this subparagraph (c).

(d) The proposed amendment of Paragraph III of the Fifth Cause of Action of plaintiff's original complaint does not conform to the evidence for each of the reasons heretofore stated in subparagraph (a) hereof and said reasons are incorporated herein by reference and made a part hereof except that where reference is made to Northern Power and Light Company in said subparagraph (a) the same shall refer to Dakota Public Service Company in this subparagraph (d).

(e) The proposed amendment of Paragraph III of the Sixth Cause of Action of plaintiff's original complaint does not conform to the evidence for each of the reasons heretofore stated in subparagraph (a) hereof and said reasons are incorporated herein by reference and made a part hereof except that where reference is made to Northern Power and Light Company in said subparagraph (a) the same shall refer to Dakota Public Service Company in this subparagraph (e).

MAX ROYHL,
M. T. WOODS,
FREDRIC H. STAFFORD,
JOHN B. ROBINSON, JR.,
Attorneys for Defendant.

(Indorsed)—Filed Oct. 5, 1948. Roy B. Marker, Clerk.

(Order of District Court Granting Leave to Plaintiff to Amend Complaint, October 5, 1948).

Plaintiff's Motion to amend its complaint coming on to [——] heard before this Court at the Federal Building in Pierre, Hughes County, South Dakota on October 5, 1948, each party appearing by its attorneys of record. The Court being fully advised in the premises, it is,

Ordered,

That plaintiff's Complaint be and is hereby amended in the following particulars, to-wit:

1. By inserting in paragraph IX of the first cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Northern Power and Light Company which defendant through its Board of Directors and officers, had caused said Northern Power and Light Company to enter into with defendant, and such agreement provided, among other things, that Northern Power and Light Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Northern Power and Light Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

2. By inserting in paragraph III of the third cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to Jannary 1, 1936, there was in existence an agreement between defendant and Northern Power and Light Company which defendant, through its Board of Directors and officers, had caused said Northern Power and Light Company to enter into with defendant, and such agreement provided,

among other things, that Northern Power and Light Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Northern Power and Light Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

3. By inserting in paragraph VI of the fourth cause of action of plaintiff's original complaint, immediately following the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Dakota Public Service Company which defendant, through its Board of Directors and officers, had caused said Dakota Public Service Company to enter into with defendant, and such agreement provided, among other things, that Dakota Public Service Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement for the payment of the portion of the salaries and expenses of load dispatchers and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Dakota Public Service Company, as elsewhere alleged in this cause of action, and said agreement was never filed by de-

fendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

4. By inserting in paragraph III of the fifth cause of action of plaintiff's original complaint, immediately preceding the allegations now contained in said paragraph, the following to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Dakota Public Service Company which defendant, through its Board of Directors and officers, had caused said Dakota Public Service Company to enter into with defendant, and such agreement provided, among other things, that Dakota Public Service Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement for the payment of the portion of the salaries and expenses of load dispatchers and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Dakota Public Service Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

5. By inserting in paragraph III of the sixth cause of action of plaintiff's original complaint, immediately pre-

ceding the allegations now contained in said paragraph, the following, to-wit:

"At all times mentioned in this cause of action subsequent to January 1, 1936, there was in existence an agreement between defendant and Dakota Public Service Company, which defendant, through its Board of Directors and officers, had caused said Dakota Public Service Company to enter into with defendant, and such agreement provided, among other things, that Dakota Public Service Company should pay to defendant monthly a portion of the salaries and expenses of the load dispatchers of defendant, and such payments were made pursuant to said agreement. Said agreement for the payment of the portion of the salaries and expenses of load dispatchers and the payments to defendant on account of said load dispatchers' salaries and expenses affected the rates and charges made by defendant against Dakota Public Service Company, as elsewhere alleged in this cause of action, and said agreement was never filed by defendant with the Federal Power Commission, and each schedule, rate and contract alleged in this cause of action to have been filed by defendant with the Federal Power Commission was an incomplete, inaccurate and misleading statement of the rates and charges so alleged to have been filed with the Federal Power Commission, and each such filed rate and charge was filed in violation of the requirements of Section 205 (c) of the Federal Power Act."

Done in open Court this 5th day of October, 1948.

By The Court:

A. LEE WYMAN,
A. L. WYMAN.

Attest:

ROY B. MARKER,
ROY MARKER,
Clerk.

(Seal of Court).

(Indorsed)—Filed Oct. 5, 1948, Roy B. Marker, Clerk.

Notice of Appeal.

Notice is hereby given that Northwestern Public Service Company, defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment dated, filed and entered in the above entitled action on the 15th day of September, 1948, and from the whole thereof.

Dated October 15, 1948.

MAX ROYHL,
Huron, South Dakota,
JOHN B. ROBINSON, JR.,
FREDRIC H. STAFFORD,
Chicago, Illinois,
M. T. WOODS,
Sioux Falls, South Dakota,
Attorneys for Appellant.

(Indorsed)—Filed Oct. 15, 1948. Roy B. Marker, Clerk.

That the following entry was made on the docket in said case showing the name of the party to whom a copy of the Notice of Appeal was sent, in words and figures the following, to-wit:

Oct. 15, 1948. Copy of Notice of Appeal mailed to John C. Benson, one of Plff's Attys., [Minnespolis], Minn.

Transcript of Record from U. S. District Court was filed in the United States Court of Appeals on December 20, 1948.

Application of Appellant for an Order of Leave Not to Print Certain Exhibits.

In the
United States Court of Appeals
for the Eighth Circuit.

Northwestern Public Service Company,
Appellant,

v.

Montana-Dakota Utilities Company,
Appellee.

No. 13887

Comes now appellant by his attorneys of record and represents and shows to the Court:

1. That the record below contained several hundred exhibits, all of which have been transmitted to this Honorable Court by the District Court; that some of those exhibits are quite voluminous and that, pursuant to stipulation entered into and made by appellant with appellee and filed with this Honorable Court on March 23, 1949, many such exhibits have been summarized and condensed in the printed record; but that there are a few exhibits hereinafter described which do not lend themselves to be summarized or condensed; that it would be very expensive to print or reproduce them in full; that the cost of the printed record exclusive of said exhibits was estimated by the St. Louis Law Printing Company to be in excess of $10,000.00; that said exhibits are very bulky and voluminous, that their inclusion in full in the printed record would encumber an already very voluminous record, at a considerable additional expense to appellant.

2. That appellee has agreed in the aforesaid stipulation, page 120 thereof, that said exhibits should not be fully reproduced in the printed record, but would be available for reference in their original form both to the Court and to counsel in their briefs and arguments.

3. That said exhibits are as follows:

Plaintiff's Exhibit 13 which is a certified copy of the Historical and Cost of Reproduction Appraisals of the Northern Power & Light Co., dated December 31, 1937, and consists of 362 pages of tabulations and other statistical data.

Plaintiff's Exhibit 14 which is a certified copy of the Historical and Cost of Reproduction Appraisal of the North Dakota Power and Light Company dated December 31, 1937, and consisting of 377 pages of tabulations and other statistical data.

Plaintiff's Exhibit 52 which consists of a Report of Sargent & Lundy, Engineers On Proposed increase in generating capacity for the North Dakota Power and Light Co., dated June 26, 1936, consisting of 15 pages and of 21 very large diagrams.

Plaintiff's Exhibit 55-3 which consists of three reports by O. C. Stokke to L. J. Strike, one of 14 pages dated April 8, 1935; one of 9 pages and 4 diagrams dated July 14, 1936; and one of 8 pages and 1 diagram dated December 31, 1935.

Plaintiff's Exhibit 32-14 which is an Engineering Survey of the Combined Properties of Hughes Electric Company, Bismarck, N. D. and Northern Power & Light Company, Mobridge, S. D. by Lucas & Luick, engineers, dated March, 1928, and consists of 149 pages plus index and accompanying letter and includes diagrams and tabulations.

Defendant's Exhibit 55-9 which is a bound volume copy of the Annual Report of defendant to the F. P. C. for the year ending December 31, 1945 filled in with pencil data and consisting of pages 100 to 606, inclusive, with omissions as marked.

Defendant's Exhibit 55-10 which is a similar report for the year ending December 31, 1938.

Defendant's Exhibit 55-11 which is a similar report for the year ending December 31, 1939.

Defendant's Exhibit 55-12 which is a similar report for the year ending December 31, 1940.

Defendant's Exhibit 55-13 which is a similar report for the year ending December 31, 1941.

Defendant's Exhibit 55-14 which is a similar report for the year ending December 31, 1942.

Defendant's Exhibit 55-15 which is a similar report for the year ending December 31, 1943.

Defendant's Exhibit 55-16 which is a similar report for the year ending December 31, 1944.

Defendant's Exhibit 55-17 which is a similar report for the year ending December 31, 1937.

Defendant's Exhibit 333 which consists of a bound volume styled Daily Load Curves 1944-45 and containing several hundred diagrams.

Defendant's Exhibit 334 which consists of a bound volume styled Daily Load Curves 1942-43 and containing several hundred diagrams.

4. That the following exhibits have not been fully reproduced in the printed record, pursuant to the aforesaid stipulation, but that in accordance with the final paragraph of said stipulation, it seems desirable that the Court and the parties herein may be entitled to refer to the originals of the said following exhibits:

Plaintiff's Exhibit 26 which consists of 48 pages of copies of correspondence of defendant with the F. P. C., with attached certificate of the Secretary of the F. P. C.

Plaintiff's Exhibit 34 which consists of 40 pages of copies of correspondence of defendant, Martens & Goldsmith with the F. P. C., with attached certificate of the Secretary of the F. P. C.

Defendant's Exhibit 340 which is a Supplement to Interchange Capacity Agreement dated February 8, 1939 and consisting of 3 pages.

Defendant's Exhibit 341 which consists of 7 pages of ratings of the Committee on Operations applicable to the Contract term beginning January 1st, 1938 and ending January 1, 1939, and are all dated May 10, 1938.

Wherefore, appellant prays this Honorable Court for an order under its Rule 9 (c) authorizing appellant not to print or reproduce as a part of the printed record in this case Plaintiff's Exhibits 13, 14, 26, 34, 52, 55-3 and 82-14; and Defendant's Exhibits 55-9 to 55-17, both inclusive, 333, 334, 340 and 341, as more fully described above, and authorizing both parties to this case to refer to said Exhibits in their original form and to consider said Exhibits as part of the appellate record for all other purposes.

Respectfully submitted,

SIDNEY K. SCHIFF,
MAX ROYHL,
FREDERIC H. STAFFORD,
JACOB M. LASHLY,
PAUL B. RAVA,
Attorneys for Appellant.

(Endorsed): Filed in United States Court of Appeals on May 17, 1949.

(Order granting Application of Appellant for leave to omit certain exhibits from printed record, etc.)

United States Court of Appeals
for the Eighth Circuit.

No. 13887 May Term, 1949.

Wednesday, May 18, 1949.

Northwestern Public Service Company, a Corporation, Appellant, vs. Montana-Dakota Utilities Co., a Corporation.	Appeal from the United States District Court for the District of South Dakota.

Application has been filed by attorneys for appellant for an order authorizing appellant not to print or reproduce as a part of the printed record Plaintiff's Exhibits 13, 14,

26, 34, 52, 55-3 and 82-14 and Defendant's Exhibits 55-9 to 55-17, both inclusive, 333, 334, 340 and 341, as more fully described in said application, with authority to both parties to this cause to refer to said exhibits in their original form and to consider said exhibits as part of the appellate record for all other purposes. The Court's order is sought because of the great expense to print or reproduce the exhibits and to avoid producing a very voluminous record which without the aforesaid exhibits is very large.

Upon representation made and on the grounds set forth in the application, It is Ordered by the Court that the application and prayer thereof is hereby granted and the said application and this order will be printed as a part of the record for hearing of this appeal.

May 18, 1949.

United States Court of Appeals

EIGHTH CIRCUIT

No. 13,887

CIVIL

NORTHWESTERN PUBLIC SERVICE COMPANY,
A CORPORATION, APPELLANT,

vs.

MONTANA-DAKOTA UTILITIES CO.,
A CORPORATION, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA.

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[fol. 1985] (Appearance of Counsel for Appellant.)

United States Court of Appeals

Eighth Circuit.

Northwestern Public Service Company, a Corporation,
Appellant,
No. 13,887. vs.
Montana-Dakota Utilities Co., a Corporation.

The Clerk will enter my appearance as Counsel for the Appellant.

JACOB M. LASHLY,
705 Olive St.,
St. Louis, 1, Mo.

MAX ROYHL,
Huron, South Dakota.

M. T. WOODS,
Sioux Falls, South Dakota.

FREDERIC H. STAFFORD,

SIDNEY K. SCHIFF,
231 S. LaSalle Street,
Chicago, 4, Illinois.

(Endorsed): Filed in U. S. Court of Appeals, Dec. 29, 1948.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

PAT MORRISON,

H. F. FELLOWS,

JOHN C. BENSON,
1260 Northwestern Bank Building,
Minneapolis 2, Minnesota.

[fol. 1986] (Endorsed): Filed in U. S. Court of Appeals, Dec. 29, 1948.

(Order Granting Leave to Federal Power Commission to file brief as amicus curiae, etc.)

November Term, 1949.

Monday, November 21, 1949.

Petition has been filed in this case by counsel for the Federal Power Commission for leave to file brief and participate in the oral argument as amicus curiae, and was served on counsel for the respective parties on November 10, 1949. No opposition to the petition has been received, and after due consideration It is now here Ordered by the Court that leave be, and is hereby, granted to file the brief as amicus curiae; also a brief in reply to brief of appellee, if desired, and to participate in the oral argument of this case, the time to be fixed by the Court when the case is reached on the calendar.

November 21, 1949.

(Appearance of Counsel for Federal Power Commission, Amicus Curiae.)

The Clerk will enter my appearance as Counsel for the Federal Power Commission, Amicus Curiae.

BRADFORD ROSS,
General Counsel,

HOWARD E. WAHRENBROCK,
Asst. Gen. Counsel,

Federal Power Commission,
Washington, 25, D. C.

(Endorsed): Filed in U. S. Court of Appeals, Jan. 9, 1950.

[fol. 1987] (Order of Submission.)

January Term, 1950.

Monday, January 9, 1950.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Jacob M. Lashly for appellant, continued by Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, for

Federal Power Commission, Amicus Curiae, continued by Mr. John C. Benson for appellee, and concluded by Mr. Jacob M. Lashly for appellant.

Thereupon, this cause was submitted to the Court on the printed record and briefs of counsel filed herein, with leave granted to the Federal Power Commission to file Memorandum of additional citations.

[fol. 1988] (Opinion.)

United States Court of Appeals
For The Eighth Circuit.

No. 13,887.

Northwestern Public Service Company, a Corporation, Appellant,
vs.
Montana-Dakota Utilities Co., a Corporation, Appellee.

Appeal from the United States District Court for the District of South Dakota.

[April 4, 1950.]

Mr. Jacob M. Lashly (Mr. Max Royhl, Mr. Sydney K. Schiff, Mr. Fredric H. Stafford, Mr. Paul B. Rava, Messrs. Pam, Hurd & Reichmann and Messrs. Lashly, Lashly, Miller & Clifford were with him on the brief) for Appellant.

Mr. John C. Benson (Mr. Pat Morrison, Mr. H. F. Fellows, Mr. Rodger L. Nordbye and Messrs. Faegre & Benson were with him on the brief) for Appellee.

Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission (Mr. Bradford Ross, General Counsel, and Mr. Louis W. McKernan, Principal Attorney, Federal Power Commission, were with him on the brief) for Federal Power Commission, Amicus Curiae.

Before SANBORN, THOMAS and JOHNSEN, Circuit Judges.

THOMAS, Circuit Judge, delivered the opinion of the Court.

This is an action brought by appellee as plaintiff in the district court on February 3, 1947, against appellant-defendant to recover damages according to the principles of the common law.

The parties, corporations organized under the laws of Delaware, are both engaged in the electric public utility business, the plaintiff chiefly in North Dakota and the defendant in South Dakota. The plaintiff brings the action as assignee of its predecessors. Prior to July 1, 1939, the Northern Power and Light Company and the North Dakota Power & Light Company, two Delaware corporations, were engaged in the electric public utility business in North Dakota. On the date named the two corporations merged into one corporation under the name of Dakota Public Service Corporation, which by the terms of the merger became the owner of the business and properties of its two predecessors. On October 19, 1945, the Dakota Public Service Company assigned to Montana-Dakota Utilities Co., plaintiff here, all claims, demands, and causes of action which it had against defendant.

Federal jurisdiction is based upon § 1331 of Title 28, U.S.C.A., upon the theory that the action arises under the "... laws of the United States", namely, the Federal Power Act, 16 U.S.C.A. § 824, et seq.

The controversy involves the period from September 1, 1935, to October 19, 1945. During this period plaintiff's predecessors and defendant operated under joint management in contiguous territory, and their lines were interconnected at several points. They entered into contracts for the exchange of electric energy and for the allocation of joint expenses. In this action plaintiff seeks to recover from defendant alleged unreasonable rates and charges for electric energy in interstate commerce at wholesale exacted from its predecessors by defendant in violation of the Federal Power Act; and to recover, also, the difference between amounts alleged to have been paid by defendant to such predecessors for electric energy and the reasonable costs of such energy on the ground that all such underpayments were in violation of the Federal Power Act. It is also alleged that all such excessive payments exacted from plaintiff's predecessors and such underpayments by defendant to such predecessors were fraudulent and unlawful.

The fraud charged was alleged to consist of (1) the exaction of unreasonable rates and charges by defendant through the medium of common officers and directors of defendant and of plaintiff's predecessors and (2) the improper filing by defendant of some rate schedules and the belated filing of others.

The record shows that all of the contracts for the interchange of electrical energy between defendant and plaintiff's predecessors fixed rates based upon per kilowatt hour service, and that such contracts were all filed by both defendant and plaintiff's predecessors with the Federal Power Commission, although some of them were filed after they had been put into effect. But they were all approved as filed by the Commission. Certain agreements for allocation of joint management expenses were not filed on the assumption that they did not affect rates.

The defendant, prior to the trial, moved the court to dismiss the complaint for want of jurisdiction over the subject matter, asserting *inter alia* that the "alleged cause of action does not really and substantially involve a dispute or controversy respecting the validity, construction or effect of the Constitution or laws of the United States nor does a determination of this suit depend thereon."

The motion was overruled; the case was tried to the court without a jury; findings of fact and conclusions of law were filed by the court and judgment rendered for plaintiff and against defendant for the total sum of $779,958.30. The judgment consisted of

(1) $229,214.46 representing the amount by which the defendant had paid less for electric energy delivered to it from 1935 to 1945 at the filed rate than the court determined would have been a "just and reasonable" rate, plus $82,417.85 interest.

(2) $196,021.51, interconnection rental charges received by defendant under an agreement filed as defendant's Rate Schedules FPC Nos. 3, 5A, 6, and supplement 1, plus $91,340.18 interest.

(3) $111,665.05, interchange capacity charges received by defendant under agreements filed as defendant's Rate Schedules FPC Nos. 4 and 6, and supplement No. 1, plus $43,866.13 interest.

(4) $19,214.76 received by defendant as reimbursement for a share of dispatching services initially paid for by it, pursuant to a joint management agreement not filed, plus $6,213.38 interest.

The defendant-appellant contends, first, that the court erred in refusing to dismiss the complaint for lack of jurisdiction over the subject matter in that under the applicable statute jurisdiction over electrical utility rates in inter-

state commerce is vested exclusively in the Federal Power Commission.

The plaintiff in its brief contends that the court had jurisdiction to adjudicate its claims under the Federal Power Act because the rates and charges sought to be recovered were collected in violation of § 205 of the Federal Power Act (16 U.S.C.A. 824d), in that (1) Section 205(a) of the Act declares that all unjust and unreasonable rates and charges are unlawful, and the rates and charges in dispute are alleged to be unjust and unreasonable; and (2) the rates in issue were illegal because defendant failed to comply with the filing provisions of § 205(d) of the Act.

The pertinent parts of § 205 (16 U.S.C.A. 824d) are:

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall . . . (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, . . .

"(c) . . . every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

"(d) . . . no change shall be made by any public utility in any such rate, charge, classification or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public . . . [But] The Commission, for good cause shown, may allow changes to take effect without requiring the thirty

days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

And subsection (e) provides that "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative" upon reasonable notice to enter upon a hearing and to make such orders as it finds to be justified.

The district court, we think, erred in assuming that because the complaint alleged that the rates and charges in issue were unjust and unreasonable it had power to determine just and reasonable rates, and if the filed rates were found to be unreasonable to declare them unlawful and grant reparations under § 205, supra. Nowhere does the Act give the district court power to determine just and reasonable rates; that power is given to the Commission exclusively. Section 314 (16 U.S.C.A. § 825m(a)) provides that the Commission may bring an action in the proper court of the United States to enjoin violations of the Act and to enforce compliance with the Act or any rule, regulation or order of the Commission; and § 317 (16 U.S.C.A. §825p) provides that such actions may be brought in the district courts of the United States. The statute does not imply that aggrieved parties may bring such actions. See *Civil Aeronautics Board* v. *Modern Air Transport, Inc.*, 2 Cir., 179 F.2d 622, 624, 625, and cases cited.

The plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act, and decisions under the latter Act should be controlling here. This is especially true since the enactment of the Administrative Procedure Act. *United States* v. *Jones*, 336 U.S. 641, 672. It is well settled that the reasonableness of rates will not be considered by the courts before application has been

made to the Commission. The rates filed and approved by the Commission are the lawful rates until changed in the way provided by the Act. *Texas and Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U.S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U.S. 247; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557; *Terminal R. R. Assn.* v. *United States*, 266 U.S. 17, 31; *United States* v. *I. C. C.*, 337 U.S. 426, 437; *Backus-Brooks Co.* v. *Northern Pac. Ry. Co.*, 8 Cir., 21 F.2d 4; *Chicago, I. & L. Ry. Co.* v. *International Milling Co.*, 8 Cir., 43 F.2d 93; *Woodrich* v. *Northern Pac. Ry. Co.*, 8 Cir., 71 F.2d 732; *Watab Paper Co.* v. *Northern Pac. Ry. Co.*, 8 Cir., 154 F.2d 436; *Civil Aeronautics Board* v. *Modern Air Transport, Inc.*, *supra*.

In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, at page 291, the Supreme Court said:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

Moreover, the transmission of electric energy being at wholesale and interstate, the seller must collect the charge named in the filed rate and the purchaser must pay that rate. So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike. *Texas & Pac. Ry. Co.* v. *Cisco Oil Mill*, 204 U.S. 449; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 197; *Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.*, 8 Cir., 25 F.2d 66, 68.

Plaintiff's further contentions that the rates in issue were unlawful are without merit in view of our conclusion that upon proper complaint under the Federal Power Act the Commission had jurisdiction and was the proper tribunal in the first instance to determine all such contentions. In brief, those contentions are that the rates were illegal because defendant failed to comply with the filing provisions of the Act; that thirty days' notice of filing as required by § 205(d) was not given; that the power, if it exists, to cure the defect in filing was nullified by the fraud of the defendant; and that defendant's acts were fraudulent because defendant and plaintiff's predecessors had common officers.

None of these contentions, however, defeated the jurisdiction of the Commission. They are in substance of the same effect as were the contentions of plaintiff in the case of *Watab Paper Co.* v. *Northern Pac. Ry. Co.*, *supra*, as enumerated on page 437 of the report. This court held there that the Commission had jurisdiction to hear and determine all the issues, and concluded: "Manifestly, if the Commission had such jurisdiction, it had jurisdiction to reach either a correct or an incorrect decision, but whether correct or incorrect its determination could not be at-

tacked collaterally as in this proceeding attempted." The situation is equally true here. Had the case been submitted to the Federal Power Commission, the statute, § 313(b) (16 U.S.C.A. § 825*l*(b)), gave to the plaintiff a right of appeal to the United States Court of Appeals.

Jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past as well as in the present is vested not in the district court, but in the Commission by § 307 (16 U.S.C.A. §825f), wherein it is provided that "The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, . . . The Commission may permit any person to file with it a statement in writing . . . as to any or all facts and circumstances concerning a matter which may be the subject of investigation . . ." The Commission by § 309 (16 U.S.C.A. § 825h) is empowered to make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act. The Commission can, no doubt, correct its own mistakes. In case a complainant is aggrieved by the decision of the Commission its remedy is by appeal under § 313(b), supra. It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed . . . injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 543.

For the foregoing reasons the judgment appealed from is reversed with instructions to dismiss the complaint.

[fol. 1998] (Judgment.)

United States Court of Appeals
for the Eighth Circuit.

March Term, 1950.

Tuesday, April 4, 1950.

Northwestern Public Service Company,
a corporation, Appellant,
No. 13,887. vs.
Montana-Dakota Utilities Co., a Corporation.

Appeal from the United States District Court
for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed with costs; and that the Northwestern Public Service Company, a corporation, have and recover against the Montana-Dakota Utilities Co., a corporation, the sum of.....Dollars for its costs in this behalf expended, and have execution therefor.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with instructions to dismiss the Complaint.

April 4, 1950.

[fol. 1999] (Stipulation for Release by District Court of Cash Security on Supersedeas and for Stay of Issuance of Mandate to May 15, 1950.)

It is hereby stipulated and agreed by and between the parties hereto, by their attorneys of record herein:

1. That mandate pursuant to judgment entered into by this Court in this cause on April 4, 1950, will be stayed until May 15, 1950, inclusive; provided that if, within such stay there is filed with the Clerk of this Court the certif-

icate of the Clerk of the United States Supreme Court that the petition for certiorari, record and brief have been filed, such stay shall continue until final disposition by the Supreme Court, and nothing herein contained shall be construed to limit the power of the Court of Appeals to grant further stays herein.

2. That the sum of Seven Hundred Eighty Thousand Dollars ($780,000.00), which amount was deposited in cash by appellant with the Clerk of the United States District Court in Sioux Falls on September 22, 1948, pursuant to order entered by that Court on September 20, 1948, fixing the security for stay and supersedeas upon appeal in said amount, shall be released forthwith by said District Court and delivered by it to appellant; and plaintiff-appellee stipulates that although said cash bond is taken down as contemplated by this stipulation, plaintiff-appellee will not levy any execution on the judgment entered in the said District Court on September 15, 1948, unless or until said judgment shall be finally affirmed in whole or in part.

Dated April 15, 1950.

[fol. 2000]

JACOB M. LASHLY,
SYDNEY K. SCHIFF,
MAX ROYHL,
Attorneys for Appellant.

PAT MORRISON,
H. F. FELLOWS,
JOHN C. BENSON,
Attorneys for Appellee.

(Endorsed): Filed in U. S. Court of Appeals, April 17, 1950.

(Order directing District Court to release Cash Security on Supersedeas, etc.)

March Term, 1950.

Monday, April 17, 1950.

Whereas, on September 15, 1948, the United States District Court for the District of South Dakota entered judg-

ment in favor of Montana-Dakota Utilities Co., a corporation, plaintiff-appellee, and against Northwestern Public Service Company, a corporation, defendant-appellant, for the sum of $779,958.30 principal and interest, together with the further sum of $1,781.41, costs and disbursements to be taxed;

Whereas, on September 20, 1948, said District Court entered its order fixing the security for stay and supersedeas upon appeal in the amount of $780,000.00, which amount was deposited in cash by defendant-appellant with the Clerk of said District Court on September 22, 1948;

[fol. 2001] Whereas, upon appeal by defendant-appellant, this Court on April 4, 1950, entered its judgment reversing the aforesaid judgment of said District Court of September 15, 1948, with instructions to dismiss the complaint herein; and

Whereas, the parties hereto have filed with this Court a stipulation dated April 15, 1950, whereby they agree that mandate pursuant to the judgment entered into by this Court in this cause on April 4, 1950, will be stayed until May 15, 1950, pending the preparation by appellee of petition for certiorari to the United States Supreme Court, and that the aforesaid sum of $780,000.00 deposited in cash by defendant-appellant with the Clerk of the said District Court be released by said Court and delivered by it to defendant-appellant;

Now, Therefore, It is hereby ordered and decreed by this Court, that notwithstanding the stay of the mandate, said District Court make an order appropriate under the circumstances and thereby release forthwith to defendant-appellant the sum of Seven Hundred Eighty Thousand Dollars ($780,000.00) which was deposited in cash by defendant-appellant with the Clerk of said Court on September 22, 1948.

April 17, 1950.

[fol. 2002] (Order Staying Issuance of Mandate until May 15, 1950, etc.)

March Term, 1950.

Tuesday, April 25, 1950.

In pursuance of stipulation of parties, the issuance of the mandate of this Court in this cause is hereby stayed until May 15, 1950, and if on or before said date there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 25, 1950.

[fol. 2003] (Clerk's Certificate.)

United States Court of Appeals

Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of six volumes contains printed record composed of five volumes, Volume I consisting of pages a to 496, inclusive, Volume II consisting of pages 497 to 736, inclusive, Volume III consisting of pages 737 to 1008, inclusive, Volume IV consisting of pages 1009 to 1488, inclusive, and Volume V consisting of pages 1489 to 1984, inclusive, on which the appeal from the United States District Court for the District of South Dakota was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, composed of one volume, Volume VI, consisting of pages 1985 to 2003, inclusive, except the full captions, titles and endorsements

omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein Northwestern Public Service Company, a Corporation, was Appellant and Montana-Dakota Utilities Co., a Corporation, was Appellee, No. 13,887.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 27th day of April, A. D. 1950.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 2004] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 77

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office-Supreme Court, U. S.
FILED
MAY 17 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

upreme Court of the United States

OCTOBER TERM, [illegible]. 1950

No. [illegible]77

MONTANA-DAKOTA UTILITIES CO.,
a corporation,

Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a corporation,

Respondent.

ETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

WILLIAM D. MITCHELL,
New York, New York,

JOHN C. BENSON,
Minneapolis, Minnesota,

H. F. FELLOWS,
Rapid City, South Dakota,

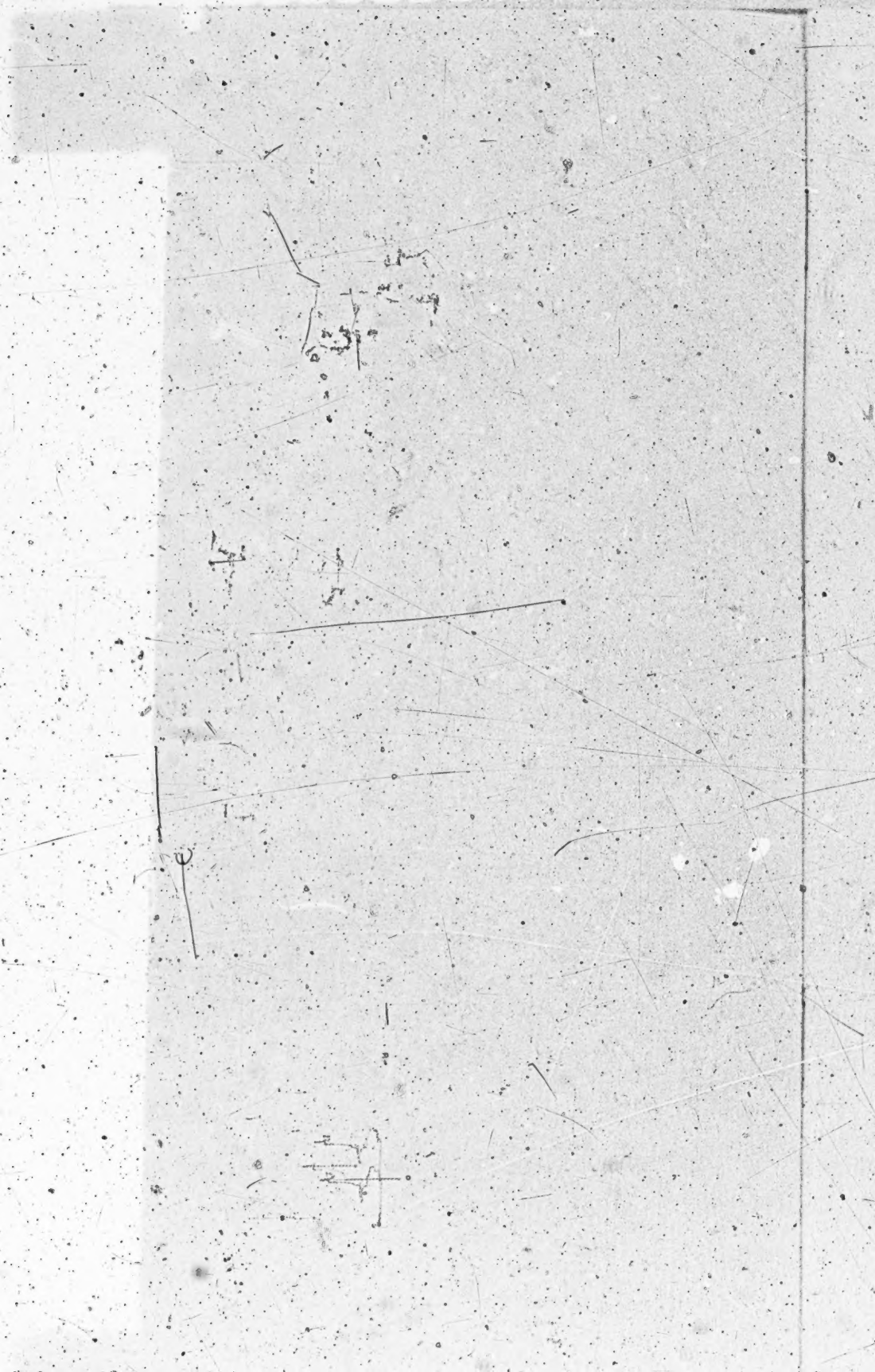
Counsel for Petitioner.

AT MORRISON,
Mobridge, South Dakota,

AEGRE & BENSON,
ODGER L. NORDBYE,
Minneapolis, Minnesota,

Of Counsel.

THE COURT PRESS, N. Y. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

MONTANA-DAKOTA UTILITIES CO.,
a corporation,

Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF.

PETITION.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause (VI,* 1996).

JURISDICTION.

The judgment of the Court of Appeals was entered April 4, 1950.

Jurisdiction to issue the writ rests on Title 28, United States Code, Sec. 1254. See also Sec. 825p of

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* Roman numerals in parenthesis indicate Record volume.

the Power Act, which gives United States District Courts "exclusive" jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by * * * this chapter," and makes the judgments of the District Courts reviewable by appeal to the Courts of Appeals, and by this Court on certiorari to the Courts of Appeals.

Statement.

This case arises under that part of the Power Act effective August 26, 1935, which gave to the Federal Power Commission authority over the transmission in interstate commerce and the sale at wholesale of electric energy. It involves questions as to the extent of the authority of the Commission to deal with the reasonableness of past rates and charges. The Commission's exclusive authority to fix rates and charges for the future is clear, and as that is a legislative function it cannot be exercised by any court, but Congress deliberately withheld from the Commission the power to grant reparations for past exactions. In that respect the Power Act is unlike the Interstate Commerce Act. The question is whether the Commission has authority to examine and make findings as to the reasonableness of past rates and charges as a basis for recovering in the United States District Court excessive and unreasonably high charges collected or unreasonably low payments made in the past, and whether resort to the Commission to find the facts must be had before resort to the courts.

The action was begun February 3, 1947 (I, 1) in the United States District Court for the District of South Dakota by petitioner as plaintiff, to recover for alleged overcharges by the defendant for services

rendered by it to some corporations to whose rights plaintiff succeeded October 19, 1945, and for underpayments by defendant to the plaintiff's predecessors for electric power transmitted by plaintiff's predecessor corporations and sold to defendant at wholesale for the period from September 1, 1935, to October 19, 1945. The complaint with amendments (I, 1-105, 173-186; V, 1879-1883, 1967-1978) alleged that the rates and charges complained of were unreasonable and therefore unlawful under Sec. 824d(a) of the Power Act, which provides:

> "*Sec. 824d Rates and charges; schedules; suspension of new rates.*—(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Involving, as the plaintiff's claim did, the reasonableness of charges for a past period, the defendant moved (I, 106) in the District Court to dismiss the case for want of "jurisdiction" asserting that the Power Commission has not only "primary" but exclusive jurisdiction to pass on the question of reasonableness of rates and consequently the District Court could not entertain an action which required it to determine the reasonableness of past rates; and that the plaintiff had not first exhausted its administrative remedies by applying to the Power Commission for relief (III, 995).

The District Court refused to dismiss (I, 112) hold-

ing that Congress had not given any power to the Commission to determine the reasonableness of past rates or grant reparations, but only to fix future rates and that the Power Act did not divest the District Courts of their jurisdiction granted by Title 28, Sec. 41, U. S. C. (now United States Code, Secs. 1331, 1337), over cases arising under laws of the United States. It then proceeded to trial on the merits without a jury, made findings (V, 1930-1965) and entered judgment for the principal sum of $556,120.76, together with interest to date of trial, making a total of $779,958.30 (V, 1965).

As the transactions between the corporations were at wholesale and required physical connections between their lines for interchange of electric energy, the rates and charges involved were fixed in contracts between them and did not affect other persons or corporations, and after the Power Act took effect August 26, 1935, the parties adopted the practice of filing these contracts with the Commission to disclose the rates and charges. The case is peculiar in that it involves not only unreasonably high charges by defendant for services it rendered, but unreasonably low rates paid by defendant for electric energy delivered to defendant. Although the contracts provided for the same price per kilowatt for electric energy whichever way it flowed, the amount of energy delivered to defendant was larger than what flowed the other way, and the largest item of recovery in the case was because of that.

On appeal by the defendant the Court of Appeals, without passing on the merits, held that the Power Act gave to the Commission primary and exclusive jurisdiction over the question of reasonableness of the rates, both past and future, and also that the plaintiff had not exhausted its administrative remedies

by applying to the Commission for relief, and reversed the judgment and ordered the District Court to dismiss the case.

It was charged in the complaint, and the District Court found, that the petitioner's predecessor corporations (to whose rights the plaintiff succeeded on October 19, 1945) (I, 12) had been dominated by officers and a board of directors who were also the officers and directors of the defendant during the period from 1935 to October 1945, and it was by means of that domination that plaintiff's predecessors in interest had been overreached by the defendant and subjected to unreasonable rates and charges. That domination had also the effect of preventing those predecessors from taking any steps for relief before the Commission or otherwise until the acquisition by petitioner in October 1945 of the assets of the predecessors vested the claims asserted in the complaint in a free agent with a new management and an independent board of directors, in a position to resort to either the Commission or the courts for such relief as either could grant.

The petitioner on August 12, 1946, filed a complaint with the Commission charging the existing rates to be unreasonable and asked for new rates *for the future* (I, 149). The complaint never came to a hearing because new schedules acceptable to the plaintiff were filed and the Commission then dismissed the complaint as moot (V, 1876) saying:

> "(e) By the terms of the agreement filed August 20, 1947, the issues involved in the complaint, as amended, have become merely moot and the public interest will be served by dismissing the same."

The petitioner did not then or since ask the Commission for any relief or action as to the unreasonable rates and charges in force from 1935 to 1945. The Commission had already conceded it had no power to grant reparations. *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. (2d) 388, 389; *Cleveland and Akron* v. *Hope Natural Gas Co.*, 44 P. U. R. (N. S.) 1, 33; *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. (2d) 287, 310-311 (1943) s. c. 320 U. S. 591, 618, January 3, 1944.

In the *Memphis* case the Commission had also held it was without authority to make findings as to past rates for use in an action to recover reparations pending in a District Court.

In the *Hope* case this Court said (p. 618):

> "It is conceded that under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. However that may be, we do not think that these findings were reviewable under § 19 (b) of the Act." That section provided for review by a Court of Appeals of "orders".

The United States Court of Appeals for the Fourth Circuit had held in *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. (2d) 287, that under the Natural Gas Act, which is substantially identical with subchapter II of the Power Act in the respects here pertinent (see Section 717c, 717d, Natural Gas Act,

15 U. S. Code, Chapter 15B) the Power Commission not only had no authority to grant reparation orders, but had no authority to examine into the reasonableness of past rates or make findings on that question. The obvious course for the petitioner was to resort to the United States District Court which under Section 825p is given "exclusive" jurisdiction (thus eliminating resort to state courts) of all controversies under the Power Act, excepting review of "orders" which are taken directly to the United States Court of Appeals for review [Section 825l (b)].

The Statutes.

The pertinent part of the Federal Power Act is subchapter II which became effective August 26, 1935 (16 U. S. C. A. § 824, *et seq.*). Section 824 (b) is as follows:

> "The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy" etc.

Section 824 (d) reads:

> "The term 'sale of electric energy at wholesale' when used in sections 824-824h of this title means a sale of electric energy to any person for resale."

Section 824d is as follows:

> "*Sec. 824d Rates and charges; schedules; suspension of new rates.*—(a) All rates and charges made, demanded, or received by any public utility

for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges *shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.*

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall

be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change

of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision *may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.* At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, § 213, 49 Stat. 851.)"

Section 824e is as follows:

"*Sec. 824e Power of Commission to fix rates and charges; determination of cost of production or transmission.*—(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge or classification, *demanded, observed, charged, or collected by* any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or

classification *is unjust, unreasonable, unduly discriminatory* or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force, and shall fix the same by order.*

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, § 213, 49 Stat. 852.)" [All italics supplied.]

It should be noted that when the bill for subchapter II of the Power Act was pending in the Congress it contained provisions (similar to those in the Acts applicable to the Interstate Commerce Commission) authorizing the Power Commission to consider the reasonableness of past rates and to make reparation orders. Those provisions were stricken out in committee. See *Hope Natural Gas Co. v. Federal Power Commission,* 134 F. (2d) 287, at page 310, where the Court said:

"It is to be noted that in the passage of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. § 79 *et seq.*, upon which the Natural Gas Act is modeled, provisions giving the Commission power to investigate single rates and is-

sue reparation orders, originally incorporated in the bill, were stricken out, the Senate Committee saying in its report: 'They are appropriate sections for a state utility law, but the committee does not consider them applicable to one governing merely wholesale transactions'. The Commission may not by administrative interpretation of the act thus clothe itself with a power denied it by Congress."

Title 28, § 41, U. S. C. (now Title 28 United States Code Sections 1331, 1337), defining the jurisdiction of the United States District Courts, provided:

"The district courts shall have original jurisdiction as follows: * * *

First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, * * *.

* * * * *

Eighth. Of all suits and proceedings arising under any law regulating commerce."

Section 825p of the Power Act is as follows:

"*Sec. 825p Jurisdiction of offenses; enforcement of liabilities and duties.*—The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in

equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. (June 10, 1920, c. 285, § 317, as added Aug. 26, 1935, c. 687, § 213, 49 Stat. 862.)"

This section seems to confirm jurisdiction of cases like this to the United States District Courts, to the exclusion of state courts, leaving Commission orders to be taken direct to the Courts of Appeals for review.

Questions Presented.

1. Has the Federal Power Commission primary jurisdiction, or indeed any jurisdiction, to consider and determine the reasonableness of rates exacted and collected in the past, or to do more than exercise the legislative power to fix rates for the future?

2. Had the plaintiff any administrative remedy before the Commission? Has the Commission any

authority to consider a complaint as to the unreasonableness of past rates, or grant reparations, or even to make any findings as to past rates, as an aid to the courts before which a claim for reparations is made?

3. Conceding that Sec. 824d(e) of the Power Act does give an administrative remedy to a corporation which is a free agent to attack unreasonable rates and prevent their becoming effective if its complaint is filed before the rates take effect, do not facts alleged and found by the District Court—viz., that the plaintiff's predecessors were helpless because of the domination over them by the defendant as a result of which the preventive remedy under 824d(e) was lost—have the effect of relieving the plaintiff of the application of the rule requiring exhaustion of administrative remedies?

Specification of Errors.

The Court below erred:

1. In holding that the District Court was without jurisdiction;

2. In holding that the Power Act gives jurisdiction to the Power Commission to determine the reasonableness of past rates and charges and denies to the District Court jurisdiction to entertain this action, in which a determination of the reasonableness of past rates is necessary to the granting of relief;

3. In applying to the facts of this case the rule that judicial relief may not be obtained until the prescribed administrative remedies have been exhausted;

4. In holding that any administrative remedy was available to the petitioner, and in ignoring the findings of the Trial Court that the petitioner's predecessors were from 1935 to 1945 under the domination of the defendant and therefore unable to resort to the Commission before the rates became effective, to prevent their taking effect;

5. In holding, in effect, that the petitioner can have no relief in any tribunal since the Commission may only exercise the legislative power to fix future rates, and the courts are without jurisdiction because they are forbidden by the Power Act to consider or determine the reasonableness of past rates although that is a judicial question.

Reasons for Granting the Writ.

1. There is a conflict between the decision of the United States Court of Appeals for the Eighth Circuit in this case and the decision of the United States Court of Appeals for the Fourth Circuit in *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. (2d) 287, decided February 16, 1943.

The *Hope* case arose under the Natural Gas Act (15 U. S. Code, Chapter 15B; Act of June 21, 1938, 52 Stat. 821, as amended), but that statute relating to natural gas and the Power Act relating to electric energy are identical in the respects pertinent here. Secs. 717c and 717d of the Gas Act are identical with Secs. 824d and 824e of the Power Act, except that one deals with the sale of natural gas at wholesale, and the other with sales of electric energy at wholesale. Thus decisions under the Natural Gas Act on the questions presented here as to powers of the

Commission are authorities on the interpretation of the Power Act.

In the *Hope* case in the Fourth Circuit the Power Commission, on complaint filed *after* the rates in question had taken effect, entered an order May 26, 1942, fixing *future* rates effective July 1, 1942, for sales of gas at wholesale by Hope to East Ohio Gas Company, but at the same time it made findings that the past wholesale rates charged by Hope to East Ohio Gas Company since June 30, 1939, had been unreasonable and found what would have been reasonable rates for the past period. The Commission had said, "The Commission does not have the authority to fix rates for the past and to award reparations" but asserted authority to make findings as to past rates "as an aid to state regulation," it appearing that the Ohio State Commission was considering the reasonableness of the retail rates being charged by the East Ohio Gas Company, a wholesale buyer from Hope.

Sec. 717d(b) of the Gas Act (identical with Sec. 824e(b) of the Power Act) which is the only provision in either Act giving the Power Commission authority to make findings "in aid" of any other agency or tribunal is as follows:

> "(b) The Commission upon its own motion, or upon the request of any State Commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. (June 21, 1938, c. 556, § 5, 52 Stat. 823.)"

That section limits the Commission "in aid" of a state commission to ascertaining "cost of production or transportation" which are only two of the pertinent factors in determining the reasonableness of rates.

The Fourth Circuit Court held (134 F. (2d) 287, pp. 309-311) that the Commission lacked authority to make findings as to the reasonableness of past rates. It said:

> "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i. e. regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act."

For the convenience of this Court the pertinent portions of the Power Commission's opinion in the *Hope* case are quoted in the appendix to this petition (*Cleveland and Akron* v. *Hope Natural Gas Co.*, 44 P. U. R. (N. S.) pp. 33-34).

It will be observed that the arguments of the Commission based on general provisions of the Natural Gas Act (Sec. 14a and Sec. 16) rejected by the Fourth Circuit are accepted by the Eighth Circuit in the present case in respect of like provisions of the Power Act. The *Hope* case reached this Court (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, decided January 4, 1944) and was reversed on other grounds, but as to findings of the Commission

"in aid" of the Ohio Commission this Court said (pp. 618-619):

> "*Findings as to the Lawfulness of Past Rates.* As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. However that may be, we do not think that these findings were reviewable under § 19 (b) of the Act. That section gives any party 'aggrieved by an order' of the Commission a review 'of such order' in the circuit court of appeals for the circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.
>
> The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. It was there pointed out that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights ad-

versely on the contingency of future administrative action,' it is not reviewable. *Id.*, p. 130. The Court said, 'In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.' *Id.*, p. 130. And see *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309, 310; *Shannahan* v. *United States*, 303 U. S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are 'the exercise solely of the function of investigation.' *United States* v. *Los Angeles & Salt Lake R. Co.*, *supra*, p. 310. They are only a preliminary, interim step towards possible future action—action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action."

2. The Court below has decided an important question of federal law which has not been but should be settled by this Court. When this action was begun, the admission by the Power Commission that it had no authority to make reparation orders and the opinion of the Fourth Circuit in the *Hope* case that the Commission's authority was limited to the legislative function of fixing future rates and could not make findings as to the reasonableness of past rates, and the refusal of the Commission in 1945 in *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, *supra*, to make findings as to the reasonableness of past rates, to aid a District Court in a pending action for recovery of unreasonable charges (one of

the grounds assigned for refusal being its lack of power), pointed to the District Court as the only tribunal which could give the relief sought. After following that course, petitioner is now confronted with the Eighth Circuit decision that it took the wrong route. Although cases of this sort may not be frequent, litigants ought not to be left in a position to fall between two stools, and the law should be settled.

Respectfully submitted.

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SUPPORTING BRIEF.

Opinions Below.

The opinion of the Court of Appeals (VI, 1987) has not been reported.

The oral opinion of the District Court (V, 1883) is not reported. Its findings are in V, 1930.

Statement.

No question of the merits is before this Court, but only the question of jurisdiction of the District Court, or to put it in another way the questions here are whether the Power Act divests the District Court of any power to consider or make findings as to the reasonableness of past rates, and whether the case is one for application of the rule that judicial relief will not be allowed until the plaintiff has exhausted his administrative powers.

The question is not whether the Power Act grants to the District Court jurisdiction, but whether it takes away or limits jurisdiction. The complaint charged and the Trial Court found that the rates charged were unreasonable and a violation of Section 824d of the Power Act, which provides that all unreasonable rates and charges are unlawful. That is a claim arising under the laws of the United States of which the District Court had original jurisdiction by virtue of what was, prior to September 1, 1948, Title 28, § 41(1) United States Code, and is now Title 28 United States Code, Section 1331, unless the Power

Act withdrew it. Section 825p of the Power Act (p. 12 of the petition) confirmed that jurisdiction, but went further and gave the District Courts "exclusive" jurisdiction of controversies under the Power Act, thus eliminating state courts.

For the purposes of this petition this Court has to assume that the evidence established and the District Court was justified in finding that the rates from 1935 to 1945 were unreasonable, and also that the petitioner's predecessor corporations were under the complete domination of the defendant, and that it was by means of that domination that there was no opportunity to apply to the Commission under Section 824d(e) of the Power Act for preventive relief to prevent the unreasonable rates from going into effect. For the same reason there was no opportunity to apply to the Commission to alter the rates for the future, until after October 19, 1945, when the petitioner acquired its predecessors and a new management was installed.

The evidence about corporate domination not only bears on the questions of constructive fraud and reasonableness of charges, and the burden of proof on that point, but also established a complete excuse to the aggrieved corporations for not applying to the Commission for relief before the rates and charges became effective.

Analysis of the Power Act.

Section 824d, subdivision (e), states that whenever any new schedule is filed then upon complaint or on its own motion the Commission may investigate the reasonableness of the proposed rates, and may stay their effectiveness for not more than five months. If the

proceeding has not been concluded and an order made at the expiration of said five months, the rates shall go into effect, but the Commission's order, if it finds the proposed rates too high, may require a refund for the period back to the date the rates took effect.

That section obviously relates to complaints filed *before* the proposed rates take effect, and in such cases allows a reparation order to a limited extent.

Section 824e relates to the power of the Commission on complaint filed *after* the rate takes effect, and in such case the Commission is limited to the determination of

> "the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force.*"

In this connection it should be noted that the provisions in the original bill to consider rates and charges collected in the past and make findings as a basis for reparation were stricken from the bill by the Senate Committee on Interstate Commerce.

There is no other provision in the Power Act which supports the view that the Commission may deal with past rates and charges. There is none which authorizes the Commission to examine into the reasonableness of past charges and make findings to bind or in order to aid a District Court when granting recovery for past unreasonable charges.

It thus appears that the Power Act limits the authority of the Commission, first, to preventing unreasonable rates from taking effect where complaint is made before they take effect; or, second, to fixing new rates for the future where the rates are assailed after they take effect.

In its opinion in the *Hope* case the Power Commission, claiming the power to make findings as to the reasonableness of past charges, said:

> "The Interstate Commerce Commission has furnished precedents for the performance of this public duty."

The Interstate Commerce Commission has not only express power to examine past charges and order reparations, but it has expressly been given authority to make findings as an aid to other agencies. Even the Mediation Board under the Railway Labor Act may apply to and obtain from the Interstate Commerce Commission findings for use in a labor dispute. *Shields* v. *Utah Idaho Railway,* 305 U. S. 177. See also *United States* v. *Interstate Commerce Commission,* 337 U. S. 427, pp. 464-6, as to staying action in the District Court to await findings by the Interstate Commerce Commission.

There is no provision in the Power Act (or the Gas Act) which even suggests that a person aggrieved by the imposition in the past of unreasonable charges may apply to the Commission for findings before bringing action in the District Court, or after action is begun may apply to the Commission for findings while the action is meanwhile stayed by the Court.

Section 824e(b) of the Power Act states that the Power Commission, on request of a state commission, and if not too busy, may determine the cost of production or transmission of electric energy in cases where the Power Commission has no authority to establish a rate, but a person subjected to an unreasonable rate has no right to make such an application, and the findings to be made are as to only one factor affecting the reasonableness of rates, and as to the *present* cost

of production as an aid to the state commission fixing future retail rates.

The Court below quotes Section 825f of the Power Act, and Section 825h—one giving investigative power, and the other giving it power to make, amend and rescind orders—as authority for its conclusion that jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past, is vested not in the District Court but in the Commission.

Those sections of the Power Act are identical with Section 717m(a) (§ 14, ch. 556, Act of June 21, 1938), and Section 717o (§ 116, ch. 556, Act of June 21, 1938) of the Natural Gas Act, and which were relied on by the Commission in the *Hope* case to support its claim to authority equal to that of the Interstate Commerce Commission, and which the Court of Appeals of the Fourth Circuit in the *Hope* case carefully analyzed and rejected as a basis for any authority of the Power Commission to make findings as to past rates.

If the Power Commission lacks authority to investigate and make findings on the reasonableness of past rates as a basis for reparation orders, the conclusion of the Court below that it may do so, if the imposition of unreasonable rates was achieved by fraud, seems to be without basis.

The fraud question is not one with which a Commission is especially equipped to deal.

The opinion of the Court below is not very informative. Its general conclusion was that the Commission has exclusive jurisdiction to pass on the reasonableness of rates, past as well as future, and an action to recover damages for unreasonable past charges cannot be maintained or even begun until the Commission has exercised that function. It fails to point out spe-

cifically a provision of the statute which is to be followed, or anything in the statute as to the effect of the findings or as to whether the complaint to the Commission may be made after action is begun in court, or must be made before action, with assurance to the Commission that complainant intends to sue.

As to "exhausting" administrative remedies, the opinion fails to state just what administrative remedy the petitioner had or how to proceed to obtain it after October 19, 1945. It does not discuss the question as to the preventive remedy under Section 824d by complaint to the Commission before rates become effective, nor does it mention the question whether the domination by defendant excused the injured corporations from proceeding under 824d.

In *Civil Aeronautics Board* v. *Modern Air Transport,* 179 F. (2d) 622, it was said that the rule requiring exhaustion of administrative remedies "serves only to prevent private litigants from attempting to oust administrative bodies from the exercise of adjudication properly committed to them." If there is no administrative remedy, resort may be had to the courts. *Steele* v. *L. & N. Railroad,* 323 U. S. 192.

The opinion below also states that the rates charged and paid were "approved for filing" by the Commission. The record shows that the Commission never approved anything. It has never to this day considered or examined into the question of reasonableness of any rate here involved. It did not even do that when petitioner applied to it to alter rates for the future, because the defendant consented to new rates with which the petitioner was satisfied. The statute does not require any approval by the Commission for the filing of rate schedules. The Commission made some

orders purporting to give a retroactive effect to contracts, the filing of which had been delayed. In one of those orders it said:

> "Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein" (I, 111).

In the Court below the petitioner was confronted with an argument by the Commission (*amicus*) that under the law the petitioner was conclusively bound by the filed rates, and could not attack them or question their reasonableness. Many cases were cited arising under the Interstate Commerce Act and other regulatory statutes that where a rate schedule has been duly filed and has taken effect, the utility must collect and the shipper or customer must pay the scheduled rates. That is to prevent discrimination and rebating. Those cases do not hold that such rates are conclusively reasonable and unimpeachable, but merely that they must be collected and paid in the first instance, subject to correction or reparation by the tribunals having jurisdiction of such claims. The Power Commission itself said in the *Hope* case, 44 P. U. R. (N. S.) 33:

> "The acceptance of a rate for filing does not mean that the Commission approves it and does not establish the justness or reasonableness of the rate. *Re Home Gas Co.*, 39 P. U. R. (N. S.) 102, 109."

Section 824d(a) of the Power Act states that all rates and charges "made, demanded or received" shall be reasonable and 'any such rate or charge

that is not just and reasonable is hereby declared to be unlawful." That applies to rates filed. The filed rate must be collected and paid in the first instance, but is subject to impeachment by proceeding brought for that purpose.

The Petitioner Had No Interest in Bypassing the Commission on the Issue as to Reasonableness of Past Rates.

There is nothing in the record to suggest that the petitioner desired to avoid the Power Commission. Confronted with the decision of the Fourth Circuit in the *Hope* case, the legislative history of the Power Act, the fact that this Court in the *Hope* case had not decided the question of the Commission's power over reasonableness of past rates, and the fact that the Commission itself had repeatedly denied its authority (see, *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. (2d) 388), and the state of the law generally, it was forced to make a decision on the proper interpretation of the Power Act, and on the course to be followed. We believe its decision was right. If the petitioner had applied to the Commission for findings as to the reasonableness of past rates, and the Commission had accepted jurisdiction and made findings, and those findings had been presented to the District Court to control its judgment as the only evidence required or permitted on the question of fact, it would now be confronted with the claim that the Commission was without authority to make the findings and the judgment should be for the defendant because of failure of proof.

The Senate Committee on Interstate Commerce, when striking from the bill for the Power Act all

provisions giving the Commission power to award reparations or to make findings as a prelude to judicial recovery of unreasonable charges paid in the past, assumed that as the bill related only to transactions at wholesale and only utility corporations were affected, such concerns, well informed and equipped to do so, could and would object to proposed rates promptly after their filing and before they took effect, and in that way avoid the necessity of providing for reparations. The Committee's assumption was sound enough as to cases where a corporation threatened by proposed unreasonable rates is a *free agent* and is not deterred for one reason or another from promptly applying for preventive relief.

In such a case it might well be concluded that if a corporation chooses not to complain to the Power Commission before the rates become effective and waits until they have been in force, it has waived the preventive remedy under Section 824d(e) and is thus limited to asking for an order fixing reasonable rates for the future under Section 824e. See, *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. (2d) 388. There the action involved a claim for unreasonable charges in the past. During the pendency of the action Mississippi on April 11, 1945, filed with the Power Commission a complaint asking it to determine "the just and reasonable rate for gas delivered at the City gate by Memphis to Mississippi between June 21, 1938, and July 26, 1943, fixing the same by order." The Commission held it was without authority to grant the relief requested because of want of power, with the added ground that the complainant had failed to ask for preventive relief when the schedule was filed. Experience has shown that the committee's assumption has not been justified,

and the Power Commission thinks it should have powers similar to those of the Interstate Commerce Commission to consider the reasonableness of past rates and award reparations, or at least have primary jurisdiction to make findings binding on the courts in actions to recover for past transactions.

When the petitioner in 1946 applied to the Commission to alter the rates for the future, there was no good reason why it should not also have asked for reparations for the past if the Power Act provided for that. A trial of the issue of reasonableness of rates in court is a more difficult undertaking than one before a commission. We do not disagree with the Commission as to the propriety of granting it power so that the question of reasonableness of rates, past or present, should be tried before administrative commissions rather than courts. One reason for vesting in a single administrative commission primary jurisdiction over the issue of reasonableness of rates is to establish uniformity and prevent discrimination. See, *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S. 285. That reason is of minor importance here, where the statute only applies to wholesale transactions and few persons are involved. The other reason for the administrative jurisdiction is to relieve the courts of the burden of dealing with the question of reasonable rates. The petitioner had no reason to object to that if the Power Act had offered an administrative remedy.

Our complaint about the Commission would be that, wanting those powers, it should have applied to Congress for an amendment to the statute instead of trying to gain those powers by straining the statute

beyond the breaking point, in the course of which it has twice shifted its position. If the decision below stands the petitioner will be left at this date without any remedy. An interpretation of the Power Act having that result should not be accepted if it may be avoided. *Ubi jus ibi remedium. Texas & Pacific Railway Co.* v. *Rigsby,* 241 U. S. 33.

The writ should issue.

Respectfully submitted,

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APPENDIX.

Cleveland and Akron v. *Hope Natural Gas Co.*, 44 Pub. Utilities Rep. (New Series) pp. 34-35.

"* * * Originally the city of Cleveland requested this Commission to find the lawful Hope-East Ohio rates since June 21, 1938, but it now represents that the subject is idle for rates prior to June 30, 1939, because those rates which Cleveland consumers were obligated to pay East Ohio have been settled. The Commission does not have the authority to fix rates for the past and to award reparations. But Congress did empower and instruct the Commission in § 5(a) of the Natural Gas Act, 15 USCA § 717d(a), to fix future rates, and as a step in that process we must necessarily consider the reasonableness of past and existing rates. When the issue is raised and the public interest will be served, we consider as a necessary part of that duty the power to examine the entire rate problem involved and to determine what rates were lawful in the past. Also, § 14(a) of the act, 15 USCA § 717m(a), authorizes the Commission to investigate any facts which it finds necessary in order to determine whether Hope has violated any provision of the Natural Gas Act. Furthermore, the Commission has power to perform any act, pursuant to § 16, 15 USCA § 717o, which is necessary or appropriate to carry out the provisions of the act. Under § 4(a) of the Act, 15 USCA § 717c(a), any interstate wholesale rate that is not just and reasonable is unlawful. *Federal Power Commission* v. *Natural Gas Pipeline Co. supra* [(1942) 315 U. S. 575, 86 L ed , 42 PUR(NS) 129, 62 S Ct 736] Hope's

rate collected from East Ohio Gas Company was lawful after June 21, 1938, the effective date of the act, only to the extent that it was just and reasonable. The city of Cleveland states that the Ohio Commission is investigating the reasonableness of the East Ohio Gas Company's bonded retail rates in Cleveland for the period since June 30, 1939, and that the lawfulness of Hope's rate is an important factor in the case. Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies.

In response to the request of the city of Cleveland, the Commission will make the appropriate findings of fact as to the lawfulness of the rates charged East Ohio by Hope since June 30, 1939. The Interstate Commerce Commission has furnished precedents for the performance of this public duty. Congress intended that this Commission cooperate with state Commissions and municipalities, and the provisions of §§ 5(b) and 17 are special evidence of such intent."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 77.

MONTANA-DAKOTA UTILITIES CO.,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
Respondent.

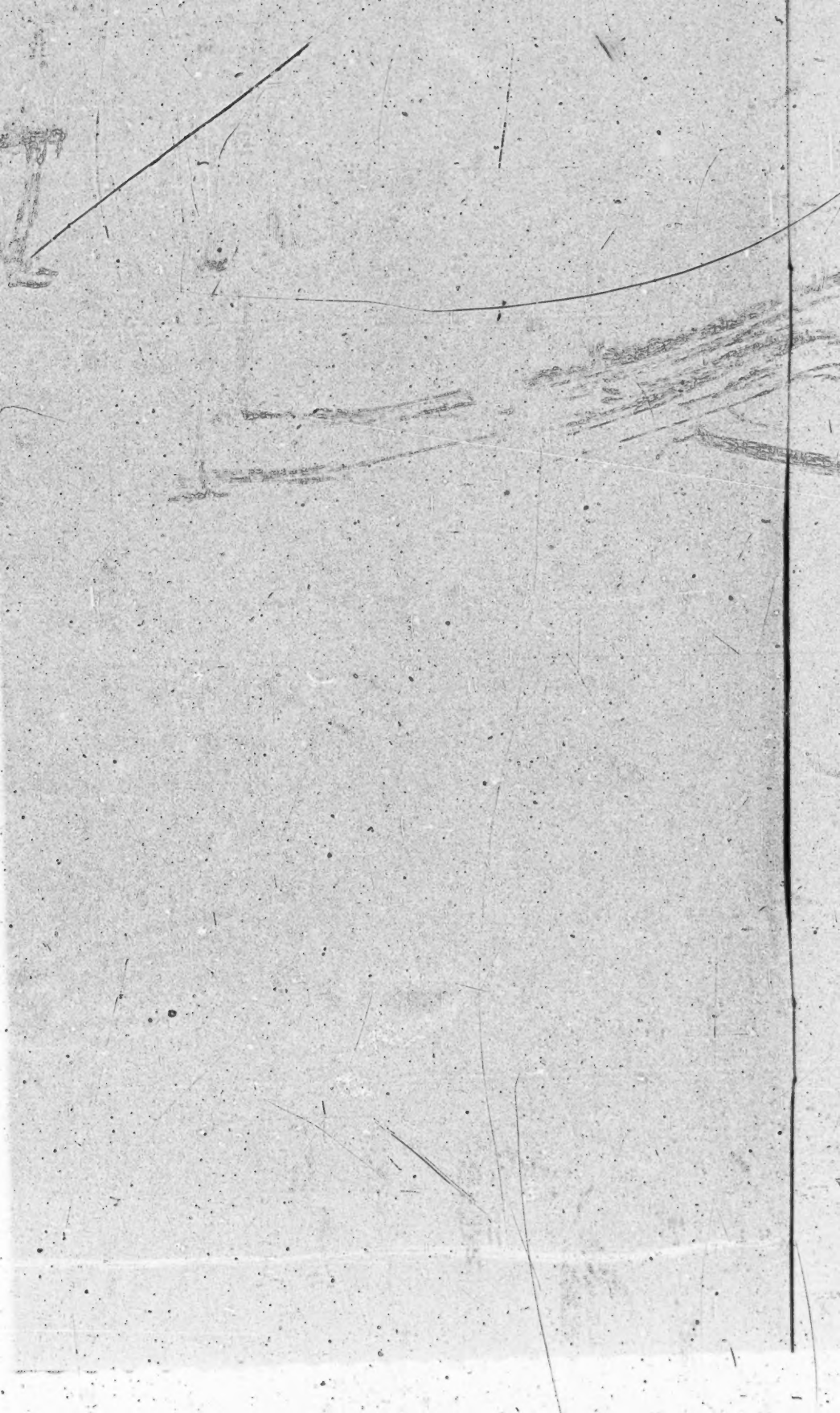
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 77.

MONTANA-DAKOTA UTILITIES CO.,

Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court (R., Vol. I, p. 112) denying motion to dismiss for want of jurisdiction is reported in 73 Fed. Supp. 149. Its opinion on the merits (R., Vol. V, p. 1883) is not reported.

The opinion of the Court of Appeals (R., Vol. VI, p. 1988) is reported in 181 F. (2d) 19.

Jurisdiction.

The judgment of the Court of Appeals was entered April 4, 1950 (R., Vol. VI, p. 1996). The petition for certiorari was filed May 17, 1950.

Jurisdiction rests on Title 28, United States Code, Section 1254. See also Section 825p of the Power Act

which, after making "exclusive" the jurisdiction of United States District Courts over "all suits in equity and actions at law brought to enforce any liability or duty created by * * * this chapter", provides that such judgments of the District Courts shall be subject to review by appeal to the Courts of Appeals and by certiorari in this Court "as provided in Sections 225 and 347 of Title 28", now Sections 1291 and 1254 of Title 28, U. S. C.

Questions Presented.

No question involving the merits is presented. The only question is one of the jurisdiction of the District Court.

The action is one arising under, and involving the interpretation of, the Power Act which gave the Federal Power Commission authority to regulate transmission and sale of electric energy in interstate commerce at wholesale, and the only question is whether that act gives the Commission either "primary" or exclusive power to determine the reasonableness of *past* charges and rates for sale of electric energy.

The action was begun in the United States District Court for South Dakota by petitioner to recover for alleged unreasonably low rates previously paid to and unreasonably high charges collected from petitioner's predecessors in interest, by the respondent. The District Court held it had jurisdiction and granted judgment for the petitioner. The Court of Appeals reversed and ordered the dismissal of the case, holding that the District Court lacked "jurisdiction" to determine the reasonableness of the rates, as the Commission had exclusive power to consider and

decide all questions as to reasonableness, and on the same theory the Court of Appeals held that the petitioner had not exhausted its administrative remedies before resorting to the courts.

The petitioner contends that under the Power Act the power of the Commission over rates is purely legislative and *is limited to establishing rates for the future*, and it has no power to grant reparations or to pass on the reasonableness of past charges as an "aid" to the courts; that the petitioner had no remedy before the Commission, and that the statutory jurisdiction of District Courts to entertain cases arising under Acts of Congress was not limited by any provision in the Power Act vesting primary or exclusive jurisdiction in the Power Commission to determine the reasonableness of charges in the past.

The questions may be stated thus:

1. Has the Federal Power Commission primary, or indeed any, jurisdiction to consider and determine the reasonableness of rates exacted and collected in the past, or do more than exercise the legislative power to fix rates for the future?

2. Had the plaintiff any administrative remedy before the Commission? Has the Commission any authority to consider a complaint as to the reasonableness of past rates, or to grant reparations, or even to make findings as to past charges as an aid to the courts in which a claim for reparations is made?

The Statutes.

Title 28, § 41, U. S. C. (now Title 28, United States Code Sections 1331, 1337), defining the jurisdiction of the United States District Courts, provided:

> "The district courts shall have original jurisdiction as follows: * * *
>
> First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, * * *.
>
> * * * *
>
> Eighth. Of all suits and proceedings arising under any law regulating commerce."

Section 825p of the Power Act is as follows:

> "*Sec. 825p Jurisdiction of offenses; enforcement of liabilities and duties.*—The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive* jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, *and of all suits in equity and actions at law brought to enforce any liability or duty created by,* or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty

created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. (June 10, 1920, c. 285, § 317, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 862, amended June 25, 1936, c. 804, 49 Stat. 1921.)"

This section seems to confirm jurisdiction of cases like this to the United States District Courts, to the exclusion of state courts, leaving Commission *orders* to be taken direct to the Courts of Appeals for review.

The pertinent part of the Federal Power Act is subchapter II which became effective August 26, 1935 (16 U. S. C. A. § 824, *et seq.*). Section 824(b) is as follows:

"The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy" etc.

Section 824(d) reads:

"The term 'sale of electric energy at wholesale' when used in sections 824-824h of this title means a sale of electric energy to any person for resale."

ection 824d is as follows:

"*Sec. 824d Rates and charges; schedules; suspension of new rates.*—(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges *shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.*

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in

any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, *except after thirty days' notice to the Commission and to the public.* Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be

proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision *may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.* At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.)"

Section 824e is as follows:

"*Sec. 824e Power of Commission to fix rates and charges; determination of cost of production or transmission.*—(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge or classification, *demanded, observed, charged, or collected by* any public utility for any transmission

or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or classification *is unjust, unreasonable, unduly discriminatory* or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force, and shall fix the same by order.*

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852.)" [All italics supplied.]

It should be noted that when the bill for subchapter II of the Power Act was pending in the Congress it contained provisions (similar to those in the Acts applicable to the Interstate Commerce Commission) authorizing the Power Commission to consider the reasonableness of past rates and to make reparation orders. Those provisions were stricken out in committee.

Specification of Errors.

The Court below erred:

1. In holding that the District Court was without jurisdiction;

2. In holding that the Power Act gives jurisdiction to the Power Commission to determine the reasonableness of past rates and charges and denies to the District Court jurisdiction to entertain this action, in which a determination of the reasonableness of past rates is necessary to the granting of relief;

3. In applying to the facts of this case the rule that judicial relief may not be obtained until the prescribed administrative remedies have been exhausted;

4. In holding that any administrative remedy was available to the petitioner, and in ignoring the allegations of the complaint and the findings of the Trial Court that the petitioner's predecessors were from 1935 to 1945 under the domination of the defendant and therefore unable to resort to the Commission before the rates became effective, to prevent their taking effect, or to resort to the Commission for relief during that period;

5. In holding, in effect, that the petitioner can have no relief in any tribunal since the Commission may only exercise the legislative power to fix future rates, and the courts are without jurisdiction because they are forbidden by the Power Act to consider or determine the reasonableness of past rates although that is a judicial question.

Statement.

This action was commenced February 3, 1947 (R., Vol. I, p. 1) in the United States District Court for South Dakota by petitioner, Montana-Dakota Utilities Co. against the respondent, Northwestern Public Service Company, to recover because of unreasonably low rates paid by defendant for electric energy delivered to it by plaintiff's predecessor corporations, and for unreasonably high charges exacted by defendant for services it rendered to plaintiff's predecessors during the period from September 1, 1935, to October 11, 1945. That period was chosen because on August 26, 1935, was enacted the statute giving the Federal Power Commission jurisdiction to regulate charges for transmission and sale of electric energy at wholesale in interstate commerce, and which statute provided that "all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

The end of the period was fixed as October 19, 1945, because on October 19, 1945, through change of ownership and management the dominion and control over plaintiff's predecessors previously exercised by respondent came to an end and the claims here involved were then acquired by petitioner.

Petitioner's predecessors were Northern Power and Light Company, North Dakota Power and Light Company, and Dakota Public Service Company. On July 1, 1939, "Northern" and "North Dakota"

merged to form Dakota Public Service Company, and on October 19, 1945, all of the stock of Dakota Public Service Company was purchased by petitioner, and on the same day "Dakota" assigned all its claims, property and assets to petitioner (R., Vol. I, pp. 237-9). Originally, petitioner's predecessors and the respondent were part of a complicated public utility holding system controlled by the same "parent" company, and through common directors and officers the respondent dominated plaintiff's predecessors. The chain was broken in 1932 by a receivership and a bankruptcy proceeding, but the complaint alleged and the District Court found that the domination and control by respondent through common directors and officers continued right down to October 19, 1945, when the petitioner stepped into the picture. The arrangements for the necessary physical connections between petitioner's predecessors and the respondent were put in the form of contracts between them, and after the passage of the act giving the Power Commission jurisdiction over wholesale transmission and sale, compliance with statutory requirement for filing schedules of rates and charges took the form of filing with the Commission those contracts.

Shortly after petitioner acquired the property of its predecessors and on February 27 and 28, 1946 (R., Vol. I, pp. 159, 263) it served notice of cancellation of the existing contracts, and on August 12, 1946, filed a complaint with the Power Commission alleging the existing rates to be unreasonable and asked the Commission to fix new rates *for the future* (R., Vol. I, p. 149). This complaint never came to a hearing because new rates acceptable to the petitioner were agreed upon and the Commis-

sion then dismissed the complaint as moot (R., Vol. V, p. 1876), saying:

> "(e) By the terms of the agreement filed August 20, 1947, the issues involved in the complaint, as amended, have become merely moot and the public interest will be served by dismissing the same."

The petitioner did not then or since ask the Commission for any relief or action as to the unreasonable rates and charges in force from 1935 to 1945. The Commission had already conceded it had no power to grant reparations, and there was no provision in the act allowing the Commission to make findings as to the reasonableness of past rates as an "aid" to the courts. It seemed the proper course for the petitioner was to begin this action.

The complaint in the case alleged that "the action arises under the Federal Power Act, as hereinafter more fully appears, and under a law of the United States regulating commerce under said Federal Power Act" (R., Vol. I, p. 2). The complaint also alleged that the rates and charges during the period from 1935 to 1945 were "unreasonable" and were forced upon the plaintiff's predecessors by respondent by fraudulent practice and by means of its domination through common directors and officers, and the Trial Court so found (R., Vol. V, pp. 1930-1965). Thrice the respondent raised the point that as granting relief required a determination of the reasonableness of the rates charged the District Court was without jurisdiction, as the Power Commission had exclusive authority to deal with that question. The point was first raised by motion to dismiss (R., Vol. I, p. 106), which the Trial Court denied (R., Vol.

I, p. 112). It was raised again by motion to dismiss at the close of the plaintiff's evidence, which was denied (R., Vol. III, pp. 986-996) and it was raised again on the final submission of the case and again rejected (R., Vol. V, p. 1883).

The District Court made findings of fact (R., Vol. V, p. 1930) and conclusions of law (R., Vol. V, p. 1960) in which it determined that the rates which had been charged during the ten year period were unreasonable and unlawful, and had been wrongfully imposed on the petitioner by respondent through its dominion over and control of plaintiff's predecessors. Judgment was rendered for the petitioner in the sum of $779,958.30 (R., Vol. V, p. 1965). The respondent appealed to the United States Court of Appeals which reversed the judgment and ordered the case dismissed, on the ground that the District Court was without "jurisdiction" because the Power Commission had exclusive jurisdiction to pass on the reasonableness of the rates charged, and on the further ground that the petitioner had not exhausted its administrative remedies by applying to the Power Commission for relief.

Summary of Argument.

This action arises under the Federal Power Act, and particularly the provision which declares that all rates and charges which are unjust or unreasonable are unlawful. The sections of the Judicial Code which define the jurisdiction of District Courts and vest in them jurisdiction in actions arising under the laws of the United States and those arising under any act regulating commerce, vest jurisdiction of the controversy in the District Court.

The question is not whether the Federal Power Act gives, but whether it deprives the courts of, jurisdiction otherwise vested in them by the Judicial Code.

An issue of fact in the case, the determination of which was necessary to the rendition of judgment on the merits, is whether rates and charges for electricity paid by or charged and collected in the past by the respondent were unjust and unreasonable. The question is whether the Power Act gives "primary" or exclusive authority to the Power Commission to consider and decide that question, and thus deprives the District Courts of jurisdiction they otherwise would have.

Under the Power Act the Commission has no power to order reparations for past unreasonable charges. That power was deliberately withheld by the Congress. One section of the Act applicable to cases where the rates complained of have been in effect [Section 824e], gives the Commission authority to consider those rates, and if found to be unreasonable, to fix rates for the future. Another section [824d(e)] provides that when a new schedule is filed, and before it takes effect, the Commission may consider the proposed rates and if found to be unreasonable disapprove the schedule. The only authority for the Commission to order refunds is in the second class of cases, and the power is limited to ordering refunds of charges collected during the pendency of the proceeding.

Thus, the Commission was not given authority, after rates have gone into effect, to consider the reasonableness of past charges and order reparations. Neither was the Commission given power, in anticipation of judicial proceedings or during their pendency, to make any finding as an "aid" to the courts on the

question of reasonableness of past rates. The only authority to make findings "in aid" of another tribunal is in Section 824e(b), which gives limited power to make findings as to cost of production or transmission of electricity as an aid to State commissions.

There is no basis for the view that authority to determine the reasonableness of past charges and allow recovery of excessive exactions is vested in the Commission and therefore withdrawn from the courts.

This is not a case for application of the rule that administrative remedies must be exhausted before resort to the courts. The complaint alleged and the Trial Court found that the petitioner's predecessors in interest were, during the period involved in the case, under the domination and control of the respondent through common directors and officers, and it appears that no resort to the Commission could have been had to prevent the unreasonable rates from taking effect, nor to obtain reasonable rates for the future until, by change of control and management, the petitioner, as a free agent, was in a position to do so.

The petitioner in 1946 did promptly apply to the Commission to fix new rates for the future, and that resulted in an agreement between the parties as to future rates which obviated a hearing by the Commission, but as the Power Act does not authorize the Commission to determine the reasonableness of past charges, either as a basis for a reparation order or as an aid to a court in an action to recover unreasonable exactions, the petitioner's only recourse was to the courts.

The decision of the Court below would leave the petitioner without a remedy.

ARGUMENT.

I.

General statutes defining the jurisdiction of District Courts vest in them jurisdiction of a case like this, which arises under a law of the United States, and since the Power Act does not give the Commission authority to pass upon the reasonableness of past charges, it does not withdraw from the courts jurisdiction in cases involving the reasonableness of rates collected in the past.

The question is not whether the Power Act grants to the District Court jurisdiction to entertain cases involving the reasonableness of past charges, but whether that act deprives the courts of jurisdiction they otherwise would have.

This action arises under a law of the United States and one "regulating commerce." The basis for recovery is that provision of Sec. 824d (p. 6 above) of the Power Act which provides that a "rate or charge that is not just and reasonable is hereby declared to be unlawful." §41 of Title 28, U. S. C. (now Sections 1331, 1337 U. S. C.) gave to the District Court jurisdiction, which seems to have been made "exclusive" of state courts by Sec. 825p of the Power Act (p. 4 above). The latter section is not by its terms limited to actions brought by the Commission, but a decision of that question is not necessary in this case as the provisions of the Judicial Code defining jurisdiction of the District Courts are enough. A similar question has arisen under the Se-

curities Exchange Act. See, *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512; *Remar* v. *Clayton Securities Corporation*, 81 F. Supp. 1014. It remains only to analyze the Power Act to find whether it gave to the Power Commission authority to determine the reasonableness of past rates and charges, and thus withdraws that question from judicial cognizance.

There are two pertinent sections in the Power Act. Under Sec. 824e the Commission, on its own motion or on complaint, may find that an existing rate is unjust or unreasonable, may fix just rates "to be thereafter observed and in force and shall fix the same by order." Section 824d(e) (pp. 7-8 above) provides that when a new schedule is filed the Commission on its own motion or on complaint may at once have a hearing as to the lawfulness of the proposed rates, and pending the hearing and decision thereon may suspend the operation of such schedule and "defer" the use of such rate, but not for a longer period than five months. If a decision is not reached by the expiration of five months, the proposed rates shall take effect, and when a decision is reached the Commission may order a refund if it finds the scheduled rates are not justified.

Section 824d(d) (p. 6 above) prevents a new schedule from taking effect until it has been on file thirty days. Thus, one section relating to rates that have been in effect and when complaint is not made until after the rates have become effective, limits the Commission to fixing new rates for the future, and the other section relating to an attack on a new schedule is intended to provide a means for preventing a new schedule from taking effect. The limited power to require refunds in Sec. 824d(e) is only applicable when a complaint against a new schedule is filed

and is only operative in cases where the new schedule takes effect pending the decision of the complaint against it.

The only authority to order refunds or reparation is found in Section 824d(e), and is only applicable under the conditions there provided. That is not the whole story.

Subchapter II of the Federal Power Act, effective August 26, 1935, which contains the sections we are now considering, originated from two bills, H. R. 5423 and S. 1725, identical in terms, both introduced February 6, 1935. S. 2796 was afterwards substituted in the Senate for S. 1725. The two original bills each contained the following:

> "Sec. 213. (a) When complaint has been made to the Commission concerning any rate or charge for any service performed by any public utility, and the Commission has found after investigation that the public utility has charged an unreasonable, excessive, or discriminatory amount for such service in violation of any provision of this title, the Commission may order that the public utility make due reparation to the complainant thereunder, with interest from the date of collection. No such order shall be issued unless the complaint is filed with the Commission within two years from the date of the payment.
>
> "(b) If the public utility does not comply with the order for the payment of reparation within the time specified within such order, action may be begun in any court of competent jurisdiction to recover the same within one year from the date of the order, and not thereafter."

Those sections were stricken from the bill by the Senate Committee on Interstate Commerce.

Senate Report 621, accompanying S. 2796, under the caption "Material Differences between Title II of S. 2796 and Title II of S. 1725" on page 20 states:

> "The provisions defining with particularity the power of the Commission to investigate single rates and to fix standards of service (former secs. 208 (b) and 210) and the section authorizing the issuance of reparation orders (former sec. 213) have been eliminated. They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions."

The only provision in the act under which the Commission may make findings of fact "in aid" of any other tribunal is in Section 824e(b) under which the Commission, if so disposed, may make findings to aid a state commission, limited to cost of production or transmission of electric energy, only two factors in rate fixing.

By familiar rules of construction, the express grant to the Commission by Section 824e(b) of power to make limited findings as an aid to State commissioners, excludes any authority to make findings in aid of the courts.

The conclusion must be that the Power Commission has no power to grant reparations or to make any findings as to reasonable past rates as an aid to any court, and is without "primary" or indeed any jurisdiction of that subject, which could diminish the jurisdiction vested by general statutes in the United States District Courts.

II.

There is no basis here for applying the rule that administrative remedies must be exhausted before resorting to the courts.

The rule about first exhausting administrative remedies has been developed judicially to maintain proper balance between administrative tribunals and courts.

The Court below has not pointed out any method by which petitioner or its predecessor corporations could have obtained relief from the Power Commission. The reasons given by the Senate Committee for striking from the bill of the Power Act all provisions for examining past rates and ordering reparations are not illuminating. We may surmise that the committee thought that as the bill dealt only with wholesale transactions and only large corporations were to be affected, the provision for prompt objection to new schedules of rates and for preventing their taking effect would give such organizations ample protection so that resort to the reparation method would not be needed.

But here, the complaint charged and the Trial Court found that from 1935 to 1945 the petitioner's predecessors were subject to the complete domination of the respondent. The domination which enabled the respondent to exact unfair contracts, enabled it to prevent resort to the Commission to disapprove them before they took effect.

If a corporation, subjected to unfair rates, is a free agent and as such refrains from taking prompt

steps to have the Commission prevent unfair rates from taking effect, it might well be that such conduct constitutes a waiver of that administrative remedy, and leaves the corporation affected only the right to apply to the Commission to establish new rates for the future. See, *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. (2d) 388. It should not be open to the respondent to assert that the petitioner or its predecessor corporations had not exhausted their administrative remedies, when resort to the Power Commission was made impossible by the respondent's domination and control. As for the petitioner, the only administrative remedy open to it was to apply to the Commission to fix reasonable rates for the future, and it promptly did so, and as a result the respondent agreed to new rates satisfactory to the petitioner, which relieved the Commission from the necessity of hearing the application which it dismissed as moot (R., Vol. V, p. 1876). When that application was made it was clear that the Commission had no power to order reparations.

As to the Commission's power to making findings as to reasonableness of past rates "in aid" of other tribunals, there was only Section 824e(b) giving the Commission permission to make limited findings in aid of State commissions. There was and is in the act nothing vesting in the Commission power to make findings as to past charges in aid of any court, either in anticipation of court action, or after an action is commenced.

III.

The opinion of the Court below.

With due respect for the learned Court below, its opinion must be characterized as inadequate.

The opinion, referring to the rates charged, states "they were all approved as filed by the Commission." No rate involved here was ever approved by the Commission. The Commission never considered or had a hearing as to the reasonableness of any of the rates.

The mere acceptance of a schedule is not an approval. The only action the Commission ever took was to make some orders allowing schedules (in the form of contracts) to take effect as of a date some months previous to filing, and in one it said:

> "Nothing contained in this order shall be construed as constituting approval by this Commission of any service, rate, provision, or condition contained in the contract referred to herein" (R., Vol. I, p. 111).

In the Court below the petitioner was confronted with an argument that under the law the petitioner was conclusively bound by the filed rates, and could not attack them or question their reasonableness. Many cases were cited arising under the Interstate Commerce Act and other regulatory statutes that where a rate schedule has been duly filed and has taken effect, the utility must collect and the shipper or customer must pay the scheduled rates. That is to prevent discrimination and rebating. Those cases do not hold that such rates are conclusively reasonable and

unimpeachable, but merely that they must be collected and paid in the first instance, subject to correction or reparation by the tribunals having jurisdiction of such claims. The Power Commission itself said in *Cleveland and Akron* v. *Hope Natural Gas Co.*, 44 P. U. R. (N. S.) 1, 33:

> "The acceptance of a rate for filing does not mean that the Commission approves it and does not establish the justness or reasonableness of the rate. *Re Home Gas Co.*, 39 P. U. R. (N. S.) 102, 109."

Section 824d(a) of the Power Act states that all rates and charges "made, demanded or received" shall be reasonable and "any such rate or charge that is not just and reasonable is hereby declared to be unlawful." That applies to rates filed. The filed rate must be collected and paid in the first instance, but is subject to impeachment in a proceeding brought for that purpose. The opinion below states (R., Vol. VI, p. 1992):

> "Nowhere does the Act give the district court power to determine just and reasonable rates."

The question is not whether the Act confers jurisdiction on the District Courts, but whether it gives jurisdiction to the Commission to exercise primary or exclusive jurisdiction over the question of reasonableness of past rates, and thus deprives the courts of power to try and decide the issue of reasonableness.

The opinion proceeds:

> "That power is given to the Commission exclusively."

The Court below completely ignores the sections of the Power Act which we have discussed above, to wit, Section 824e(a) which limits the Commission, after rates have taken effect, to fixing rates to be thereafter observed and in force, and Section 824d(e) that where a new schedule is filed the Commission may prevent its taking effect. No mention was made of Section 824e(b), the only authority for making findings "in aid" of other tribunals and which is limited to aiding State commissions, not courts, and which permits the Commission to make findings *only* as to cost of production or transmission.

Nor does the opinion even refer to the fact that a provision in the bill allowing the Commission to examine past charges as to reasonableness and order reparations was stricken from the bill before its passage.

The opinion then asserts that "the plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act" and then cites a long list of cases under the Interstate Commerce Act to the effect that "the reasonableness of (railway) rates will not be considered by the courts before application has been made to the Commission." That assertion was made notwithstanding the Interstate Commerce Commission has express authority to examine into past rates and make reparation orders—a power deliberately withheld from the Power Commission—and has been given authority to make findings "in aid" even of the Railway Mediation Board, and differs radically from the Power Act.

In support of the assertion that "jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past as well as in the present is vested not in the district court

but in the Commission" the opinion below cites § 307 (16 U. S. C., 825f) relating to general investigative powers.

That position produces the astonishing result that, although the Commission has no power to grant reparations, it has jurisdiction to consider the issue of fraud exercised through corporate domination, which issue is preeminently a judicial one, and which the Commission is not specially qualified to deal with. The opinion fails to point out what use the Commission could make of a finding on fraud, in the absence of power to order reparations.

Finally, the opinion invokes the rule that no one is entitled to judicial relief "until the prescribed administrative remedy has been exhausted", ignoring the fact that the Commission is limited to fixing rates for the future or preventing a new schedule of rates from taking effect, and that the latter remedy was lost in this case because of the corporate control and domination which lasted until the time for applying for preventive relief was long past.

The Court below does not even mention the opinion in the Fourth Circuit in *Hope Natural Gas Co.* v. *Federal Power Commission,* 134 F. (2d) 287, although that case was cited in the briefs. The Natural Gas Act and the Federal Power Act are identical in their provisions about the power of the Commission, except that one relates to natural gas and the other to electricity, and any decision under one is an authority under the other. The opinion in the Fourth Circuit (pp. 309-311) analyzed the provisions of the Gas Act. In that case the Commission fixed wholesale gas rates to become effective in the future and "as an aid to state regulation", proceeded to find that wholesale

rates charged by Hope to the East Ohio Gas Company for a past period of three years were "unreasonably high". Its findings were not limited to cost of production or transmission as the statute provides, but fixed the final delivery price in dollars and the amount of excess charges for each of the past three years. The power of the Commission to do that was challenged in the Court of Appeals and there held to be wanting (p. 310). It said:

> "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, *i. e.* regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act, 49 U. S. C. A. § 9. As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any such unusual power in a commission ought to be indulged unless conferred in the plainest terms; and not only is it not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar."

In the case at bar a question is whether the Commission, being without power to grant reparations, nevertheless has power to make findings as to past rates "in aid" of a District Court, and exclusive power to deal with that issue. Whatever may be said about findings "in aid" of a State commission, there is no shadow of power in the Commission to make findings as to reasonableness of past rates as a basis for judicial action.

The *Hope* case reached this Court and was reversed on other points, but the question as to the extent of the Commission's power to make findings as an "aid" to State commissions was not decided as there had been no "order" by the Commission on that subject, and the review of Commission acts by direct appeal from it to a Court of Appeals, as in that case, only is available to review an "order". What the Commission said in the *Hope* case, and what this Court said are set forth in the appendix to this brief.

IV.

Where there is a right, there should be a remedy.

If the decision in the Court of Appeals is affirmed, the petitioner is left without a remedy. The corporate domination by respondent forestalled any move to prevent the rates taking effect, or any early move to obtain just rates for the future.

There was no remedy available before the Commission, and if the District Court was powerless to act, there is no other place to obtain relief.

In a long line of cases this Court has always held that where there is a right, there should be a remedy. See, *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33.

The Power Commission has no reason to complain of our position. We are not attacking the generally accepted principle that an administrative commission is an appropriate tribunal to exercise primary jurisdiction as to the reasonableness of past rates. We did not apply to the Commission for findings as to past charges, for the simple reason that the Federal Power Act does not permit it. If the Commission wants such authority, it should apply to the Congress for it instead of asking this Court to disregard what seems to be the clear effect of the present statute.

The judgment of the Court of Appeals should be reversed and the case remanded to that Court for consideration of the merits.

Respectfully submitted,

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APPENDIX.

Cleveland and Akron v. *Hope Natural Gas Co.*, 44 Pub. Utilities Rep. (New Series), pp. 34-35:

"* * * Originally the city of Cleveland requested this Commission to find the lawful Hope-East Ohio rates since June 21, 1938, but it now represents that the subject is idle for rates prior to June 30, 1939, because those rates which Cleveland consumers were obligated to pay East Ohio have been settled. The Commission does not have the authority to fix rates for the past and to award reparations. But Congress did empower and instruct the Commission in § 5(a) of the Natural Gas Act, 15 USCA § 717d(a), to fix future rates, and as a step in that process we must necessarily consider the reasonableness of past and existing rates. When the issue is raised and the public interest will be served, we consider as a necessary part of that duty the power to examine the entire rate problem involved and to determine what rates were lawful in the past. Also, § 14(a) of the act, 15 USCA § 717m(a), authorizes the Commission to investigate any facts which it finds necessary in order to determine whether Hope has violated any provision of the Natural Gas Act. Furthermore, the Commission has power to perform any act, pursuant to § 16, 15 USCA § 717o, which is necessary or appropriate to carry out the provisions of the act. Under § 4(a) of the Act, 15 USCA § 717c(a), any interstate wholesale rate that is not just and reasonable is unlawful. *Federal Power Commission* v. *Natural Gas Pipeline Co. supra* [(1942) 315 U. S. 575, 86 L ed , 42 PUR(NS) 129, 62 S Ct 736] Hope's rate collected from East Ohio Gas Company was lawful after June 21, 1938, the effective date of the act, only to the extent that it was just and reasonable. The city of Cleveland states that the Ohio Commission is investigating the reason-

ableness of the East Ohio Gas Company's bonded retail rates in Cleveland for the period since June 30, 1939, and that the lawfulness of Hope's rate is an important factor in the case. Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies.

In response to the request of the city of Cleveland, the Commission will make the appropriate findings of fact as to the lawfulness of the rates charged East Ohio by Hope since June 30, 1939. The Interstate Commerce Commission has furnished precedents for the performance of this public duty. Congress intended that this Commission cooperate with state Commissions and municipalities, and the provisions of §§ 5(b) and 17 are special evidence of such intent."

Extract from opinion in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (decided January 3, 1944), pp. 618-619:

"*Findings as to the Lawfulness of Past Rates.* As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' § 5(a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. However that may be, we do not think that these findings were reviewable under § 19(b) of the Act. That section gives any party 'aggrieved by an order' of the Commission a review 'of such order' in the circuit court of appeals for

the circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. It was there pointed out that where 'the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action,' it is not reviewable. *Id.*, p. 130. The Court said, 'In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.' *Id.*, p. 130. And see *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309, 310; *Shannahan* v. *United States*, 303 U. S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are 'the exercise solely of the function of investigation.' *United States* v. *Los Angeles & Salt Lake R. Co., supra*, p. 310. They are only a preliminary, interim step towards possible future action—action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action."

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No. [redacted]77

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1950

MONTANA-DAKOTA UTILITIES CO.,
a Corporation,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a Corporation,
Respondent.

BRIEF

Of Respondent, Northwestern Public Service Company, in Opposition to Petition for Writ of Certiorari.

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No. 827.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

MONTANA-DAKOTA UTILITIES CO.,
a Corporation,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a Corporation,
Respondent.

BRIEF

Of Respondent, Northwestern Public Service Company, in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The judgment of which petitioner seeks review by certiorari was entered by the United States Court of Appeals for the Eighth Circuit on April 4, 1950 (R. 1996). The opinion is reported in 181 F. 2d 19. That decision reversed the judgment of the United States District Court for the District of South Dakota which was rendered against this respondent on September 15, 1948. The opinion of the trial court on the jurisdictional issue is reported in 73 F. S. 149. The opinion of the trial court on the merits is not reported and is set out in R. 1883-7.

JURISDICTION.

Respondent agrees with petitioner that Title 28 U. S. C., Sec. 1254 confers jurisdiction upon this Court to issue the writ, but denies that similar jurisdiction is conferred by Title 16 U. S. C., Sec. 825p. That section of the Federal Power Act does not apply to the case at bar, as more fully discussed herein (p. 16).

QUESTIONS PRESENTED.

The petition sets out three questions for the consideration of the Court, but fails to identify the basic question which in reality is the only question before this Court: Had the District Court jurisdiction over the action instituted by petitioner against this respondent, or was the Court of Appeals correct in reversing the judgment below for lack of jurisdiction?

STATEMENT.

There were three power properties involved here. They abutted each other in a nearly perpendicular line in the states of North and South Dakota. The predecessors of plaintiff-petitioner, North Dakota Power and Light Company ("North Dakota"), and Northern Power and Light Company ("Northern"), operated the northernmost and middle properties, respectively. The defendant-respondent ("Northwestern") operated the southernmost of the three. Petitioner's predecessors, including Dakota Public Service Company ("Dakota") into which the other two companies were later merged, were owned by one holding company, United Public Utilities Corporation ("UPU"), and respondent was owned indirectly by another holding company, The Middle West Corporation.

At the time these two holding companies came out of separate receiverships in 1935, the three properties were

being operated as a single system by interchange connections arranged prior to, and continued during, the receiverships. Connections and additional facilities for this purpose had been built and paid for by respondent. To facilitate joint operations certain of the key operating personnel were put on the boards of directors of the three companies. For this reason, petitioner claims that the contracts covering the interchange arrangements among the three systems were presumptively fraudulent. In each instance the joint director arrangement was reported to the Federal Power Commission and had its approval. The dominant person in the UPU subsidiaries was Samuel W. White, the chief executive of UPU, and he was never on the board of the respondent, operator of the southern company. The contracts between the companies recording their interchange arrangements and fixing the rates and charges between them were filed with the FPC, and legal rates thus established. The parties operated under these arrangements throughout the ten year period in issue, that is, from September 1, 1935, to October 19, 1945, on which latter date the petitioner purchased from the UPU holding company the stock of Dakota and acquired its properties through liquidation of the company.

Fifteen months later, on February 3, 1948, it brought the present suit against the respondent, allegedly under the Federal Power Act* claiming (a) that the interchange contracts were presumptively fraudulent because petitioner's predecessors had joint directors and officers with the respondent; (b) that the rates provided were unreasonable, and (c) that the contracts were improperly filed. In the present application the petitioner appears to have dropped its complaint about improper or late filings. The petitioner's case here is rested on the alleged presumption of fraud attaching to transactions entered into by companies with joint directorates. The petitioner desires to escape

* Both parties being Delaware corporations, there is no diversity of citizenship (R. 2, 210, 116).

from application of the rules making the filed rate the legal rate, and requiring it or its predecessors to apply for relief to the FPC through the claim that its predecessors were subject to domination by the respondent throughout the ten-year period on account of the joint directorates. It is argued that, by reason of this, petitioner's predecessors were not free agents to decide to apply, or to apply, to the Commission for relief, and hence neither the rule of exclusive jurisdiction nor of prior exhaustion of remedies was binding on them. Thus petitioner, having purchased Dakota from UPU, claims to be entitled as assignee and successor in interest to its predecessors to proceed in the District Court to recover damages it claims they suffered through the ten years involved by overcharges for energy bought and under-payments for energy sold in their interchanges with the respondent. The basis of recovery was a determination by the District Court of the unreasonableness of the rates established in the contracts and filed with the FPC. That judgment was reversed by the Eighth Circuit which held that the trial court lacked jurisdiction over the subject matter.

Some of the factual record constituting the setting in which these claims are laid and which was before the Court of Appeals might be helpful to the Court here, particularly to amplify the statement as to the contracts between the parties.

(1) The first contract in issue is the oral contract of September, 1935, for the interchange of energy between Northern and Northwestern for five mills per kilowatt hour. This rate remained unchanged throughout the ten years in issue (R. 630-1). The energy sold by Northern to Northwestern was surplus energy (R. 1644, 1127, 1499) generated by North Dakota (R. 1080). It was delivered to respondent mostly during off-peak periods while Northwestern furnished energy to the UPU group mostly during peak periods (R. 961, 1723, 1030, 1499).

(2) The second contract is known as the interconnection contract of October 7, 1936 (R. 464-5): In the late twenties Northern needed to fortify and improve its system, which was weak both in generating and transmission facilities (R. 1075, 1083-4, 433, 997-8, 815, 1001, 1034, 1828-9, 1845). Northern being badly in need of cash (R. 1075-6), Northwestern, which was at that time controlled by the same holding company as Northern, built interconnection facilities at no capital or carrying cost to Northern (R. 1497). When, after receivership, UPU emerged as the separate owner of the Northern and North Dakota, the question was presented to UPU whether to build new plants and transmission facilities or to continue to tie-in with respondent on an agreed basis of rates and charges. UPU chose the latter course for its subsidiaries rather than bear the whole brunt of the sizable expenditures which would have been required under the first alternative (R. 1076). Negotiations toward the establishment of a charge for these interconnection facilities were carried out over a long period between Strike, vice president of the three operating companies, and White, first receiver, and later president of UPU (R. 1074-5, 1100, 1020). White sent Lakin, an engineer and president of eleven of the UPU subsidiaries (R. 1604), and later a UPU director (R. 1194), who had no connection with respondent (R. 1604-5) to inspect the properties and determine the advisability of the contract (R. 1113). Upon his recommendation White decided that the contract as to both the charges provided, namely, $20,000 interconnection charge and the five mills energy rate was not only desirable (R. 1128-9, 1610-3) but necessary to Northern (R. 1076). It was also beneficial to North Dakota which could run its low cost power station at Beulah at a high load factor by selling surplus energy to Northwestern (R. 1080, 1005), also increasing the revenue for Knife River Coal Mining Co., the fuel supplying subsidiary of UPU (R. 1067, 1080, 1084-5, 1004). Both Lakin and White advised the UPU board to approve the contract

(R. 1609-14). Similar opinion was expressed by the UPU general counsel, Francis H. Scheetz of the firm of Evans, Bayard & Frick of Philadelphia (R. 1132-3, 1647), who had no connection with respondent or its parent company (R. 1636). The matter was laid twice before the board of UPU (R. 1114-5, 1121-28) and upon its approval White instructed the UPU subsidiaries to execute the contract (R. 1138).

(3) The history of the reserve capacity contract of 1938 shows the same pattern. UPU was faced with the problem of meeting the critical power situation of its subsidiaries (R. 1645). It caused a survey to be made by Sargent and Lundy, a firm of consulting engineers of Chicago, and considered the same, as well as other engineering studies at several meetings (R. 1118-9, 1138-41, 1160-61, 1164-5). The contract which provided for a yearly reserve capacity charge of $13.20 per kw payable to whichever company or companies was or were supplying reserve capacity (R. 54-5), was intended to pool the generating capacities of the UPU and the Northwestern systems, thus making available to the UPU subsidiaries the reserve capacity of Northwestern. After discussion by White with engineers (R. 1177), other officers of UPU, and Scheetz (R. 1178), it was approved by the UPU board (R. 1179-84) and executed by the operating companies in December of 1938.

(4-5) After the merger of Northern and North Dakota into Dakota on July 1, 1939, UPU decided that the interconnection and reserve capacity contracts should be redrafted to reflect the corporate change of its subsidiaries (R. 1652, 1185). Since no changes were made in any of the rates (R. 1189-90, 631, 704-5) Scheetz entrusted the matter to his South Dakota correspondent (R. 1652-3).

(6) Throughout this period there was a steady growth of demand for energy (R. 1879, 891). In 1941 additional generating capacity on the interconnected system was con-

sidered necessary. Northwestern expressed willingness to install additional capacity at Aberdeen at the northern end of its system upon the safeguard that the reserve capacity agreement with Dakota be changed into a ten year contract (R. 1190-92). White made several substantial modifications in the original draft (R. 1219-20) and, after a survey of the properties by both White and Lakin (R. 1194) and advice by Scheetz (R. 1221, 1509, 1645-6, 1654-5), the contract was approved by the UPU board, which recommended it to Dakota (R. 1193, 1614). The contract continued the three rates. On January 28, 1942, White authorized and approved the execution of the contract as of July 1, 1941 (R. 1225, 1221).

(7) Since the war had prevented Northwestern from carrying out the program of increasing its generating capacity, as contemplated by the 1941 contract, Sanborn (then president of Dakota and respondent, and, after petitioner's acquisition of Dakota, still the president of respondent) suggested to White an amendment to change the ten year contract into a cancellable contract (R. 1229-31). His suggestion was accepted, and the contract was finally drafted by the UPU counsel after several changes were made by White (R. 1232-54, 1656, 1858). The UPU board authorized White to recommend the execution of the amendment to Dakota (R. 1255-6, 1615), and the contract was executed on March 13, 1943 (R. 103).

(8-9) The last two contracts in issue are two agreements for allocation of joint management expenses between Northwestern and the UPU subsidiaries, which were dated January 2, 1936, and July 1, 1939, respectively. As receiver first, and as president of UPU later, White, who had terminated six similar arrangements relating to other UPU subsidiaries (R. 1316-19, 1553), decided to and did continue this joint management arrangement until the day UPU sold its Dakota stock to petitioner. He actively par-

ticipated in the drafting and negotiating of these contracts as representative of the UPU subsidiaries (R. 1099, 1384), on whose boards he remained at all times (R. 28-33, 1106). Both of these contracts were approved by the UPU board (R. 1099). The only item challenged by petitioner under these contracts, which cover nine classes of employees, concerns the allocation of the salaries and expenses of load dispatchers (R. 173-186, 1967-71).

These are the contracts in issue. Under the provisions of the Federal Power Act, all of the interchange contracts were filed with the FPC and petitioner's predecessors either participated in the filing or filed a certificate of concurrence in the filed rate under the directions or approval of UPU (R. 267-9, 343-5, 1652, 297-8, 1583, 1224-5). Thus, everybody having a financial interest participated in, or approved of, the filings. The Commission approved all the filings (R. 34, 35, 43, 61, 68, 87, 103, 108-111, 353). The joint management contracts were not formally filed because they did not establish or affect rates and charges for the transmission or sale of electric energy and were not required to be formally filed as such. Their existence and their basic terms, however, were disclosed to the FPC in the applications filed by the joint directors and officers for authority to hold interlocking positions in compliance with the requirements of the Federal Power Act, 16 U. S. C., 825d (R. 330, 339, 353). All these applications were granted by the FPC (R. 359-362).

The joint operating directors were selected and approved by White personally before being elected annually by vote of proxies under instructions of UPU (R. 1096-9, 1319). In his capacity as president and director of UPU and director of the Dakota companies, White was satisfied as to the "ability," "integrity" and "loyalty" of that personnel (R. 1328).

SUMMARY OF THE ARGUMENT.

I.

There is no conflict between the decision of the court below and the decision of the U. S. Circuit Court of Appeals for the Fourth Circuit in **Hope Natural Gas Co. v. Federal Power Commission** (1943), 134 F. (2d) 287, reversed (1944), 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

II.

The petition, far from tendering a new important question to be settled by this Court, actually attempts to unsettle the doctrines of exclusive jurisdiction of the FPC and of exhaustion of administrative remedies in disregard of unbroken lines of decision of this Court.

1. The Court of Appeals below properly held that the determination of the reasonableness of rates is within the exclusive jurisdiction of the FPC.

2. The alleged lack of administrative remedies, which is disproved by the record, affords no basis for jurisdiction in the District Court.

3. No public interest is involved in the present petition; any recovery by petitioner would be a mere windfall for it, while consumers could receive no possible benefit.

ARGUMENT.

I.

There Is No Conflict Between the Decision of the Court Below and the Decision of the U. S. Circuit Court of Appeals for the Fourth Circuit in Hope Natural Gas Co. v. Federal Power Commission (1943), 134 F. (2d) 287, Reversed (1944), 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281.

1. In the first place, inasmuch as the decision of the Circuit Court of Appeals in the **Hope** case and the decision below did not involve the same or similar issues, there would have been no conflict between the two decisions, even if the former one had not been reversed by this Court, which it was. In the **Hope** case, no district court trial was involved and no question of district court jurisdiction was in issue. The case involved an appeal from an FPC rate order; in the Commission proceedings the principal issue was the reasonableness of certain wholesale rates for the future but the Commission also made findings as to the reasonableness of past rates. In so doing, the Commission held that it did not have the power to fix rates for the past or award reparations, but that it did have power to make findings as to the reasonableness of past rates at the request of an interested municipality. 134 F. (2d), l. c. 309. The decision of the Circuit Court of Appeals on this point was summarized in the following words:

> "If it [the Commission] was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceed-

ings before state commissions." [134 F. (2d), l. c. 310.]

In the present case, the decision below relates to the jurisdiction of a district court to determine the reasonableness of filed rates. No findings of the FPC as to past rates in aid of a state regulatory commission are in question. In fact, the court below has made no decision, conflicting or otherwise, on any issue involved in the **Hope** case. The only respect in which there is even a superficial resemblance between the issue and decision in the present case and those in the **Hope** case is this: in the course of its discussion as to the lack of jurisdiction of the district court in the present case, the court below (after stating that the rule of primary jurisdiction and the doctrine of legality of filed rates are not affected by petitioner's contentions as to alleged defective filing and alleged fraud) proceeds to say:

> "Jurisdiction in such a controversy as this to investigate fraud practiced by an electric public utility in the past as well as in the present is vested not in the district court, but in the Commission by § 307, 16 U. S. C. A., § 825f, . . . The Commission by § 309 (16 U. S. C. A., § 825h) is empowered to make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act. The Commission can, no doubt, correct its own mistakes. In case a complainant is aggrieved by the decision of the Commission, its remedy is by appeal under § 313 (b), supra" [R. 1995, 181 F. (2d), l. c. 23].

Even if this statement be regarded as a "decision" of the court below, there quite obviously would be no conflict between such a decision, viz., that the Commission has power to investigate past fraud and correct past mistakes, and a decision that the Commission has no power to make find-

ings as to reasonableness of past rates to be given effect in rate proceedings before state authorities.

The basic holdings of the two courts of appeal as to legality of filed rates were identical;* their conclusions differed only because they were dealing with different issues. The alleged conflict relied on in the petition is thus a synthetic one which could be suggested only through misapprehension of the issues and decisions in the two cases.

2. If there had otherwise been a conflict between any decision of the Circuit Court of Appeals in the **Hope** case and the decision below, that conflict would have disappeared entirely for purposes of the present petition when this Court reversed the judgment of the Circuit Court of Appeals in the **Hope** case.

The reversal, it is to be noted, went specifically to the decision of the Circuit Court of Appeals that the Commission had improperly made findings as to reasonableness of past rates. True, this Court did not itself pass upon the Commission's power to make such findings, but this Court did expressly reverse the Circuit Court's decision on the ground that the findings were not reviewable in any event. After reversal by this Court, the decision of the Circuit Court is neither controlling nor authoritative as a precedent, and, therefore, not a "decision" with which the decision below may be in conflict within the meaning of Rule 38.5 (b) of this Court.

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* Compare the following portions of the respective opinions:

4th Circuit 134 F. (2d), l. c. 311	8th Circuit R. 1995; 181 F. (2d), l. c. 22
"When rates were filed with the Commission pursuant to Section 4 (c) of the Act they became the only lawful rates which the utility could charge or accept. * * * Until changed by the Commission under the power granted pursuant to Section 5 (a) they were binding alike upon the company and its customers * * *"	"The rates filed and approved by the Commission are the lawful rates until changed in the way provided by the Act. * * * So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike."

Freeman on Judgments (5th Ed., 1925), Vol. 3; p. 2416, says: "The judgment reversed becomes mere waste paper * * *." In **Leader et al. v. Apex Hosiery Co.** (C. C. A. 3, 1939), 108 F. (2d) 71, 81, aff'd 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 982, the Circuit Court of Appeals considered the effect of the Supreme Court reversal (302 U. S. 656, 82 L. Ed. 508, 58 S. Ct. 362) of its previous decision in certain injunction proceedings (90 F. [2d] 155) and said:

> "The decree of this court in the injunction proceedings must therefore be considered as having been vacated. It is no longer binding as a precedent, as the law of the case, or as res judicata."

Likewise, in **Crawford v. Metropolitan Life Ins. Co.** (St. Louis Ct. App. 1943), 167 S. W. (2d) 915, 920, the Court stated:

> "The first and foremost contention of appellant is that the suit is barred by the ten year statutes of limitation. * * * That question was before this Court in a very similar case based on this same policy of insurance. * * * Later our opinion was quashed by the Supreme Court. * * * And although it was quashed on another ground than as to the statute of limitations, the effect of the Supreme Court action was to do away entirely with our opinion so that it never became an authority. Hence the question is now again before us for determination, as though neither this Court nor the Supreme Court had ever considered it, and in fact the Supreme Court did not deem it necessary to and did not consider the question of the statute of limitations, as its opinion clearly shows."

To the same effect, see **Keller v. Hall** (C. C. A. 9, 1940), 111 F. (2d) 129, 131; **Kaplan et al. v. Joseph et al.** (C. C. A. 7, 1942), 125 F. (2d) 602, 606, and **Barr et al. v. Sumner et al.** (1915), 183 Ind. 402, 109 N. E. 193.

In any event, even assuming that the Court of Appeals' opinion in the **Hope** case should not be considered a legal nullity insofar as it sets forth grounds of decision which were not expressly reversed by the Supreme Court (the decision itself having been reversed on other grounds), it is clear that such statement of the lower court as to the grounds of the reversed decision is at most an obiter dictum and not a "decision." Cf. **Remick Music Corp. v. Interstate Hotel Co. of Nebraska** (D. C. Neb. 1944), 58 F. S. 523, 542.

As this Court pointed out in **Rogers v. Hill** (1933), 289 U. S. 582, 587, 77 L. Ed. 1385, 53 S. Ct. 731, the words "opinion" and "decision"

> "• • • while often loosely used interchangeably, are not equivalents. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests [citing cases]. The Judicial Code uses 'decision' as the equivalent of 'judgment' and 'decree'. §§ 128, 238, U. S. C., Title 28, §§ 225, 345."

The same is true of rule 38.5 (b) of this Court, which uses the term "decision" in its technical sense. Compare: **Magnum Import Co. v. De Spoturno Coty** (1923), 262 U. S. 159, 163, 67 L. Ed. 922, 43 S. Ct. 531.

Under no permissible theory can it be said that a conflict exists between the decision below and the "decision" of the Circuit Court of Appeals in the **Hope** case.

II.

The Petition, Far From Tendering a New Important Question to Be Settled by This Court, Actually Attempts to Unsettle the Doctrines of Exclusive Jurisdiction of the FPC and of Exhaustion of Administrative Remedies in Disregard of Unbroken Lines of Decision of This Court.

1. The Court of Appeals below properly held that the determination of the reasonableness of rates is within the exclusive jurisdiction of the FPC.

Petitioner grounds federal jurisdiction on the Judicial Code, 28 U. S. C. 41 (1) (now 28 U. S. C. 1331) and on Section 317 of the Federal Power Act, 16 U. S. C. 825p (Petition, pp. 1-2, 12-13). Both contentions are clearly erroneous.

(a) **As to the Judicial Code.** Petitioner raises the self-defeating question "whether the Power Act divests the District Court" of jurisdiction (Petitioner's Brief, p. 21). It is clear that until the Power Act was enacted, there could be no jurisdiction over claims arising under it. Obviously, the Act which allegedly gave rise to the asserted claim could not also take away a non-existent prior jurisdiction to determine the same. The statute creates new substantive rights* and duties and at the same time defines by whom, and how, and where those rights and duties should be protected and enforced. Petitioner forgets for the moment that federal courts are courts of limited jurisdiction and that since **Turner v. Bank of North**

* No right or remedy to attack public utility wholesale rates fixed by contract on the ground of unreasonableness existed at common law, as petitioner itself admitted in its brief before the Court of Appeals (p. 28). See also **Arkansas Natural Gas Co. v. Arkansas R. R. Commission et al.** (1923), 261 U. S. 379, 67 L. Ed. 705, 43 S. Ct. 387; **Southern Iowa Electric Co. v. City of Chariton, Iowa, et al.** (1921), 255 U. S. 539, 65 L. Ed. 764, 41 S. Ct. 400; **City of Paducah v. Paducah Ry. Co.** (1923), 261 U. S. 267, 67 L. Ed. 647, 43 S. Ct. 335; **Colorado Power Company v. Halderman et al.** (D. C. Colo., 1924), 295 F. 178.

America (1799), 4 Dall 8, 11, 1 L. Ed. 718, a presumption obtains that a cause is not within their jurisdiction until the contrary appears.

If any new or additional rights were created by the Power Act in favor of petitioner or its predecessors, those rights, and any corresponding duties on the part of respondent, are to be measured according to the standards provided by the Act itself, and adjudicated and enforced under the procedural mechanism there established. The Court of Appeals below correctly held, "Nowhere does the Act give the district court power to determine just and reasonable rates; that power is given to the Commission exclusively" (R. 1992; 181 F. [2d], l. c. 22). Section 41 (1) of the Judicial Code cannot be resorted to as a detour to avoid the application of those standards, to circumvent the exclusive jurisdiction of the FPC and the statutory method whereby its orders are reviewable in the Courts of Appeals.

(b) **As to the Power Act.** Petitioner attempts here to find a basis for jurisdiction in the District Court by isolating a particular section of the Act (Section 317, 16 U. S. C. 825p)* from its context in the statute so as to give it a new and unsupportable meaning and function. The real meaning and function of the section, entirely different from those attributed to it by petitioner, are clear enough when the statute is viewed in its entirety.

In the Power Act Congress created a comprehensive scheme of regulation of interstate utility companies **through the instrumentality of the Federal Power Commission.** The interstate facilities of such companies are expressly committed to the jurisdiction of the Commission,

* That section, so heavily relied upon in the Petition, was neither pleaded in the complaint as amended nor relied upon by the District Court, which ruled that "While the Power Act does not specifically authorize such a suit * * * the Court * * * is vested with the necessary authority, as well as the duty to entertain such suit, by implication" (R. 113).

and each of the sections of the Act dealing with a particular aspect of utility regulation refers to the Commission as the agency of Congress to effectuate the purposes of the Act. The filing and other administrative provisions of the Act are closely tied in with the provisions establishing the standard of reasonableness, and all aspects are referred to the exclusive jurisdiction of the Commission. As part of the same pattern the Commission is given various types of enforcement powers in cooperation with the Attorney General. 16 U. S. C. 825 e, f, g, m, n. Insofar as the Commission may seek enforcement through criminal actions or other judicial proceedings, jurisdiction over such proceedings (not suits between power companies over claims for damages because of alleged unreasonablenes of filed rates or alleged fraud) is vested exclusively in the District Courts. 16 U. S. C. 825p.

Judicial review of orders of the FPC under the Power Act is conferred on the U. S. Courts of Appeals. 16 U. S. C. 825l. This means of review is exclusive. **Federal Power Commission v. Pacific Power & Light Co.** (1939), 307 U. S. 156, 160, 83 L. Ed. 1180, 1183, 59 S. Ct. 766; **Switchmen's Union of N. A. et al. v. National Mediation Board et al.** (1943), 320 U. S. 297, 88 L. Ed. 61, 64, 64 S. Ct. 95; **Safe Harbor Water Power Corp. v. Federal Power Commission** (C. C. A. 3, 1941), 124 F. 2d 800, cert. den. (1942), 316 U. S. 663, 86 L. Ed. 1740. But again prior resort to the Commission is a condition precedent for judicial review. Section 825l (a) provides:

> "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." [1]

[1] This requirement is jurisdictional. **Federal Power Commission v. Metropolitan Edison Co. et al.** (1938), 304 U. S. 375, 82 L. Ed. 1408, 58 S. Ct. 963.

To follow out petitioner's assertion (Petition, pp. 2, 7, 13; Brief, p. 22) that Section 825p, Title 16 U. S. C., confers "exclusive jurisdiction" upon the **District Court** to entertain actions based on alleged violations of the statutory requirement that rates shall be reasonable, without prior resort to the Commission, would mean to thwart the whole scheme of administrative machinery and procedural requirements, and the limitations which the statute establishes. It would mean to take away the exclusive jurisdiction of the FPC over the reasonableness of rates and to transfer that jurisdiction to the 87 District Courts. Petitioner has not cited a single case which even inferentially supports this construction of Section 825p of the Power Act, or the parallel Section 717u of the Natural Gas Act.

Section 825p refers only to the enforcement of the Act by the Commission, as the Eighth Circuit properly held. If it were intended to cover suits by private parties, its language would not be limited to cases where no administrative remedy is available—as contended here by petitioner—but would include all cases. In such event, the Commission would be deprived of its primary function; the carefully limited jurisdiction of the Court of Appeals on orders of the Commission would become meaningless; and a new system of administration and enforcement of the Act at the hands of the District Courts would nullify and replace the whole scheme of the Act.

Its legislative history makes it perfectly clear that such construction of Section 825p must be rejected. As originally introduced, the Senate and House bills (S. 1725 and H. R. 5423, 74th Congress) each contained a reparations provision taken in substance from the Interstate Commerce Act, providing that (a) the Commission could order reparations for past payments of unreasonable rates, on complaints filed within two years after payment, and (b)

if the utility did not comply, **action could be brought on the Commission's order in a court of competent jurisdiction.** However, the entire reparation provision was eliminated because not deemed applicable to wholesale transactions. Where Congress has thus **considered and rejected** a provision conferring **jurisdiction on the courts with respect to past payments,*** and then only to enforce Commission determinations as to unreasonableness of past rates, how can an even broader jurisdiction be deemed to have been established by another Section—825p—of the same statute? Petitioner contends that Congress' underlying assumption "has not been justified" (Petitioner's Brief, p. 29), but that is obviously for Congress to consider. It does not warrant judicial adoption of a proposal rejected by the legislative branch.

We submit that Congress has said, as plainly as if it used the very words: "The standards set forth in paragraphs (a) and (b) of Section 824d are to be realized exclusively through the agency named and the procedures detailed in paragraphs (c), (d) and (e) of Section 824d and in Section 824e."

Indeed, this Court has precisely so concluded under the comparable Natural Gas Act. In **Illinois Natural Gas Co. v. Central Illinois Public Service Co.** (1942), 314 U. S. 498, 506, 86 L. Ed. 371, 376, 62 S. Ct. 384, this Court said that the underlying purpose of that Act was to provide

> "* * * through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate * * *."

In **Federal Power Commission v. Hope Natural Gas Co.** (1944), 320 U. S. 591, 617, 88 L. Ed. 333, 353, 64 S. Ct. 281, this Court stated:

* In its summary of the legislative history, petitioner significantly overlooks this essential provision of the original bills (Petition, pp. 11-12, 23).

> "Congress has entrusted the administration of the Act to the Commission not to the courts."

As Mr. Justice Jackson observed in his separate opinion in that case:

> "To carry this into techniques of inquiry is the task of the Commissioner rather than of the judge, and it certainly is no task to be solved by mere bookkeeping, but requires the best economic talent available" (320 U. S., l. c. 653).

In **Colorado Interstate Gas Co. v. Federal Power Commission** (1945), 324 U. S. 581, 589, 89 L. Ed. 1206, 65 S. Ct. 829, a proceeding involving the same Natural Gas Act, this Court said:

> "Rate-making is essentially a legislative function. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. Congress to be sure has provided for judicial review of the Commission's orders. Sect. 19, 15 U. S. C. A., Sec. 717r; 4 F. C. A. Title 15, Sect. 717r. But that review is limited to keeping the Commission within the bounds which Congress has created."

Likewise in **Federal Power Commission v. Pacific Power & Light Co.**, supra, this Court stated:

> "A federal court cannot fix rates * * *" (307 U. S., l. c. 160).

There is nothing unique or anomalous about the statute thus construed; it is merely a Congressional restatement of a rule of law which would apply even apart from the statute—the rule of exclusive jurisdiction, which removes from the jurisdiction of the courts (except within the limited area of permissible review) all questions involving reasonableness of rates and other technical matters for the regulation of which an administrative agency has been created.

This rule was first established in **Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.** (1907), 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, and has been consistently reasserted through the years down to the latest decisions of this Court. Thus, in **United States v. Jones** (1949), 336 U. S. 641, 93 L. Ed. 938, 69 S. Ct. 787, reh. den. 337 U. S. 920, 93 L. Ed. 1729, 69 S. Ct. 1150, this Court stated that the District Court properly made "no attempt to render a money judgment for the carrier" (the very thing done by the District Court in the case at bar), and added:

> "Necessarily this restraint reflected the jurisdictional limitations placed upon the court by the Urgent Deficiencies Act. But those limitations themselves reflected another policy, quite apart from and in addition to that giving effect to the constitutional limitations of Article III. The limitations exemplify settled congressional policy concerning the relations of rate-making bodies and reviewing courts. Not only is rate-making essentially legislative in the first instance. **The policy of judicial restraint is one having regard for the expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function.** Such doctrines or policies as those of 'primary jurisdiction' and exhaustion of administrative remedies lie at the very root of the problem" (l. c. 652). (Emphasis added.)

While the merits are not before this Court, it may be appropriate to point out that the basic errors made by the District Court in dealing with the technical problems of utility rate-making in this very case sufficiently demonstrate the soundness of the primary jurisdiction rule as embodied in the Federal Power Act. For example, the District Court was evidently unaware of the significance

of the differences between incremental cost and average cost of energy, between "graveyard" or other surplus energy and firm energy, and between peak power and off-peak power. It apparently was not familiar with the theory and practice of power pool arrangements or of the significance and importance of reserve capacity in an electric system. It seemingly failed to grasp the significance of energy interchange in the operations of respondent and petitioner's predecessors. These matters are all grist in the Commission's mill and they are basic to any determination of reasonableness of rates in the present case. In the words of the Jones opinion, quoted supra, the District Court was under an "actual, as well as legal, disability" in dealing with them.

As a corollary of the rule so frequently stated by this Court requiring the determination of the reasonableness of rates to be made by the specially qualified administrative agency created by Congress to deal with this specialized field, it is settled that the filed rate is the only legal rate. The District Court erred in holding it could be disregarded.*

As pointed out in the statement, supra, each of the interchange contracts was filed with the FPC as specifically required by law,** and plaintiff's predecessors either joined or concurred in the filings. Also as above noted,

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* Texas and Pac. Ry. Co. v. Abilene Cotton Oil Co., supra; Robinson v. Baltimore & Ohio R. Co. (1912), 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114; Mitchell Coal Co. v. Pennsylvania R. Co. (1913), 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916; Louisville & N. R. Co. v. Maxwell (1915), 237 U. S. 94, 59 L. Ed. 853, 35 S. Ct. 494; United States v. Interstate Commerce Commission, 337 U. S. 426, 93 L. Ed. 1451, 69 S. Ct. 1410; Backus-Brooks Co. v. Northern Pac. Ry. Co. (C. C. A. 8, 1927), 21 F. 2d 4, cert. den. (1927), 275 U. S. 562, 72 L. Ed. 427, 48 S. Ct. 120; Woodrich et al. v. Northern Pac. Ry. Co. (C. C. A. 8, 1934), 71 F. 2d 732, 736; Watab Paper Co. v. Northern Pac. Ry. Co. (C. C. A. 8, 1946), 154 F. 2d 436; Mississippi Power & Light Co. v. Memphis Natural Gas Co. (C. C. A. 5, 1947), 162 F. 2d 388, cert. den. 332 U. S. 770, 92 L. Ed. 355, 68 S. Ct. 82.

** In view of the requirements of the statute and of the FPC regulations, it is a peculiar statement for petitioner to say that "after the Power Act took effect August 26, 1935, the parties adopted the practice of filing these contracts with the Commission to disclose the rates and charges" (Petition, p. 4; our emphasis).

UPU, plaintiff's vendor and the sole stockholder of plaintiff's predecessors, directed or approved the filings. Under the foregoing authorities the rates and charges in all the contracts were the only legal rates, and so remained, because they were never changed by the FPC.

2. The alleged lack of administrative remedies, which is disproved by the record, affords no basis for jurisdiction in the District Court.

Petitioner's effort focuses on the proposition that no administrative remedy was available to its predecessors because of their alleged domination by respondent, and that therefore there must be jurisdiction on the part of the District Court to entertain this action, otherwise petitioner's right would fail for lack of any remedy (Petition, pp. 14-5, 22, 26, 31). This contention was most strenuously but unsuccessfully urged by petitioner before the Court of Appeals both in its brief and in the oral argument. It is erroneous in fact as well as in law.

(a) In the first place, the complaint below as amended did not plead that petitioner's predecessors were prevented from resorting to the administrative remedies provided by the Power Act because of the alleged domination and fraud of respondent. Being a prerequisite to the jurisdiction of the District Court—as petitioner seems to claim (Petition, p. 14, Question 3)—that allegation should have been pleaded. Nor is there any finding or holding by the District Court that the statutory administrative remedies were unavailable to petitioner's predecessors by reason of the alleged domination of respondent. Petitioner boldly asserts:

> "For the purposes of this petition this Court has to assume that the evidence established and the District Court was justified in finding * * * that the petitioner's predecessor corporations were under the com-

plete domination of the defendant, and that it was by means of that domination that there was no opportunity to apply to the Commission under Section 824d (e) of the Power Act for preventive relief to prevent the unreasonable rates from going into effect" (Petitioner's brief, p. 22).*

Significantly enough, no record reference is furnished by petitioner. Indeed, there were no such findings by the District Court.

Petitioner's statement is also unsound in law. The judgment of the District Court was rendered after trial on the merits, and, after it was reversed by the Court of Appeals, the findings of the District Court are not conclusive on this Court. A presumption of correctness attaches to the decision of the Court of Appeals, and as this Court held in **Reinman v. City of Little Rock et al.** (1915), 237 U. S. 171, 180, 59 L. Ed. 900, 905, 35 S. Ct. 511,

> "If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment."

Failure to apply the foregoing rules and principles would necessitate an examination into the factual issues of fraud tendered by the petitioner in the District Court and urged in the Court of Appeals. And this the writ of certiorari was not designed to do. The rule is generally asserted by this Court that certiorari does not issue to review facts. **General Talking Pictures Corp. v. Western Electric Co.**

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* See also the even stronger—and equally wrong—statement in the Petition, p. 14, question 3, asserting the existence of

> "* * * facts alleged and found by the District Court—viz., that the plaintiff's predecessors were helpless because of the domination over them by the defendant as a result of which the preventive remedy under 824d (e) was lost * * *."

(1938), 304 U. S. 175, 178, 82 L. Ed. 1273, 58 S. Ct. 849; Frankfurter and Landis, The Business of the Supreme Court (1928), p. 290.

(b) In any event the record clearly shows that there was no "domination" of petitioner's predecessors on the part of respondent or its holding company. Petitioner's repeated charge of "domination" (Petition, pp. 14, 15, 22, 26) is an inflation of the allegations of the complaint and of the findings of the trial court, that the joint officers and directors, or respondent through them, "caused" the predecessors of petitioner to enter into transactions detrimental to them and devised exclusively for the benefit of respondent (e. g., R. 7, 1940).

Yet petitioner does not even claim that White, who at all times was on the boards of the UPU subsidiaries and never on that of respondent, was ever prevented by respondent from resorting to the Commission. The dominant position of White, the chief executive of UPU, in all of the transactions in issue is apparent throughout the record. (See e. g., R. 1111-2, 1318-9, 1866-67, 1838-9; as to his financial interest, R. 1437, 1380 ff.)

Furthermore the undisputed evidence reviewed in the statement, supra, shows that the contracts and rates in issue were all arrived at under the direction or approval of UPU. The joint directors, each of whose applications for interlocking positions was approved by the FPC (R. 359-62),* were elected each year by independent action of the separate stockholders of respondent and of petitioner's predecessors (R. 1096-9). Again, at the hearings held in 1942 by the Securities and Exchange Commission in connection with the integration proceedings against the UPU

* The orders of the FPC contain findings that

"Applicant has made due showing in the form and manner prescribed by this Commission that neither public nor private interests will be adversely affected by his holding the following positions * * * [listing positions]" (R. 360-2).

Nor did FPC question the arrangement at any later time (R. 1510, 1587-8).

under 15 U. S. C. 79k (b) (1) (R. 1487 ff.), Scheetz represented UPU and its subsidiaries (R. 1657). Here the operation of the Dakota system under the 1941 contract, which covered all rates, was fully explored. In answer to the examiner's pointed inquiries the contract was most earnestly defended by UPU in all of its aspects. In so doing UPU again ratified the contract and the three rates provided therein. At those hearings UPU witnesses and its general counsel explained that the joint management followed the policy of referring to the respective companies all matters in which there might be a possible conflict of interests (R. 1542-3, 1545-6).

There is no allegation in the petition herein or in the complaint below, nor is there any finding by the District Court that UPU, as the sole stockholder of petitioner's predecessors, was ever under the domination of respondent for any purpose. The only finding, which has some indirect bearing on the point, is the one that "Middle West"—not respondent—had "actual control" of United Public Service Corporation and through it "potential control" of UPU (R. 1935). That finding was clearly erroneous both in law and in fact. In law, control of UPU by Middle West would not be control by respondent of UPU or of the predecessors of petitioner, and the finding was erroneous insofar as it purported to support the judgment against respondent. The act of an agent may legally become the act of his principal, but the converse is not true.*

In fact, the undisputed evidence shows that Middle West did not have control of petitioner's predecessors at any time during the period of controversy. From 1935 until July 1, 1945, Middle West could elect only one of the 5 to 7 directors of UPU (R. 233-4, 1349-51, 1088, 1554-5,

* Crosby et al. v. Calaway (1941), 65 Ga. App. 266, 16 S. E. 2d 155, 158; Pfeffer v. Lehmann et al. (1938), 255 App. Div. 220, 7 N. Y. S. 2d 275, 278; Barnett v. Perrine (Tex. Civ. App., 1923), 250 S. W. 1111, 1115; King v. City of Beaumont et al. (D. C. Tex., 1924), 296 F. 531, 534; Kingston Dry Dock Co. v. Lake Champlain Transp. Co. (C. C. A. 2, 1929), 31 F. 2d 265; 3 C. J. S., Agency, p. 130.

343, 356, 1092-3). On July 1, 1945, Middle West became entitled to vote 28% of the stock of UPU, but this was unimportant because, after lengthy negotiations, on the following day UPU contracted to sell Dakota to petitioner (R. 1333-4) and the transfer followed in due course. In any event it will be noted that the last contract in issue was dated March 13, 1943 (R. 103), that is, more than two years prior to the one day 28% "control" of UPU by Middle West.

Thus, there is no evidence establishing "domination" by respondent of either the predecessor operating companies of petitioner or of UPU. It is absolutely undisputed that in the ten year period in issue neither UPU, nor any consumer or state regulatory body or any other person lodged any complaint with the FPC challenging the reasonableness of the rates and charges involved here. Nor did the Commission on its own motion institute any proceeding against this respondent (R. 1588).

(c) Finally, even assuming for the sake of argument that petitioner's factual assertions of "domination" were correct, it is a non-sequitur to claim that the District Court is therefore empowered to determine the reasonableness of the rates in issue. No legal metamorphosis can convert lack of adequate administrative remedy into a source of jurisdiction for the District Courts, particularly when Congress has deliberately withheld from those courts any jurisdiction over reparations (supra, pp. 18, 19). Arguments similar to those of petitioner have been rejected by other courts of appeals. Thus, in **Mississippi Power & Light Co. v. Memphis Natural Gas Co.**, supra, where Mississippi argued that it had been induced by Memphis not to resort to the Commission, the Court said, inter alia:

> "Mississippi argues that since the Commission has held it may not set retroactive rates, to require it to

go before the Commission to obtain lower rates in advance of deliveries, would require it to have instantaneous knowledge of the lower rates extended by Memphis to another customer, and would require the Commission to obtain immediate action. Congress has made certain provisions for these hardships, and supplication for further relief must be addressed to that body" (162 F. 2d, l. c. 391).

Similarly, in **Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co. et al.** (C. A. 1949), 173 F. 2d 784, the Sixth Circuit rejected the contention that a federal court should take jurisdiction upon an allegation by plaintiff that the FPC has no authority to grant the relief prayed. Likewise in **Backus-Brooks Co. v. Northern Pac. Ry. Co. et al.**, supra, charges of domination and unfaithfulness of the directors were held of no avail to confer jurisdiction upon the district court.

The rule clearly applicable to the present case is that stated by Mr. Justice Douglas in **General Committee etc. v. Missouri-Kansas-Texas R. Co. et al.** (1943), 320 U. S. 323, 337-338, 88 L. Ed. 76, 84, 64 S. Ct. 146:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized * * * **Courts should not rush in where Congress has not chosen to tread.**" (Emphasis supplied.)

Petitioner's ultimate plea that it must have a remedy because it has a "right" is equally fallacious in its major premise, namely, that it has an **existing right.** The prede-

cessors of petitioner and respondent took the only means authorized by law to establish legal rates for electric power at wholesale moving in commerce, that is, filed their contracts containing the rates with the FPC. Under the law approval of these filings operated to establish the rate as legal and enforceable. The rates thus established continued to be the legal and binding rates by remaining on file through the period involved here. As time moved on these established rates performed their function and no longer had any purpose to serve. The fact that these were the legal rates, binding on all, occurred because the Federal Power Act declared it so. Neither of the contracting parties who had established the rates, or their respective stockholder owners; nor any consumer; nor other person on behalf of consumers, took any action to modify, change or disestablish the rates then in effect. Nor did the Commission do so of its own motion, after inquiry or otherwise (R. 1588). Nor does petitioner challenge here the filing of any of the rates. The attack on the rates is collateral.

What petitioner claims to be its "right" is that of a successor owner to set aside and disestablish the legal rates of those past years, and to collect damages through the establishment by court decree of new rates in their stead. This is the "right" as to which petitioner is claiming there would be no remedy, under the holding of the Court of Appeals. As a newcomer on the scene, petitioner can have no greater "rights" than those of the parties to which it has succeeded. Petitioner's alleged "right" is not a reality.

3. **No public interest is involved in the present petition: any recovery by petitioner would be a mere windfall for it while consumers could receive no possible benefit.**

There is no new issue of federal law of public importance tendered in the petition which would justify the issuance of the writ. As this Court said of the parallel provisions of the Natural Gas Act, which is also administered by the

FPC, "the aim of the Act was to protect ultimate consumers * * *." **Federal Power Commission v. Interstate Natural Gas Co., Inc., et al.** (1949), 336 U. S. 577, 581, 93 L. Ed. 895, 69 S. Ct. 775; see also **Federal Power Commission v. Hope Natural Gas Co.**, supra, 320 U. S., l. c. 610, 612. Obviously, the consumers for the period 1935-1945 would not share in any recovery of petitioner, which is not even purporting to sue in a representative capacity. Nor would any other consumer benefit thereby. This is the position taken by the FPC in its amicus brief and argument before the Court of Appeals, in support of its conclusion that the trial court lacked jurisdiction and that any recovery by petitioner would amount to a mere windfall to it. The FPC is entrusted with the duty of administering and enforcing the Act, and as a Justice of this Court had occasion to state, the Commission "has not been an unzealous guardian of national interest."*

The windfall aspect of this case is particularly striking since all of the matters complained of by petitioner occurred prior to October 19, 1945 and until that day petitioner owned no stock of, nor had any direct or indirect interest in, any of the UPU subsidiaries. Until petitioner entered on the scene, those companies had the burdens and benefits of the contracts in question: their costs of operation, their rates to customers, and their earnings to stockholders—all depended upon the entire set of facts and circumstances as then existing, including the contracts with respondent, and there is no suggestion that their customers paid excessive rates or their stockholders received an inadequate return. When petitioner bought the Dakota stock from UPU, the sale was authorized by the Securities and Exchange Commission (R. 242) and petitioner did not and does not claim that it paid more than a fair price for the utility assets and earning power it was acquiring.

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* Mr. Justice Frankfurter in First Iowa Hydro-Electric Cooperative v. Federal Power Commission (1946), 328 U. S. 152, 187, 90 L. Ed. 1143, 66 S. Ct. 906.

Petitioner tries to reap where its predecessors did not sow. Any recovery in this case would be of no avail to consumers, who are the ultimate beneficiaries of the Act, and therefore no question of public importance is raised by the petition for certiorari. In **Layne Bowler Corp. v. Western Well Works** (1923), 261 U. S. 387, 393, 67 L. Ed. 712, 43 S. Ct. 422, in dismissing a writ of certiorari, this Court stated:

> "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties * * *."

In conclusion, it is respectfully suggested that the petition for writ of certiorari to the court below should be denied.

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No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

MONTANA-DAKOTA UTILITIES CO.,
a Corporation,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court denying respondent's motion to dismiss is reported in 73 F. S. 149 (R. I, 112-113). Its opinion on the merits is not reported (R. V, 1883-1887). The opinion of the Court of Appeals is reported in 181 F. 2d 19 (R. VI, 1988-1995).

JURISDICTION.

Respondent agrees with petitioner that jurisdiction of this Court rests on 28 U. S. C. 1254, but denies that jurisdiction over this action is conferred by 16 U. S. C. 825p, as more fully discussed herein (pp. 28-30).

QUESTIONS PRESENTED.

The action is for damages. There is no diversity of citizenship between the parties, yet the suit was brought in the United States District Court. The complaint alleges that the action arises under the Federal Power Act and the Court held that it had jurisdiction "by implication" to enforce the reasonable rates provision of the Act and to award damages for its breach. The questions arise:

1. Whether the District Court had power or jurisdiction at the instance of a private party to enforce the Federal Power Act, or award damages for its breach.

2. Whether the District Court had jurisdiction to determine wholesale rates for public utilities for a past period, notwithstanding the existence of legal rates on file with the Federal Power Commission under Section 205 of the Federal Power Act, and to enter a judgment for the difference.

3. Whether the Federal Power Commission has primary jurisdiction for the establishment of legal wholesale rates between public utilities which would require resort to the Commission with regard to the rates or any orders affecting them by any interested party.

4. Whether it was the intention of Congress in adopting the Federal Power Act to provide a forum, either commission or court, for the recovery of reparations for past periods.

5. Whether constructive fraud and "domination" can be predicated upon interlocking directors and officers in adjoining utility companies, separately owned, where the interlocking directors and officers were authorized and approved by the Commission under Section 305 (b) of the Federal Power Act.

6. Whether a charge of constructive fraud and "domination" through authorized interlocking directors and officers supplies a legal reason for not applying to the Commission for relief from alleged unreasonable rates.

STATUTES INVOLVED.

The statutes involved are set out in the Appendix.

STATEMENT.

The scene of this controversy is laid in North and South Dakota, and the period in issue is 1935 to 1945. The two public utility properties which ultimately were acquired by petitioner were located, one above the other, north of respondent's property. All three properties had once been controlled by the same holding company, but throughout the period in issue here the two northernmost properties were controlled by one holding company, United Public Utilities Corporation (UPU), and respondent was controlled by a separate holding company, The Middle West Corporation (Middle West).

Prior to 1935, while the three public utilities were still controlled by a single holding company, their facilities had been physically interconnected and a joint management arrangement had been entered into, with the result that the three utilities were operated substantially as a single system. When the two northern companies and respondent came under the separate control of UPU and Middle West, respectively, the two holding companies

decided to continue the joint management arrangement, for reasons of economy. On UPU's part this decision was supported by a study of comparative costs and was in contrast to UPU's decision to terminate six similar arrangements relating to others of its subsidiaries.* Since the interlocking arrangement is the source of petitioner's present claim that "domination" of its predecessors precluded their obtaining administrative relief, the facts as to actual operation of the arrangement are of importance.

A single general office was maintained for the northern companies as well as respondent, and the holding company owners separately elected annually, from the operating personnel, common directors for the three corporate boards. The chief executive officer of UPU (White) was at all times a director of the northern companies but never was on the board of respondent.[1] (In addition to White's being an officer and director of UPU, his family had a substantial stock interest in that company; on the other hand, he had no interest whatever in respondent or in its parent company.[2]) White personally selected or approved the joint directors and officers before they were elected or re-elected. He testified that he had satisfied himself as to the "ability", "integrity" and "loyalty" of the joint personnel and as to the quality of their work.[3]

Each of the three operating companies was a "public utility" within the meaning of the Federal Power Act, 49 Stat. 847, 16 U. S. C. 824 et seq. In compliance with Section 305 (b) of the Act, 16 U. S. C. 825d (b),[4] each person who served as a joint director or officer at any time

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* R. IV, 1316-1324; V, 1563.

1 R. IV, 1057, 1106.

2 R. IV, 1067, 1364-1366, 1380-1381.

3 R. IV, 1096-1097, 1349, 1328, 1079. In one instance, when White became dissatisfied with a joint president, he caused his removal (R. IV, 1318-1319).

4 The text of this Section is set out in the Appendix, p. 48.

during the ten-year period filed with the Federal Power Commission (FPC) his individual application for authority to hold interlocking positions. These applications were granted by the Commission upon its finding in each case that "neither public nor private interests will be adversely affected by the holding of such positions."[5]

While the three companies were operated locally as a single system, it was the practice to refer to the respective parent companies all matters of importance as to which it was thought there might be a conflict of interest.[6]

Through the ten-year period, rates and charges for the interchange of electric energy, for the use of interconnection facilities, and for pooling reserve capacity between the northern companies and respondent were established in a series of inter-company contracts. (The earliest was a 1935 oral contract and the latest was a written contract dated March 13, 1943. In 1939 the two northern companies were merged and the name taken was Dakota Public Service Company—"Dakota"; at that time the contracts were remade in the name of the successor company.[7]) All of the rates and charges were negotiated on behalf of the UPU group by White personally or, after having been initially worked out by the operating personnel, were reviewed and confirmed by him.[8] White's review was not merely perfunctory. He took pains to obtain pertinent data and in all instances secured the advice of an expert

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5 R. I, 323-343, 347, 353-362.

6 R. IV, 1098-1099; V, 1542-1546, 1853, 1833-1834, 1845-1846, cf. 1540. Cf. R. IV, 1111-1112.

7 The contracts involved are set out at R. 34-105, 178-186.

8 1936 contract: R. IV, 1125-1138; V, 1639, 1644; 1938 contract: R. IV, 1178-1184; V, 1645-1646, 1650; 1939 contract: R. IV, 1185; V, 1852; 1941 contract: R. IV, 1196-1229; 1943 amendment: R. IV, 1229-1262; V, 1656; joint management contracts: R. IV, 1099, 1384. He delayed for some four years the execution of the 1936 contract in order to avoid the outlay of cash by his companies, and he thereafter invalidated the first execution of that contract while additional technical studies were conducted under his instructions (R. IV, 1072, 1020, 1106-1110; I, 464-467; V, 1835).

engineer of the UPU organization, having no relation to respondent or its parent, or of independent engineers.[9] In addition, UPU's general counsel (Francis H. Scheetz of Philadelphia), who had no connection with respondent or its parent, either drafted or passed upon all written contracts.[10] Moreover, the written contracts were submitted for approval in advance to the UPU board.[11]

All of the contracts establishing intercompany rates and charges during the ten-year period were filed with the FPC under Section 205 of the Act, 16 U. S. C. 824d. The northern companies either participated in each filing or filed a certificate of concurrence, and the UPU management and counsel participated in various determinations regarding the filing procedures.[12] The Commission established effective dates of filing in all cases, after obtaining additional information by correspondence in certain instances.[13] At no time in the ten-year period did the FPC or any other person, including UPU, challenge any of the filed rates under the statutory standard.[14] In 1942, in integration proceedings before the Securities and Exchange Commission (SEC), under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79 et seq., involving the UPU system (not respondent or its

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9 Reports: R. IV, 1331, 1020, 1026, 1282-1286; V, 1846. Inspection trips: R. IV, 1059-1061, 1028; V, 1846, 1853. Lakin, an engineer, President of 11 UPU subsidiaries and a UPU director (R. IV, 1194; V, 1601, 1604), inspected the properties and reported to White concerning the three basic rates in issue (R. IV, 1113, 1115, 1128; V, 1605-1615; IV, 1366-1371). Cf. R. IV, 1118-1119.

10 R. V, 1636; as to the interconnection contract: R. IV, 1132; V, 1643-1644, 1647; as to the reserve capacity contract: R. IV, 1178; as to the 1939 contracts: R. IV, 1188; V, 1652; as to the 1941 contract: R. V, 1509, 1645-1646, 1654-1655; as to the 1943 amendment: R. IV, 1234-1253, 1257-1258; V, 1656-1657; and as to the joint management arrangement: R. V, 1637.

11 R. IV, 1114-1115, 1121-1122, 1127-1128, 1178-1184, 1099, 1192-1193, 1255-1256; V, 1648.

12 R. I, 267-269, 343-345, 297-298; IV, 1177-1178, 1224-1225; V, 1652.

13 R. I, 34, 35, 43, 61, 68, 87, 10., 108-111, 353.

14 R. IV, 1587-1588.

parent) the operation of this joint management arrangement and the terms of the prevailing inter-company contracts—including the three rates in issue—were fully explored and their fairness to the UPU group was vigorously asserted by White and all other UPU witnesses, and by Scheetz, its counsel.[15]

Petitioner itself did not come upon the scene until October 19, 1945—the close of the ten-year period—when it purchased the stock of Dakota from UPU and succeeded to all of Dakota's assets by assignment.[16] The terms of the sale and purchase were approved by the SEC and by the FPC. Petitioner continued to operate under the contracts, but on August 12, 1946, it filed a complaint under the Federal Power Act, in which it asked the Commission to determine reasonable rates for the future and alleged that the rate and joint management contracts were the result of domination over its predecessors on the part of Middle West.[17] (At this stage there was no hint of petitioner's present crucial contention, that is, domination by the present respondent.) That complaint never went to hearing since new temporary rates were agreed upon between the companies for the period following the date of termination of the rate contract, August 31, 1947.[18]

On February 3, 1947, petitioner brought the present action in the District Court in South Dakota, seeking, as stated by the Court of Appeals in this case, "to recover damages according to the principles of common law" for the period from September 1, 1935, to the date of petitioner's purchase of the Dakota stock.[19] The complaint

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15 R. IV, 1487 ff.; V, 1524 ff., 1540-1548, 1556 ff., 1657.

16 Dakota and its two constituent companies, referred to above as the "northern companies," are generally referred to as "petitioner's predecessors" in the balance of this brief.

17 R. I, 149-168; received in evidence: R. V, 1587.

18 R. V, 1875-1877.

19 R. VI, 1988.

alleged that the contracts were tainted with fraud, due to the fact that the interlocking directors and officers were involved in making them; that the rates and charges provided in the contracts were "without consideration, unjust, unreasonable and unlawful" in their entirety; and that respondent "unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from" predecessors of petitioner the moneys sued for in the various counts.[20] The complaint asked that the contracts be declared void; that the rates and charges be declared unjust and unreasonable, and that fair and reasonable amounts be determined; also asked for an accounting and for a money judgment in specified amount.[21]

Both petitioner and respondent are Delaware corporations.[22] There being no diversity of citizenship, federal jurisdiction was ascribed to alleged violations of the Federal Power Act. The trial court sustained federal jurisdiction under the Act "by implication."[23] It held that "all of the contracts in question were presumptively fraudulent as to plaintiff's assignor and its predecessors, in view of the common directors and officers. Defendant has failed to rebut this presumption and sustain the fairness of the contracts."[24] Thus, the Court did not purport to set aside—it completely ignored—the series of orders of the FPC approving the interlocking positions; it merely decided that the relationship resulted, as a matter of law, in constructive fraud. Largely on this premise, the Court gave no weight to the other series of orders of the FPC which approved the filing of the contract rates. It determined that the rates and charges provided in the con-

20 E. g., R. I, 7.

21 R. I, 26-27, 177-178.

22 R. I, 2, 116, 210.

23 R. I, 112-113; V, 1883.

24 R. V, 1963, conclusion of law 13.

tracts were unreasonable; found and supplied other rates which it determined would have been reasonable; gave judgment for the difference, in the aggregate amount of $779,958.30, inclusive of interest.[25]

On appeal by respondent, the Court of Appeals for the Eighth Circuit reversed the judgment on the grounds that the District Court was without jurisdiction to pass on the reasonableness of the rates, that the subject matter of the action was within the primary jurisdiction of the Commission, and that the administrative remedies provided in the Federal Power Act had not been exhausted.[26] The Court of Appeals did not review the merits; thus, the only determination of unreasonableness of the rates is that of the District Court, whose jurisdiction to make the determination is in issue.

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25 R. V, 1960-1965.

26 R. VI, 1992-1995.

SUMMARY OF THE ARGUMENT.

The petitioner having purchased the property of the subsidiary called "Dakota" from its owner, the United Public Utilities Corporation, is seeking here to recover from respondent a damage claim based on charges that petitioner's predecessors had been defrauded by respondent through the period 1935 to 1945 due to the rates and charges contracted between them for electric energy. Absent diversity of citizenship, federal jurisdiction is predicated on the allegation that "the action arises under the Federal Power Act * * * and under a law of the United States regulating commerce under said Federal Power Act."[1] In substance the claim is that fraud is inferred from the existence of interlocking relationships among the officers and some of the directors of the respondent and the predecessors of petitioner during the period in question. From this relationship constructive fraud is alleged to have resulted, and it is alleged that petitioner's predecessors were damaged by it, but respondent was not. The fraud went into the contracts between the parties providing for interchange rates, interconnection and reserve capacity charges, according to this theory, so that the contracts are said to be void and to furnish no justification for the payments (under or over) made under them. The Court of Appeals concluded that the claim was one for damages at common law, and thus far it undoubtedly appears that it is so. However, beyond this point the contracts containing the rates and charges provisions were filed with the Federal Power Commission by the respondent with the concurrence of petitioner's predecessors. It was necessary to file them. The law required it. The filings and concurrences having been approved by the Commission, the rates and charges therein became and remain the only legal rates which could exist

1 Pet. Brief, p. 13.

between the parties. Their filing conveyed notice to the Commission, all interested rate making bodies, and the consumer-customers of these wholesale contractors. But petitioner claims that the rates and charges provided in the contracts and established as the legal rates through their filing and approval, were in fact unreasonable, hence, under Section 205 (a), unlawful. Without applying to the Commission to disestablish the filings, the petitioner brought suit in the federal District Court in 1947 to have rival rates and charges established by court decree. These were to be reasonable, hence lawful, rates and charges.

The District Court, overruling objection to the proceedings on jurisdictional grounds, determined that the filed rates and charges then existing unchallenged in the Federal Power Commission were unlawful and had been so for the ten year period from 1935 to 1945. In overruling the plea to the jurisdiction, the District Court, holding that the Federal Power Act did not explicitly provide jurisdiction in the courts for its enforcement or to award reparations or damages for its breach, concluded nevertheless that there was jurisdiction "by implication" to do so. The attack on the orders approving the filings by the Commission obviously was collateral, and the effect of the judgment of the District Court was to ignore the existence of the established legal rates, upon the ground that they were unlawful and of no validity. It seems clear that the Act did not undertake to supply either a right to reparations, damages or windfalls, or to furnish any remedy for enforcement of any such claimed right.

The pattern of the Act shows that Congress entrusted the duty to administer the statutory standard of reasonable rates to the Federal Power Commission and not to the courts, either explicitly or by implication. The consumers, not public utilities, were to be the beneficiaries of the law. If current and prospective regulation is not efficient to keep wholesale rates in line, then the entire scheme is a failure,

since consumers obviously would derive no benefit from reparations or damages collected by the wholesale utilities for past periods not included in their retail rates. The legislative history of the Act itself rejects any such construction. As is noted by petitioner in its brief,[2] Congress originally had before it a bill providing for reparations proceedings within the Commission, with enforcement referred to court action. Those provisions were eliminated from the final draft of the statute. They were dropped because contrary to the purposes of the Act, and not for the reason suggested by petitioner, namely, to leave the subject of reparations and damages for past periods to the courts. The idea which prevailed with the Committee, and which undoubtedly went into the Act, was to rely on current and prospective regulation exclusively to control the relations of wholesalers and producers with each other, not to provide a process by which a public utility might have or claim the right to go ahead receiving service at an established legal rate for a period of years, and then to maintain a court action for lump sum damages in which the customer-consumers would have no participation.

In the brief of petitioner (pages 4 and 5), it is tentatively suggested, rather than seriously argued, that Section 825 (p) (Section 317) of the Power Act "Seems to confirm jurisdiction of cases like this to the United States District Court, to the exclusion of state courts, * * *." This suggestion could be misleading unless Section 317 is read in context with the three sections immediately preceding. Those sections supply enforcement machinery for the Commission, not for private litigants. Section 317 designates the district courts as the exclusive jurisdiction for such enforcement, designates the venue for criminal and civil enforcement proceedings, which the Commission is authorized in the next preceding sections to undertake. The review was to be that provided in Sections 225 and

2 Pet. Brief, p. 9.

347 of Title 28, and no costs were to be taxed against the Commission in any case.[3] Here again the legislative history compels the conclusion that Section 317 was intended to refer only to Commission enforcement, not to private suits by public utilities against each other.

At the outset the respondent challenges any claim of fraud based upon the fact of interlocking officers and directors, since their positions had the formal approval of the Commission under authority of Section 305 (b) of the Act. Clearly, as a matter of law, no fraud may be inferred from relationships made lawful and proper by authority of the Commission exercised within the scope of its statutory powers. The record shows, therefore—the petition and brief of petitioner confirms—that there is no fraud here which can be recognized by the Court. The petitioner does not claim to have applied to the Commission, or that its predecessors or their corporate owner, at any time applied to the Commission to set aside the eleven formal orders made during the ten years drawn in question approving the positions of these corporate officials, but on the contrary the orders, like the filing approvals, stand to this day as valid, vital instruments of authorized power.

The petitioner claims that the constructive fraud alleged to arise from the authorized interlocking relationships resulted in "dominance" over its predecessors so as to enable respondent to secure the allegedly void contracts for rates and charges which were filed with the Commission. The same "dominance," so it is alleged, stood in the way of its predecessors having resort to the Commission for relief against the rates and charges, and against the alleged fraud on the petitioner. Again, the petition for certiorari in this Court and the briefs of counsel refute this contention. "Dominance" which would paralyze the active minds and bodies of the owners of the property which the peti-

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3 Sections 314-317, inclusive.

tioner has purchased cannot be held to flow from an interlocking relationship made legal, for all of the purposes of wholesale transactions by public utilities, by proper orders of the Commission. Respondent does not wish to discuss the facts as though the scope of the present proceedings would involve the merits of these claims of fraud. That issue, together with the defenses of ratification and statute of limitations, were not reached in the Court of Appeals and are not before this Court now. But enough may be said to show beyond question that the United Public Utilities Corporation, the person who sold these properties to the petitioner; the owner of its predecessors throughout the ten year period under scrutiny, was not hampered or hindered in any way or prevented from applying to the Commission for relief at any time. No "dominance" over that interested party is pretended or claimed by the petitioner either in its petition or brief. The UPU president, who at all times was also a director of the two subsidiaries eventually purchased by the petitioner, was free to act on behalf of his properties and in his own interest. This much may be said as bearing upon the question of jurisdiction presented here. It is sufficient to show the flimsy tissue supporting the argument of "dominance" such as to prevent resort to the Commission. It destroys the excuses offered by petitioner for the failure through the ten years between 1935 and 1945, and even down to the present moment, of any person to apply to the Federal Power Commission for relief. It is assumed that petitioner thinks that, unless petitioner's predecessors were prevented by this fraud, it would have been necessary to come to the Commission in the first instance. Otherwise no excuse would be needed.

There is, therefore, both a legal reason and a factual reason apparent upon the face of these proceedings such as to warrant the Court in not accepting the excuse of "domination."

As a matter of fact, petitioner has given no reason why it could not itself have resorted to the Federal Power Commission to challenge the validity of the orders approving the filing of the rates and the orders authorizing the interlocking positions of certain of the officers and directors of the utilities. As is admitted here, petitioner actually filed a complaint with the Power Commission in February of 1946, alleging the filed rates to have been unreasonable and asking the Commission to fix new rates.[4] It offers no reason why its claim of constructive fraud such as to void the contracts then on file as the bases for the existing legal rates was not then brought to the attention of the Commission and a hearing requested on its complaint. It did not do that. It preferred to launch a collateral attack in the district court the next year, which ignored the existence of the legal rates and orders, as well, through the claim that they were unlawful and need not be considered. No such course was contemplated by the Federal Power Act, and approval of that course would do violence to clear purposes of the statute. A judgment in the district court which would enable the utility to enrich itself at the expense of another would have the effect to directly oppose the regulatory program designed to pass on to retail users all of the profits and benefits which should go into the rates. Utility rate making must not be left to circumstances so fortuitous and uncertain. Such a construction of the Power Act would result in the regulation of interstate commerce public utilities for the benefit of the utility rather than its retail customers.

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[4] Pet. Brief, p. 12.

ARGUMENT.

I.

The Judicial Code Does Not Confer Jurisdiction Upon District Courts to Entertain Private Proceedings Under the Federal Power Act.

The complaint alleged that "the action arises under the Federal Power Act, as hereinafter more fully appears, and under a law of the United States regulating commerce under said Federal Power Act" (R. I, 2). The District Court sustained this claim of jurisdiction. In this Court petitioner argues that "the provisions of the Judicial Code defining jurisdiction of the District Courts are enough" (Pet. Brief, p. 17). Its concern with the Power Act is whether it "deprives the courts of jurisdiction otherwise vested in them by the Judicial Code" (Pet. Brief, p. 15; cf. id. p. 17).

Petitioner's logic here is difficult. "Deprives" connotes taking away something that existed before. The Federal Power Act could "deprive" district courts of jurisdiction only if jurisdiction existed apart from and prior to the Federal Power Act. But the only jurisdiction referred to by petitioner as being "deprived" by the Federal Power Act is the jurisdiction created by the provisions of the Judicial Code referring to suits arising under "laws of the United States" or "any law regulating commerce", and petitioner does not refer to any such law except the Federal Power Act itself. What, then, is the jurisdiction "otherwise vested in [the district courts] by the Judicial Code" of which the Federal Power Act "deprives" them?

The question seems to answer itself and to expose the fallacy of petitioner's reliance upon the Judicial Code

per se. The Judicial Code confers jurisdiction (among other things) over matters arising under laws of the United States and laws regulating commerce; it does not itself designate what those "matters" are. In enacting a law regulating commerce, as in any other law, Congress may decide to create or not to create a particular right or remedy. If Congress did not intend in enacting a particular law to create a right or remedy by court proceedings, the Judicial Code would not supply such an intent. *Switchmen's Union of N. A. v. National Mediation Board* (1943), 320 U. S. 297.

The Judicial Code was with us when this Court decided *Texas & Pacific Ry. Co. v. Abilene Oil Co.* (1907), 204 U. S. 426; *General Committee, etc., v. Missouri-Kansas-Texas R. Co. et al.* (1943), 320 U. S. 323, and the many other cases holding that federal courts lacked jurisdiction to grant relief under various laws of the United States, including laws regulating commerce. So here, the Judicial Code is of no ultimate avail to petitioner unless the Federal Power Act first creates a right and remedy in petitioner.

The real inquiry, then, is whether Congress intended, in enacting the Federal Power Act, that federal district courts should have jurisdiction to entertain proceedings of the type here involved, to enforce rights said to be created by the Act, for which no remedy was provided.[1]

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1 The problem of statutory interpretation as to whether a right or remedy by court proceedings was intended to be created under a particular law of the United States, if substantial and not merely colorable, might itself present a federal question. *Gully v. First National Bank* (1936), 299 U. S. 109. In this case, however, in view of the rule of primary jurisdiction firmly established by this Court in 1907 and uniformly followed in numerous subsequent cases (see pages 22-24, infra) the claim that a judicial remedy was intended to be created under the Federal Power Act would seem to be plainly wanting in substance so that dismissal for want of jurisdiction would have been proper. *Levering & G. Co. v. Morrin* (1933), 289 U. S. 103, 105-6; *California Water Service Co. v. Redding* (1938), 304 U. S. 252, 255. But even if it be assumed that the question of statutory interpretation is not plainly wanting in substance, if the answer to that question is that Congress did not intend to create the remedy sought by petitioner here, the Judicial Code could not become the basis of jurisdiction to sustain petitioner's claims.

II.

The District Court Had No Jurisdiction Under the Federal Power Act to Entertain the Present Suit and to Substitute Its Own Conception of Reasonable Rates for the Rates Filed with the Federal Power Commission Pursuant to the Act.

The complaint, in invoking the Federal Power Act as the basis of federal jurisdiction, proceeds on the theory that petitioner had a right, under the Act, to obtain a determination by the District Court as to what rates would have been just and reasonable, and to recover the difference between the amount so determined and the amount paid and received under the rates actually filed.[2] The District Court held that the Act did not specifically authorize such a suit, but that,

> "in the absence of an adequate administrative remedy, the only relief remaining to those who have sustained damage by reason of such a breach of statutory duty as is set forth in the complaint, is in resort to the Court which, in my opinion, is vested with the necessary authority, as well as the duty to entertain such suit, *by implication.*" (Emphasis supplied).

Referring to a similar claim of implied judicial power under the Railway Labor Act, this Court said, through Mr. Justice Douglas, in *General Committee etc. v. Missouri-Kansas-Texas R. Co. et al.* (1943), 320 U. S. 323, 337:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied."

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2 The complaint also was founded upon alleged violations of the filing requirements of the Act, but all such contentions were rejected by the Court of Appeals and have been abandoned by petitioner.

With reference to the Federal Power Act, it seems clear that "the pattern of this legislation and its history" do not reveal any purpose to afford a private right of action, but plainly show a contrary purpose.

(A) Under the Federal Power Act jurisdiction to keep filed rates in conformity with the "just and reasonable" standard is vested exclusively in the Commission, and the role of the courts is limited to (i) aiding Commission enforcement and (ii) reviewing Commission orders, within defined limits.

Whether Congress intended to create a private right of action to determine reasonableness of rates cannot be ascertained, as petitioner has sought to do, from an isolated sentence or two of the Federal Power Act. Part II (Sections 201 to 209, 16 U. S. C. 824 to 824 h, inclusive) and Part III (Sections 301 to 319, 16 U. S. C. 825 to 824 r, inclusive) of the Act were enacted together.[3] Their provisions are related and integrated parts of a comprehensive regulatory program, and all must be taken in their legal and historical context in determining the roles which Congress assigned to the Commission and to courts respectively. Accordingly, before examining the rate sections (Sections 205 and 206, 16 U. S. C. 824d and 824e) in detail, a brief survey of the whole of Parts II and III will be helpful.

1. Summary of Parts II and III of the Act.

Part II contains a series of provisions, both substantive and administrative, concerning "public utilities," and Part III contains additional provisions, mostly administrative in character, concerning "licensees" and "public utilities". Throughout Part II there is not a single mention of any court or any judicial function, whereas "the Commission" is everywhere. Just as this Court said of

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3 Part I of the present Act is the Federal Water Power Act of 1920 relating to so-called "licensees" and is not here involved.

the essentially similar Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 et seq., in *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 617:

> "Congress has entrusted the administration of the Act to the Commission not to the courts."

The keynote of *Commission* jurisdiction is found in the very first section (Section 201, 16 U. S. C. 824):

> "(b) The provisions of Sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, • • •. *The Commission shall have jurisdiction* over all facilities for such transmission or sale • • •
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> • • • • • • • •
>
> "(e) The term 'public utility' • • • means any person who owns or operates facilities *subject to the jurisdiction of the Commission* under Sections 824-824h of this title." (Emphasis supplied.)

In each of the succeeding sections of Part II and Part III dealing with particular aspects of utility regulation substantive and administrative provisions are interwoven and the entire administration is entrusted to the Commission.

The first mention of any judicial function or authority is in the section on judicial review of Commission orders (Section 313, 16 U. S. C. 825 l) and the enforcement sections (Sections 314-317, 16 U. S. C. 825m to 825p, inclusive). The former section provides for limited review by circuit courts of appeals—not district courts. As to the several enforcement sections, the role of the Commission is again primary, but Congress strengthened its hand by authorizing it to invoke the aid of the courts in several different ways. Thus the Commission may seek injunctions to prevent violations or enforce compliance (Section 314, 16 U. S. C. 825m), it may request the institution of criminal

proceedings (Sections 314 and 316, 16 U. S. C. 825m and 825o), and it may fix the amount of certain forfeitures recoverable by the United States (Section 315, 16 U. S. C. 825). As to Section 317 (16 U. S. C. 825p), the Court of Appeals correctly held that it was designed to give federal courts exclusive jurisdiction (i. e., exclusive of State courts) over the various types of court proceedings specifically authorized in and by the three sections immediately preceding it, and has no reference to private suits of any kind.[4]

2. The rate provisions: Sections 205 and 206 (a).[5]

As in the statute as a whole, so also, in Sections 205 and 206 (a) there is the intermingling of substantive and administrative provisions, and the administrator is exclusively the Commission. In paragraphs (a) and (b) of Section 205 are the substantive standards: rates are to be just and reasonable—otherwise they are declared to be "unlawful"—and may not be discriminatory or preferential. In paragraphs (c), (d) and (e) of Section 205 and in paragraph (a) of Section 206 are provided the administrative means to achieve these standards: schedules of rates are to be filed with the Commission and kept open for public inspection; no change may be made in filed rates except after notice to the Commission and the public by appropriate filing; the Commission may, upon complaint or on its own motion, suspend the operation of a new rate schedule pending hearing; and once a rate has become effective the Commission may, on complaint or on its own motion, hold a hearing to determine whether it conforms with the substantive standards, and if not, may determine, and compel adoption of, a proper rate under those standards. By Section 206 (b) the Commission is empowered to investigate

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4 See pages 28-30, infra. The full text of this Section is set out in the Appendix, p. 50.

5 The full text of these provisions is set out in the Appendix, pp. 45-47.

and determine costs of production and transmission in certain situations where it has no authority to establish a rate.

Read by themselves, and even more so when read in their statutory context, Sections 205 and 206 (a) say plainly and unmistakably: *"The Commission is to have exclusive jurisdiction—through the mechanics of filing, publicity, complaints, investigations, hearings and orders, as detailed in the Act—to regulate wholesale rates in conformity with the standards set forth in Section 205 (a) and (b)."* These sections were patterned closely after the rate provisions of the Interstate Commerce Act (49 U. S. C. 1 et seq.) and similar statutes[6] with a few important changes occasioned by the difference in the subject matters (pages 24-28, infra). They embodied a half century's accumulated experience and doctrine on rate regulation, which petitioner now asks this Court to ignore.

3. The doctrine of exclusive jurisdiction.

The doctrine of exclusive jurisdiction of administrative agencies originated in decisions of this Court under the Interstate Commerce Act, holding that courts are without jurisdiction to find or determine the reasonableness of rates filed with the Interstate Commerce Commission but not found by that Commission to be unreasonable—notwithstanding the election given by Section 9 of that Act (of which there is no counterpart in the present Act) to a person claiming to be damaged to make complaint to the Commission or to bring suit in a district court of the United States. The venerability and vitality of the doctrine were expressed by this Court in *United States v. Interstate Commerce Commission* (1949), 337 U. S. 426, 437:

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6 Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423 (74th Cong., 1st Sess.), pp. 392, 393, 2170.

"But it has been established doctrine since this Court's holding in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, * * * that a shipper cannot file a § 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for exercise of the [Interstate Commerce] Commission's primary jurisdiction."

The doctrine has been applied in multitudinous cases and by now—

"has pervaded the entire realm of administrative law. Railroad legislation developed the doctrine, public utility expanded it, tax litigation extended it, and now the rapidly enlarging fields of labor and industry regulation have adopted it."[7]

The *Abilene* case had emphasized the need for *uniformity* as a rationale of the doctrine.

The recent case of *United States v. Jones* (1949), 336 U. S. 641, contains a succinct statement of another important rationale of the doctrine, namely, *"expertise"*:

"Not only is rate making essentially legislative in the first instance. The policy of judicial restraint is one having regard for the *expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function.* Such doctrines or policies as those of 'primary jurisdiction' and ex-

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7 51 Harv. L. Rev. (1938) 1251, 1252. The quotation is from a note entitled "Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts," in which "primary jurisdiction" is shown to have two main branches, namely: (1) exclusive jurisdiction, where the court has no jurisdiction of the subject matter at all, and the commission must decide the question, with judicial review ordinarily only to safeguard the requirements of due process of law, and possible court action to enforce the commission's order; and (2) exhaustion of remedy, where the court has jurisdiction of the subject matter but the suit is premature, and the court refuses to decide the case until all possible administrative determination has been completed. Cf. K. C. Davis, Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction (1949-1950), 28 Texas Law Review, p. 168 et seq., p. 400 et seq.

haustion of administrative remedies lie at the very root of the problem." (Emphasis supplied.) (l. c. 652)[8]

Both grounds of decision—*uniformity* (Abilene) and *expertise* (Jones)—are valid and relevant in the case of the Federal Power Act, and each helps to illuminate Congress' purpose and intent. To permit the district courts to determine reasonableness of filed rates retrospectively in private litigation would do violence to both.

(B) Congress's deliberate omission of a reparations provision from the Federal Power Act, for the specific reason that such a provision would be inappropriate in a statute regulating wholesale rates, confirms the intention to confer exclusive jurisdiction upon the Commission.

Petitioner has attempted to distinguish the cases applying the doctrine of exclusive jurisdiction under the Interstate Commerce Act by pointing to the absence of a provision in the Federal Power Act authorizing the granting of reparations (Pet. Brief, pp. 23-4). The theory of the argument seems to be that the absence of a reparations remedy before the Commission warrants the *inference* that a private right to direct relief in the district courts was intended. But when the particular and cogent reasons for omitting a reparations provision from this statute are taken into account, the intention of Congress to exclude any private right to sue stands out clearly.

The controlling consideration in enacting the statute was to regulate only *wholesale* rates (rates charged pur-

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8 See also the following statement in *Mississippi Valley Barge Line Co. v. United States et al.* (1934), 292 U. S. 282, 286:

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the [Interstate Commerce] Commission, by training and experience is qualified to form [citing cases]. It is not the province of a court to absorb this function to itself."

chasers for resale, not those charged retail consumers)—yet its aim was to protect *retail* consumers.[9] If the ultimate (retail) consumers ever are to benefit by regulation of wholesale rates, compliance with the substantive standards contained in Section 205 (a) and (b) must be attained during the period when a particular rate is actually in effect, i. e., must be achieved by prospective action and not *ex post facto* through recovery of reparations. This follows from the very nature of the relationship between wholesale rates and retail rates. If wholesale rates are maintained in conformity with statutory standards, by prospective regulation, the ultimate consumer will be the beneficiary. This Court said in *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 577, 581, immediately after the passage quoted in footnote 9 herein:

> "The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility."

On the other hand, if wholesale rates are not kept in line by prospective regulation, ultimate consumers will derive no benefit from a later recovery of reparations—the retail rates actually paid by them during the past period in question having been predicated on the wholesale rates actually in effect during such period—and the only result will be but a windfall to the wholesaler.

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[9] See *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 577, 581, and *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 610, 612, relating to the parallel provisions of the Natural Gas Act, and particularly the following statement in the *Interstate Natural Gas Co.* case (l. c. 581):

> "The aim of the [Natural Gas] Act was to protect ultimate consumers of natural gas from excessive charges * * *. They were the intended beneficiaries of rate reductions ordered by the federal commission, * * *."

The establishment by a district court *ex post facto* of a different rate from that on file in the Commission would accomplish none of the purposes of the Federal Power Act. Obviously the intent of the Act was not to create damage windfalls between wholesale utilities long after any differences in balance which may have existed between them had been distributed to their consumer-customers. The failure of the Act to support such a result as this neither implies a violation of the Act itself nor supports the claim that either of the wholesalers now has a *right without a remedy*. The legislative history contains specific and pointed evidence that such result would be precisely against the reasoning of Congress. As originally introduced, the Senate and House Bills (S. 1725 and H. R. 5423, 74th Cong.) each contained a reparations provision, providing that (a) the Commission could order reparations for past payments of unreasonable rates, on complaints filed within two years after payment, and (b) if the utility did not comply, action could be brought on the Commission's order in a court of competent jurisdiction. However, these and certain other provisions were omitted by the Senate Committee for the express reason that:

> "They are appropriate sections for a State utility law, but the Committee does not consider them applicable to one governing merely wholesale transactions." [10]

This latter conclusion was arrived at by the Committee after hearing testimony of the General Solicitor of the National Association of Railroad and Utilities Commissioners as follows:

> "That is an entirely proper provision in a railroad statute. When a man goes to the railroad station with a load of goods to ship somewhere he has to ship at the rate that is fixed in the tariff. He must make the

10 Senate Report No. 621, 74th Cong., 1st Sess., p. 20.

shipment then; and he ought to be able to come thereafter to the Commission and show that he was required to pay an unreasonable rate, if it was unreasonable, and to ask for a determination of a reasonable rate and get reparation that is due him for any overpayment. That is perfectly proper. But this bill relates only to service *between the wholesale generating or producing company and the distributing utility.* We question whether the *public interest* will be served by giving any company the right to go ahead receiving service at the established rate for 2 years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable." (Emphsis supplied.) [11]

Thus, the determination of Congress to rely on prospective regulation exclusively and not to provide for private suits to recover reparations was deliberate, occasioned by the specified reason that only wholesale rates were involved. If the suggested reparations provisions had been retained, the Commission (not the courts, except by way of enforcing Commission determinations) would have had the power (not indefinitely, but subject to a two-year time limitation) to adjust a particular rate retrospectively, to accord with the just and reasonable standard. In such case the filed rates would not have been conclusively "lawful," i. e., in conformity with the substantive standard. But Congress concluded that the purpose of benefiting ultimate consumers would not be served by permitting retrospective determinations of reasonableness of wholesale rates. It preferred to make the filed rate conclusively the lawful rate and to rely upon the statutory machinery of filing, publicity, complaints, hearings, and reports to maintain filed rates in conformity with the standard of reasonableness.

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11 Hearings, Committee on Interstate and Foreign Commerce, Public Utilities Holding Companies, on H. R. 5423, 74th Cong., 1st Sess., p. 1685.

Neither the statutory language nor the legislative history permits the conclusion that, by declining to give the Commission a limited reparations power for the reason disclosed in the hearings, Congress inferentially conferred an unlimited reparations power on the courts. To the contrary, both the language of the Act and the legislative history make it abundantly clear that Congress intended that no private rights to sue for reparations should exist.[12]

(C) **Section 317 of the Act has reference to the several types of judicial proceedings enumerated in preceding sections of the Act, and does not itself create or infer a private right of action.**

Neither the complaint below nor petitioner's brief in this Court claims that any specific section of the Federal Power Act confers jurisdiction upon the District Court. However, after referring to the Judicial Code as a sufficient source of jurisdiction, the brief suggests that Section 317 of the Federal Power Act, 16 U. S. C. 825p[13] "seems to confirm jurisdiction of cases like this to the United States District Courts * * *" (Pet. Brief, p. 5, compare id. p. 17).

When Section 317 is read in the light of the three immediately preceding sections, it is clear that it has no relevance at all to cases such as this. Those sections provide for enforcement of the Act by various types of proceedings at law and in equity: injunctions, forfeitures, mandamus actions, and criminal proceedings. Section 317 says that federal courts are to have jurisdiction in the enumerated classes of proceedings, to the exclusion of the State courts. It is not necessary to look elsewhere for any additional meaning of Section 317.

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12 No right or remedy to attack public utility wholesale rates fixed by contract, on the ground of unreasonableness, existed at common law: *Arkansas Natural Gas Co. v. Arkansas R. R. Commission et al.* (1923), 261 U. S. 379; *Southern Iowa Electric Co. v. City of Chariton, Iowa, et al.* (1921), 255 U. S. 539; *City of Paducah et al. v. Paducah Ry. Co.* (1923), 261 U. S. 267.

13 The full text of this Section is set out in the Appendix, p. 50.

Here, again, the legislative history fully supports the conclusion that Section 317 was intended only to refer to Commission enforcement, not private suits. In their official statements to Congress concerning the proposed legislation, Commissioner Clyde L. Seavey and Solicitor Dozier DeVane of the Federal Power Commission said:[14]

> "Sections 311 and 312 [now Sections 314 and 317 of the Act] give to the Commission power to resort to appropriate United States courts for the enforcement of the provisions of the act and its orders and give to such courts the necessary authority to enforce the same."

Petitioner refers (Pet. Brief, p. 18) to two district court cases arising under the Securities Exchange Act of 1934, 15 U. S. C. 78 et seq., as involving "a similar question." These were cases applying the familiar tort principle that a violation of a statutory prohibition will create a right of action in favor of a person injured thereby, if he was of the class intended to be protected. In each of those cases the question was properly treated as a matter of legislative intent as shown by the entire statute in question, its legislative history.[15] In the present case, on the other hand,

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14 Respectively: 74th Congress, 1st Session, Hearings before the Committee on Interstate and Foreign Commerce on H. R. 5423, p. 388, and Hearings before the Committee on Interstate Commerce on S. 1725, p. 249.

15 In *Massachusetts Universalist Convention v. Hildreth & Rogers Co.* (1949), 87 F. S. 822, another judge of the same district court which had decided *Remar v. Clayton Securities Corporation* (D. C. Mass., 1949), 81 F. S. 1014, one of the two cases relied upon by petitioner, held that there was no intention to create a private remedy under the Federal Communications Act, saying:

> "The only function of the courts in the enforcement of the Act is the exercise of the right to enforce or review orders of the Commission under Sections 401 and 402 of the Act. * * *
>
> "In the light of the scheme of enforcement by means of an administrative agency which Congress has chosen to select, it cannot be held that Congress intended to create by implication additional rights such as those for which plaintiff contends. The Communications Act is not designed primarily as a new code for the judgment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." Federal Communications Commission v. Pottsville Broadcasting Co.,

petitioner is not a member of the class intended to be benefited, as is apparent from the text of the statute and the legislative history discussed supra, pp. 19-21, and the decisions of this Court under the comparable Natural Gas Act, *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 557, 581, and *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 610, 612, 659. Furthermore, the present case involves not a simple violation of a prohibition, as in the cases cited by petitioner, but a determination of the reasonableness of rates as to which jurisdiction of a court in the first instance is not to be inferred. The importance of this distinction is cogently brought out in the recent opinion of the Court of Appeals for the Second Circuit in *Civil Aeronautics Board et al. v. Modern Air Transport, Inc.* (1950), 179 F. 2d 622, 624-625.

Petitioner apparently seeks to find in Section 317, and in the two cases cited by it relating to a wholly different statute, a substitute for the reparations provision which Congress considered and rejected in enacting this statute. Congress having shown its contrary intention so clearly, petitioner's effort must fail.

III.

Petitioner's Claim That No Administrative Remedies Were Available Is Wholly Unwarranted and Affords No Basis for Direct Resort to the District Court.

The Court of Appeals held that none of the contentions of petitioner, including the claim that "defendant's acts

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309 U. S. 134, 138, 60 S. Ct. 437, 439, 84 L. Ed. 656. The enforcement of the Act by the Commission would be hindered rather than aided if the plaintiff's contentions were correct. The problem of defining the public 'interest' under the Act is one appropriately left to the Commission rather than in the first instance to the courts, for it is one which is complicated by problems peculiar to the radio industry" (l. c. 825).

These considerations apply with at least equal strength to rate making in the public utility field.

were fraudulent because defendant and plaintiff's predecessors had common officers", justified the District Court in awarding damages to petitioner (R. VI, 1994). Petitioner challenges this holding by advancing the theory that, even if the Commission has exclusive jurisdiction over rates where a complainant is free to invoke its protection prospectively, the District Court must have had jurisdiction to examine the question of reasonableness retrospectively in this case because "domination" through interlocking managements prevented timely recourse to the Commission.

This theory rests on four separate premises, each of which is essential to sustain it:

(a) That the interlocking of management between respondent and petitioner's predecessors constituted constructive fraud amounting to "domination" by the former over the latter (Pet. Brief, p. 12).

(b) That this "domination" prevented timely recourse to the Commission (Petition, p. 5; Brief, pp. 16, 21, 22, 26).

(c) That since the Commission has no reparation power, no resort to the Commission was available to petitioner after it came upon the scene in 1945 (Pet. Brief, pp. 3, 16, 22).

(d) That the District Court had jurisdiction to award reparations if the Commission could not do so (Pet. Brief, pp. 3, 16, 28).

Each of these premises is unsound and petitioner's conclusion bottomed thereon is untenable.

(A) The express sanction of the FPC under Section 305 (b) of the Act to the partial interlocking of managements between respondent and petitioner's predecessors disproves as a matter of law petitioner's claim that the joint management constituted constructive fraud on its predecessors by respondent, and prevented them from resorting to the FPC.

Section 305 (b) of the statute, 16 U. S. C. 825d (b), provides that

> "* * * it shall be unlawful for any person to hold the position of officer or director of more than one public utility * * * unless the holding of such positions shall have been authorized by order of the Commission upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby."[16]

This provision is broad enough to cover all interlockings of management between public utility companies subject to the Act, whether or not the particular companies happen to have physical connections or business relationships in addition to the interlockings. The question of adverse effect on public or private interests must necessarily be decided by the Commission in light of the particular facts presented,[17] and if there are known to be important interconnections and business relationships between two public utilities having common personnel, this obviously is a factor of great importance.

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16 The full text of this Section is set out in the Appendix, p. 48.

17 In denying the applications prayed for in *Matter of Applications of John Edward Aldred et al.* (1940), 2 FPC 247, 260, the Commission said:

> "By the enactment of Section 305 (b) of the Act, Congress made unlawful the holding of so-called multiple directorships unless the holding of such positions shall have been authorized by order of this Commission, and placed the burden for showing that neither public nor private interests will be adversely affected thereby upon the applicant. Obviously, therefore, this Commission is required to inquire into and determine with respect to each application presented for its approval, whether the circumstances and conditions found therein are such as may reasonably be expected to accomplish that purpose."

On the other hand, the Commission's jurisdiction under Sections 205 and 206, already discussed in detail (pp. 21-22, supra), extends broadly to all intercompany contracts establishing rates, whether or not there is any interlocking of personnel between the parties. But where interlocking does exist, that fact is necessarily known to the Commission and presumably has an important bearing on the nature and extent of the Commission's actual scrutiny of a particular rate schedule in the exercise of its various statutory powers.

In the present case, plaintiff's predecessors and respondent were all "public utilities" within the meaning of the Act. Thus, the Commission had two separate but complementary sources of jurisdiction in dealing with the actual facts of the case: (1) Over the ten-year period 13 separate applications were filed and allowed in 11 orders issued under Section 305 (b) (R. I, 324-343, 353-362). The Commission thus had many occasions to consider the possible effects on public or private interests of the interlockings here involved. It had the power and duty to do so in light of the known fact that there were continuing business relationships of prime significance between the companies.[18] (2) The Commission had complete jurisdiction also to control the basic terms of those business relationships under Sections 205 and 206. It had the power and duty to do so more especially in light of the known fact that the contracting parties had interlocking managements.[19]

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18 Furthermore, the question of possible adverse effect on public or private interests was subject to reopening at any time or from time to time throughout the ten-year period, inasmuch as each of the Commission's orders granting an application to be a director or officer of more than one company expressly reserved to the Commission the power to reopen the question in the future (R. I, 357-362). At no time in the ten-year period did the Commission ever question the propriety of continuing any of the interlockings authorized by its orders in this situation (R. V, 1510, 1587-1588).

19 In addition to analyzing data contained in the filed rate contracts, the FPC inquired about the technical phases of the operation of the contracts, and requested further data relating to the rates, prior to making certain of the orders approving the filings (see, e. g., as to the interconnection charge: R. I, 277-282; and again R. I, 290-296, when the FPC

With both sides of the problem before it, each bearing directly upon the other, the Commission over a ten-year period entered 11 orders authorizing interlockings and accepted 8 different rate filings involving respondent and petitioner's predecessors, and never raised any question as to the propriety of continuing the interlockings on the one hand or as to the justness and reasonableness of the rate contracts on the other hand.[20]

No interested consumer, stockholder, municipality or other person or agency ever requested it to do so, and none of the orders which the Commission entered in connection with the above matters was ever made the subject of judicial review under Section 313 by "any person, State, municipality, or State commission aggrieved" (R. V, 1587-1588).

No joint management arrangement thus entered into in compliance with the law and procedure of the Act can give rise to constructive fraud. Nor can it become the basis for a collateral attack on that agency's jurisdiction. Thus, the first premise which underlies petitioner's theory is invalid.

(B) Administrative remedies were always available to the non-interlocked director (White) of petitioner's predecessors and to UPU (petitioner's vendor and the sole stockholder of petitioner's predecessors).

The second difficulty with petitioner's argument at this point is that it overlooks the all-important director of each

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inquired into certain aspects of the reserve capacity charge). Furthermore, most detailed information as to the generating capacity of each plant, demands, reserve capacities and apportionment of the resulting charges was supplied to the FPC at least yearly in the Supplements to the Interchange Capacity Agreement (R. I, 300-321, 248-257). Again the FPC received throughout the period verified Annual Reports showing financial statements and such matters as relations with affiliated and non-affiliated companies, production costs, rates, rents, interchanged power and method of settlement thereof and statistics concerning the generating facilities (R. II, 643-647).

20 R. I, 357-362, 34, 35, 43, 61, 68, 87, 103, 108-111, 267-269, 283-285, 299-300, 353.

of petitioner's predecessors who was not on the board of respondent at any time: Samuel W. White, the president of UPU. Petitioner did not even purport to show that White was prevented from resorting to the Commission at any time within the ten-year period.[21]

White's complete independence of his fellow directors, as well as his energy and resourcefulness in upholding the interests of his own companies, are conclusively demonstrated by the whole record of evidence, the highlights of which are summarized in the Statement, supra, pp. 4-7.[22] The evidence established that White was free and willing to do everything necessary to promote and protect the interests of the northern companies. There is not the slightest factual basis for suggesting that he would not have been equally free and willing to complain to the FPC if the interests of the UPU subsidiaries had so required. Indeed, he personally took an active and important role in the dealings of the northern companies with the regulatory agencies, including arrangements relating to the filing of the contracts with the FPC (R. IV, 1177-1178, 1224-1225).

Apart from White personally, UPU was a company having other directors, officers and stockholders, not to

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21 In the fourth paragraph of its Specification of Errors (Pet. Brief p. 10) petitioner refers to "the findings of the Trial Court that the petitioner's predecessors were from 1935 to 1945 under the domination of the defendant [respondent] *and therefore unable to resort to the Commission* * * *." (Emphasis supplied.) While the trial court did refer, in one of its Conclusions of Law, to "the fact that plaintiff's assignor and its predecessors were under the domination and control of the defendant" (Conclusion 18, R. V, 1964), there is no Finding or Conclusion dealing directly with the question of whether petitioner's predecessors were or were not able to resort to the Commission; nor is there any Finding or Conclusion on the question of whether White or UPU were precluded from resort to the Commission.

22 Cf., the following passage in the opinion of the District Court:

"I have no doubt but what Mr. White used his best judgment and his energies in an effort to so conduct those companies as to produce for the holding company, United Public Utilities, the greatest profit that he could, but I am convinced from the evidence in this case that in passing upon the conduct of these joint directors and officers in the transactions between the corporations which were controlled by them and which were operated by them, that he also had in mind the benefit which might accrue to some other corporation that he had [referring to a wholly owned subsidiary of UPU which supplied coal to the northern companies and respondent]" (R. V, 1886).

mention its own employees, engineers and attorneys. It cannot be questioned that UPU's access to the Commission was free and unrestrained at all times during the period—even if the contrary be assumed as to the northern companies themselves for the sake of argument. As the sole stockholder of those subsidiaries, upon which it depended for at least 60% of its net earnings, UPU had a direct and important financial interest in the fairness of the intercompany contracts (R. IV, 1094). Had there been any reason to complain of the contracts in whole or in part, UPU could have complained to the Commission at any time. There is nothing in the Act limiting the right of complaint to a contractual party; on the contrary, the regulatory pattern depends upon providing the widest possible publicity and opportunity to complain about filed rates. UPU never made any complaint or sought any other administrative remedy; whether because it had no grievance, or because it failed to voice it, is here unimportant.

Petitioner, besides being assignee of the former UPU subsidiaries, is the vendee of UPU. UPU's failure to make any use of the administrative remedies which were fully and freely available to it involves the petitioner. Thus even if assuming arguendo that mere absence of other remedies were sufficient to confer jurisdiction on the District Court, this particular basis of jurisdiction would not be available to petitioner.

(C) Petitioner itself failed to exhaust its administrative remedies before the FPC after its purchase in 1945.

Even if it be assumed that petitioner's vendor, as well as its predecessors, had no administrative remedies (violent assumption), petitioner itself did have certain remedies which it failed to pursue after its purchase of the Dakota stock in 1945.

Petitioner's brief devotes much attention to the question of whether the Commission has power to award reparations

under the Act, but this is not in issue. The Court of Appeals did not hold, and neither the respondent nor the Commission has asserted, that the Commission does have such power. But it does not follow that petitioner had no remedies under the Act.

Originally petitioner complained that improper, irregular and illegal filings of the contracts with the Commission were such as to render all of the filings, and the rates and charges founded thereon, illegal. That was the position in this case in the Court of Appeals. But the point has been abandoned in the petition for certiorari and need not further concern us. Whether constructive fraud, as complained of, due to the authorized interlocking officers and directors of the parties, could in any circumstances amount to a claim of fraud upon the Commission is questionable. Petitioner does not say so in its original complaint, but for the purpose of this argument let us concede (while actually denying) that the complaint of constructive fraud on petitioner's predecessors through which allegedly void contracts were negotiated and made amounts to a claim of fraud on the Commission, as well as on the other party to the contract.

Upon such assumption, a complaint so challenging the validity of the filed and legal rates would involve an attack upon the orders of the Commission approving those filings and should be addressed to the Commission. No such collateral attack as that attempted here would be permissible even in those circumstances. *Adams v. Nagle et al.* (1938), 303 U. S. 532; *Watab Paper Co. v. Northern Pac. Ry. Co.* (C. C. A. 8, 1946), 154 F. 2d 436, 438; *Tilney et al. v. City of Chicago, Ill., et al.* (C. C. A. 7, 1943), 134 F. 2d 682, 683; 42 Am. Jur., paragraphs 158, 159, pp. 514-517.

Petitioner asserts that the Commission "is not specially qualified to deal with" the issue of fraud (Pet. Brief, p. 26). There are two complete answers to any such contention:

1. No tribunal is as well equipped as the FPC to understand and determine a fraud issue such as the one assumed here, since it alone has a backlog of specific information both as to the technical features of the rates and as to the operation of the contracts.[23]

2. Where the perversion of an agency's own processes by fraud is alleged, "Every tribunal has inherent power to re-open and revise a decision induced by fraud." (United States Supreme Court Justice Roberts, as Umpire for the Mixed Claim Commission, United States and Germany, Opinions and Decisions, January 1, 1933—October 30, 1939, page 1127.) Cf. *Lane v. United States ex rel. Mickadiet* (1916), 241 U. S. 201; *Tagg Brothers and Moorhead v. United States* (1930), 280 U. S. 420; *Hanlon v. Town of Belleville et al.* (1950), 4 N. J. 99, 71 A. 2d 624, 627; K. C. Davis, Res Judicata in Administrative Law (1947), 25 Texas L. Rev. 199, 236. As this Court said in *Pacific Railroad Company v. Ketchum et al.* (1880), 101 U. S. 289, 296:

> "The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained."

Cf. *Universal Oil Products Company v. Root Refining Co.* (1946), 328 U. S. 575, 580; *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944), 322 U. S. 238.

Besides this inherent power possessed by all tribunals, the Commission has *express* power under the Act to "investigate into facts, conditions, practices, or matters which it may find necessary or proper to determine whether any person has violated or is about to violate any provision of this chapter, or any rule, regulation or order thereunder, or to aid in the enforcement of the provisions of this

23 See footnote 19, supra, p. 33 of this brief.

chapter * * *" [Section 307 (a), 16 U. S. C. 825f (a)],[24] and it is also empowered "to perform any and all acts and to prescribe, issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this chapter" (Section 309, 16 U. S. C. 825h). If the Commission's orders were indeed induced by fraud and domination, a more obvious occasion for the exercise of these powers would be hard to imagine. The Court of Appeals properly held that "The Commission can, no doubt, correct its own mistakes" (R. VI, 1995).

Would it have been useful to petitioner to invoke these remedies, absent the power to award reparations? It not only would have been a useful step, it was an indispensable one under existing statutory procedures. As the discussion under Point II (B), supra, has shown, the orders of the Commission specifying effective dates for the contracts established the filed rates as the only legal rates, binding on everybody until disestablished by appropriate action of the companies or appropriate proceedings of the Commission. If petitioner was to have any right to question the reasonableness of the filed rates in any tribunal, judicial or administrative, state or federal, it first had to remove the conclusive barriers to such inquiry which had been created by the filing of the rates pursuant to the statute and the unchallenged orders of the Commission establishing the legal rates.[25]

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[24] The full text of this Section is set out in the Appendix, p. 48.

[25] It is noteworthy that petitioner in the case at bar did file a complaint with the FPC alleging that existing rates were unjust and unreasonable and asking that the FPC establish different rates for the future (R. I, 149). Petitioner, however, did not ask that the Commission investigate the alleged fraud nor did it pray that the Commission set aside its orders approving the filing of the rates or the interlocking management.

For present purposes it is unnecessary to decide whether the Commission could and should have been requested, in addition to setting aside the filing orders, to make findings as to reasonable rates in lieu thereof. Concurring in *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 577, 589, Mr. Justice Frankfurter said: " * * * the Court of Appeals should ask the Federal Power Commission for an advisory report * * *. But a court of equity has inherent powers to invite such help from a great agency of the Government * * *."

Petitioner chose to ignore the FPC, which had voluminous files on the transactions in issue, as to the rates, the common directors and the transfer by Dakota to petitioner itself (cf. R. V, 1577-1583). It detoured to the District Court, and in doing so violated both the rules of primary jurisdiction and of exhaustion of administrative remedies. The Court of Appeals properly held that this could not be done under the law. As the Court pointed out in reference to the rule of exhaustion of administrative remedies, in *Meyers et al. v. Bethlehem Shipbuilding Corp., Ltd.* (1938), 303 U. S. 41, 51:

> "That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

(D) Even assuming lack of all administrative remedies, the District Court nevertheless lacked jurisdiction to sustain petitioner's claims.

If we make the final assumption, contrary to what has been shown in Point III (A), (B) and (C) above, that neither petitioner nor its vendor, nor its predecessors, had administrative remedies, it still does not follow that there was a remedy under the Act by civil proceedings in a District Court.

Contentions analogous to those urged by petitioner here were advanced and rejected in *Backus-Brooks Co. v. Northern Pac. Ry. Co. et al.* (C. C. A. 8, 1927), 21 F. 2d 4, 11, cert. den. (1927), 275 U. S. 562, and in *Mississippi Power & Light Co. v. Memphis Natural Gas Co.* (C. C. A. 5, 1947), 162 F. 2d 388, cert. den. (1947), 332 U. S. 770. In the former case, alleged domination by defendant over the corporation, on whose behalf plaintiff was suing, was held to be of no avail to confer jurisdiction on the court to determine the just and reasonable division of joint rates under the Interstate Commerce Act, even though the

Interstate Commerce Commission had no power to award reparations in the circumstances. In the latter case the fact that no administrative remedies were available to Mississippi, a wholesale purchaser of natural gas from Memphis, and the fact that Mississippi "was requested by Memphis to defer action" (l. c. 390) until it was too late to get prospective relief before the FPC, were held not to sustain Mississippi's claim for relief. To grant that claim "would be tantamount to forcing new rates on Memphis" (l. c. 391). The Court of Appeals affirmed the decision of the court below that "until the Commission changed the rate, the contract rate between Memphis and Mississippi [filed with the Commission] was the lawfully promulgated rate" (l. c. 389-390).

As in those cases, so in this case: *"Ubi jus, ibi remedium" does not supply any answer, but poses a new question—what "right" does petitioner have under the Act?* It has been seen (pages 24-28) that Congress quite deliberately omitted a reparations provision from this statute for the reason that such a provision would not benefit ultimate consumers in accordance with the purpose of the Act but might only produce windfalls for wholesale purchasers. For this reason, wholesale purchasers were given the right to invoke the jurisdiction of the Commission to regulate rates prospectively under the procedures provided in Sections 205 and 206, but they were not given any "right" to a windfall through either Commission or court proceedings for reparations.

What petitioner asserts here is essentially a "right" to a windfall which Congress intentionally withheld. If it were true, as contended by petitioner, that over the ten year period the price received by respondent for energy sold to petitioner's predecessors was too high and the price paid by respondent for energy purchased from petitioner's predecessors was too low, it would have to be presumed that over this period the difference has gone

into the retail rates of the three public utilities involved. That is to say, the undue benefits which respondent is alleged to have obtained would have gone out to its ultimate consumers through the rates paid by them, and the undue burdens which plaintiff's predecessors are alleged to have borne would have been passed on to its ultimate consumers through the resale rates paid by them. There is no suggestion in the record that respondent earned more than a fair return or that petitioner's predecessors earned less than a fair return at any time. In these circumstances the determination by the District Court of different rates from those on file during the ten year period ending in 1945 could accomplish none of the purposes of the Act, but could only confer a windfall contrary to the purposes of the Act; a gift from respondent, of moneys it no longer has, to the petitioner—of moneys already returned to petitioner's predecessors by their customers.[26] Violation of the Federal Power Act thus cannot be the true ground for this action.

In *General Committee etc. v. Missouri-Kansas-Texas R. Co. et al.* (1943), 320 U. S. 323, 337, this Court said, immediately after the passage from the opinion quoted on page 18, supra, that unless the statutory purpose to afford a judicial remedy is plain "* * * the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result, many areas in this field where neither the administrative nor the judicial function can be utilized. * * * Courts should not rush in where Congress has not chosen to tread."

In the final analysis, there being no right to sue for damages under the Act because of alleged unreasonable rates

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26 The windfall aspect of this case is particularly striking since all of the matters complained of by petitioner occurred prior to October 19, 1945, and until that day petitioner owned no stock of, nor had any direct or indirect interest in, any of the UPU subsidiaries. When petitioner bought the Dakota stock from UPU, the transaction was authorized by the FPC and the SEC, and petitioner did not and does not claim that it paid more than a fair price for the utility assets and earning power it was acquiring.

(Point II, supra), petitioner's claim rests on the allegation in its complaint of fraud through common directors and officers. Whether petitioner emphasizes the origin of the contracts or the alleged inability to resort to the Commission, in either case the gravamen of petitioner's claim is alleged fraud and domination stemming from common directors and officers—a common-law action not involving a federal question. Since petitioner and respondent are both Delaware corporations (R. I, 2), the District Court lacked jurisdiction apart from the Federal Power Act as well as under the Act.

In the case at bar, the District Court has rushed in where Congress has most definitely chosen not to tread.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

(Pertinent Sections of the Federal Power Act, Parts II and III, 16 U. S. C. 824d et seq.)

§ 824d (§ 206). Rates and Charges; Schedules; Suspension of New Rates.

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract, relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classifica-

tion, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilites to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 824e (§ 206). Power of Commission to Fix Rates and Charges; Determination of Cost of Production or Transmission.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * * * *

§ 825d (§ 305). Officials Dealing in Securities; Declaring Dividends Out of Capital Account; Interlocking Directorates.

* * * * * * *

(b) After six months from August 26, 1935, it shall be unlawful for any person to hold the position of officer or director of more than one public utility or to hold the position of officer or director of a public utility * * * and the position of officer or director of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. The Commission shall not grant any such authorization in respect of such positions held on August 26, 1935, unless application for such authorization is filed with the Commission within sixty days after that date.

§ 825f (§ 307). Investigations by Commission; Attendance of Witnesses; Depositions; Immunity of Witnesses.

(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates. The Commission may permit any person to file with it a statement in writing under oath or other-

wise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

* * * * * * *

§ 825h (§ 309). Administrative Powers of Commission; Rules, Regulations, and Orders.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

§ 825p (§ 317). Jurisdiction of Offenses; Enforcement of Liabilities and Duties.

The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 77

MONTANA-DAKOTA UTILITIES CO., PETITIONER

v.

NORTHWESTERN PUBLIC SERVICE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals (VI R. 1987) is reported at 181 F. 2d 19. The oral opinion of the District Court (V R. 1883) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1950. The petition for a writ of certiorari was filed on May 17, 1950, and granted on October 9, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether under the Federal Power Act reparations for past unreasonable rates are recoverable in the courts.

2. Whether the Federal Power Commission has primary jurisdiction to determine whether a fraud has been perpetrated upon it in the filing of rate schedules when an element of such an inquiry may be the reasonableness of past rates.

3. If so, whether the District Court should stay its hand when such questions are presented in a suit to collect damages for such a fraud until after the Commission has determined them.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, Ch. 687, 49 Stat. 803, 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

The Federal Power Commission files this brief *amicus curiae* because the petition for certiorari raises questions important to the administration of the Federal Power Act, and by close analogy the Natural Gas Act.

This proceeding was initiated by Montana-Dakota Utilities Co. to recover a difference between alleged reasonable rates and the rates actually paid for electricity interchanged between its assignor (and predecessors of its assignor) on the

one hand, and Northwestern Public Service Company, on the other, over a ten-year period from 1935 to 1945. The rates paid were the rates prescribed in contracts and supplementary contracts which from time to time were filed as rate schedules with the Federal Power Commission, given effective dates by orders of the Commission, and deemed by the Commission to have been duly filed under Sections 205(c) and 205(d) of the Power Act.

The district court presumed from the fact of interlocking officers and directors that respondent dominated petitioner's assignor (and before it, its predecessors). It found the rates to be "unfair,"[1] and concluded that a presumption of fraud had not

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[1] The nature of the "unfairness" found by the District Court is shown by its treatment of all components of the service rendered, in addition to the supply of energy upon which charges had been computed (i.e., interconnection facilities rental, capacity, a share of joint dispatching costs, etc.), as merely being devices for charging additionally for the energy component of the interchanged services. Thus, the District Court judgment for $779,958.30 (V. R. 1965) was for an aggregate of several amounts relating to payments made or received by Northwestern, to or from the predecessors of Montana-Dakota, plus interest thereon. The interconnection facility rental charges (V R. 1950, 1959, 1963; I R. 35, 61, 87, 103; V R. 1942-1947), interchange capacity charges (V R. 1959-1960, 1963), and dispatching costs (V R. 1960, 1963) were found by the District Court to be charges by Northwestern for energy delivered by it, and part of a scheme to offset the price paid by Northwestern for energy received by it (V R. 1959), i.e., further reductions in Northwestern's 5-mill payment already found to be less than "just and reasonable" (V R. 1941, 1944-1945, 1948, 1960). All four of the above amounts were held to have been underpaid to Montana-Dakota's predecessors, or charged and exacted from them (as the case may be), "unlawfully, wrongfully and fraudulently" (V R. 1963-1964).

been rebutted by respondent (V R. 1963). It accordingly entered judgment for petitioner for $779,958 (V R. 1965).

The Court of Appeals, without reviewing the merits of the case, held that the Federal Power Commission, not the courts, had primary jurisdiction both to determine the reasonableness of rates and charges and to inquire into whether a fraud had been perpetrated upon the Commission. The court accordingly ordered the district court to dismiss the complaint.

SUMMARY OF ARGUMENT

I

Although the Federal Power Act was modeled on the Interstate Commerce Act, reparation provisions were deleted from the bill as inappropriate for a statute regarding only wholesale transactions. For reparations for past overcharges to purchasing utilities would not be passed on to the ultimate consumers whom the statute was designed to protect, and who had already reimbursed the utility for the excessive costs. The result would not be merely to give the purchasing utility a windfall. More importantly, it would provide an incentive not to follow the statutory procedure for challenging rates in advance of the effective date, but to pay the excessive rate and seek subsequent reparations at a time when the excess would not have to be returned to the ultimate consumers. Moreover, to allow subsequent

reparations would be inconsistent with the statutory scheme, which contemplates that changes must be made in the filed rates at a time when they can be translated into benefit to the ultimate consumer. This result is not unfair to the purchasing utility, which can utilize the procedures of the Act to protect itself against excessive rates. All of these considerations demonstrate that Congress did not intend a remedy by way of reparations to be available either before the Commission or in the courts.

II

The Power Commission does possess the authority to determine whether a fraud has been perpetrated on it in the filing of rate schedules. The power to correct an error induced by fraud is inherent in any tribunal, and such authority is, in addition, clearly granted by provisions of the Federal Power Act authorizing the Commission to perform any act and to issue, amend or rescind any order it may find necessary or appropriate to carry out the provisions of the Act, and to determine whether the Act was being violated. Inasmuch as the Commission is required to approve interlocking directorates and to pass upon the effect of corporate affiliation and less-than-arm's-length dealing, as well as to determine the reasonableness of rates, the type of fraud found to exist in this case relates to subjects with which the Commission is peculiarly well-fitted to deal. The

fact that the inquiry into an alleged fraud may require a consideration of the reasonableness of past rates does not deprive the Commission of jurisdiction, even though it has no authority to *fix* past rates in a reparations proceeding. The Commission possesses the authority to investigate the lawfulness of past rates in an appropriate situation in the public interest, such as when necessary to aid a court or state administrative agency.

III

In such circumstances, when the jurisdiction of a court is invoked to collect damages for the alleged fraud, the court should stay its hand until the Commission has exercised its primary jurisdiction to determine whether a fraud has been committed and the ancillary question of the reasonableness of rates. There is ample analogy in the precedents, in very similar situations, for such a proceeding. *United States* v. *Morgan,* 307 U.S. 183; *Atlantic Coast Line Co.* v. *Florida,* 295 U.S. 301; *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422.

ARGUMENT

Introductory Analysis

Under the Federal Power Act, all rates must be filed with the Commission (Section 205(c), 16 U.S.C., Sec. 824d(c)); all rates are required to be "just and reasonable", with other rates "declared to be unlawful" (Section 205(a), 16 U.S.C., Sec.

824d(a)); and the Commission has authority, on complaint or on its own motion, to suspend proposed changes in filed rates pending an inquiry into their lawfulness (Section 205(e), 16 U.S.C., Sec. 824d(e)).[2] On complaint, or its own motion, the Commission also has authority to investigate any filed rate and, after hearing, if found to be "unjust, unreasonable, unduly discriminatory or preferential," to fix the "just and reasonable" rate "to be thereafter observed" (Section 206(a), 16 U.S.C., Sec. 824e(a)). The Act contains no provision for either the administrative or the judicial determination of the lawfulness of past rates in a reparation proceeding—and this omission, as we shall show, was deliberate. Under the statutory scheme and in fact, purchasers of electric power at wholesale—and it is only wholesale rates which are subject to the Commission's jurisdiction under Part II of the Act here involved—protect themselves against excessive rates by filing complaints with the Commission before changes in filed rate schedules become effective or by filing complaints for relief from filed rates alleged to be unlawful.

In this case petitioner claims that by reason of prior affiliation of its predecessors (hereafter re-

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[2] Section 205(e) empowers the Commission to suspend the new rates for a period of five months; if the administrative proceeding is not concluded by the expiration of that period, the proposed change of rate may go into effect, but the Commission may require the utility to "keep accurate account * * * of all amounts received by reason of" the change in rates, and may subsequently require a refund of any amounts paid in excess of the rate subsequently found to be justified.

ferred to as petitioner) with, and domination by, respondent, it was fraudulently deterred from objecting to the rates and charges either before or after they became effective, until after the affiliation between the two companies was dissolved in 1945. Its contentions are (1) that since the Commission lacks power to grant reparations for a departure in the past from the "just and reasonable" standard of Section 205(a), the statute should be construed to vest such power in the district courts; and (2) that, whether or not this is true generally, such a remedy must be available when resort to the remedy *in futuro* contained in the statute is prevented by the fraud of the other party.

It is the position of the Government (1) that Congress deliberately omitted provisions for reparations from the Federal Power Act both because they were unnecessary to protect the wholesale distributors with whom the Act deals, and because to permit such distributors to recover reparations after they had passed on the costs of the past rates to the ultimate consumers would be inconsistent with the statutory scheme and detrimental to the effectuation of the purposes of the Act; (2) that, in the exceptional situation where the statutory remedy *in futuro* is ineffective for some such reason as the fraud claimed here, the proper remedy is to apply to the Commission to vacate the schedules fraudulently filed; and (3) that if there is any implied right to recovery in the

courts, the courts must await the Commission's prior determination as to whether a fraud has been perpetrated upon it and as to matters relating to the reasonableness of rates.

I

The Federal Power Act Does Not Provide for or Contemplate the Recovery of Reparations

A. *A Provision for Reparations was Deliberately Eliminated from the Federal Power Act*

In enacting the Power Act, Congress for the first time applied to the regulation of wholesale rates,[3] rate regulatory procedures and principles which had theretofore developed exclusively in relation to retail rates, particularly as embodied in the Interstate Commerce Act.[4] To do so it adopted the Commerce Act procedural provisions with the construction placed upon them by the

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[3] The wholesale rates involved were those beyond the powers of state regulation under the commerce clause. *Publ. Util. Comm.* v. *Attleboro Co.*, 273 U.S. 83; *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298; *cf., Interstate Natural Gas Co.* v. *F. P. C.*, 331 U.S. 682, 687-688.

[4] A comparison of the rate regulatory provisions of the Power Act, Sections 205 and 206, with those of the Commerce Act (49 U.S.C. §§ 1(5), 6(1), 6(3), 6(5)-6(7), 6(9), 13, 14, 15(1), 15(3) and 15(7)) shows their similarity, a similarity admitted by petitioner in its brief in the Court of Appeals (Br. Appellee, p. 31). The legislative history of the Power Act shows that generally it was patterned on that Act, the Communications Act (47 U.S.C. §§ 151, *et seq.*; see particularly §§ 201-205) and in places on state regulatory statutes. *Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423* (74th Cong., 1st Sess.), pp. 392, 393, 2170.

courts.[5] Under that construction the filed rate is the only legally enforceable rate and the courts will not undertake the direct enforcement of the "just and reasonable" standard of "lawful" rates. Otherwise, this Court has reasoned, the rates enforced would vary from case to case, defeating the purpose of Congress to secure uniform and nondiscriminatory rates,[6] and court-fixed rates would conflict with commission-fixed rates, rendering enforcement of the Act impossible (*Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439, 440-441). The policy of judicial restraint thus established "is one having regard for the expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function" (*United States* v. *Jones*, 336 U.S. 641, 652-653, 670-671; *cf., United States*

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[5] *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases there cited.

[6] Petitioner attempts to distinguish the Power Act from the Commerce Act on the ground that the former is concerned with rates in sales to a limited number of, or frequently only one, customer and hence is not affected by the same Congressional purpose of uniformity and nondiscrimination as the Commerce Act. But this is answered by the explicit provisions of Section 205 (b) of the Power Act against discrimination and preferences. Congress intended that even where there is only one purchaser under a filed rate, that rate be posted and filed so as to be disclosed to state utility commissions and all other existing or potential wholesale customers, including any who might apply for compulsory service under Section 202(b) of the Federal Power Act. In this way the objective of Congress to promote greater integration and coordination of electric facilities is served. That objective is clearly shown in the legislative history of the Act. *Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423*, pp. 2148-2169, 501, 517, 520, 531-535, 384-385, 392.

v. *I.C.C.*, 337 U.S. 426, 437, 463-465). Even the express preservation of common law remedies in the Commerce Act did not prevent the adoption of the rule. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446.

But the Power Act contains no provision for reparations such as is found in the Interstate Commerce Act. As originally introduced in the House and Senate, the bills subsequently enacted as the Public Utility Act of 1935 (Title II of which amended the Federal Water Power Act and gave it the new short title, Federal Power Act) expressly provided for Commission reparations awards enforceable in the courts. That provision read as follows in both bills:[7]

> Sec. 213. (a) When complaint has been made to the Commission concerning any rate or charge for any service performed by any public utility, and the Commission has found after investigation that the public utility has charged an unreasonable, excessive, or discriminatory amount for such service in violation of any provision of this title, the Commission may order that the public utility make due reparation to the complainant thereunder, with interest from the date of collection. No such order shall be issued unless the complaint is filed with the Commission within two years from the date of the payment.

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[7] *Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423*, 74th Cong., 1st Sess., p. 36; *Hearings, S. Committee on Interstate Commerce, on S. 1725*, 74th Cong., 1st Sess., p. 43.

(b) If the public utility does not comply with the order for the payment of reparation within the time specified within such order, action may be begun in any court of competent jurisdiction to recover the same within one year from the date of the order, and not thereafter.

In a sectional analysis of the bill submitted by Mr. Dozier A. DeVane, Solicitor of the Commission, who was one of the draftsmen of the bill,[8] that Section was referred to as containing, "the usual utility law provisions, permitting complaints to the Commission and orders for reparation in cases where unreasonable or discriminatory rates have been charged."[9]

That provision was, however, eliminated from the bill as reported out of the Senate Committee, with the succinct explanation (referring to it and another provision also eliminated, S. Rep. No. 621, 74th Cong., 1st Sess., p. 20):

> They are appropriate sections for a State utility law, but the committee does not consider them applicable to one governing merely wholesale transactions.

The deletion of this provision had been requested by the National Association of Railroad and Utilities Commissioners, whose general solicitor, Mr.

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[8] Hearings, S. Committee, *ibid.*, p. 223.
[9] Hearings, S. Committee, *ibid.*, p. 247.

John E. Benton, made the following illuminating statement of reasons (H. Hearings, *ibid.*, p. 1685):

> That is an entirely proper provision in a railroad statute. When a man goes to the railroad station with a load of goods to ship somewhere he has to ship at the rate that is fixed in the tariff. He must make the shipment then; and he ought to be able to come thereafter to the Commission and show that he was required to pay an unreasonable rate, if it was unreasonable, and to ask for a determination of a reasonable rate and get reparation that is due him for any overpayment. That is perfectly proper. But this bill relates only to service *between the wholesale generating or producing company and the distributing utility.* We question whether the *public interest will be served by giving any company the right to go ahead receiving service at the established rate for 2 years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable.* [Italics supplied.]

B. *Reparations Would Not Be Passed On To the Ultimate Consumer Who Has Already Reimbursed the Distributing Utility for the Excessive Cost of the Power.*

The reason why reparations for wholesale electric purchasers would be inappropriate and not in "the public interest" is because wholesale electric purchasers are themselves typically regulated utilities. As such, the filed rates they pay in obtain-

ing their supply of electricity are part of their costs of operation. Their ability to pass along to their customers any excess of the filed rate over a just and reasonable rate paid for their purchased electricity is normally assured either by their government-granted monopoly position or their legally protected right to rates covering operating expenses plus a fair return. It is not dependent upon whether economic conditions will permit them to include it in a price for a commodity or service sold and delivered in a competitive market, as is true, for example, in the case of a purchaser of freight transportation services. Cf. *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 237-238. As this Court said in *F.P.C.* v. *Interstate Natural Gas Co.* (336 U. S. 577, 582): "* * * experience does not indicate that utilities are wont to charge themselves out of business."

For Congress to have provided a reparations award for such a purchaser would result in a lump sum recovery by the purchaser after the year had closed in which it had incurred the excessive expense for power purchased at the filed rate. Such a reparations award could not lower the purchaser's resale rates during the past period covered by the award. During that period those resale rates would have been determinable on a basis which would reimburse it for its expenditures for purchased power at the filed rate it was currently paying, without any deduction for the

contingency of a reparations award at a later date. Nor could it affect future rates, for such lump sum award, when realized, would be an unusual and nonrecurring income. *Knoxville* v. *Water Co.*, 212 U.S. 1, 14; *Galveston Elec. Co.* v. *Galveston*, 258 U.S. 388, 395; *Board of Comm'rs.* v. *N. Y. Tel. Co.*, 271 U.S. 23, 32; *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U.S. 287, 313.

Not only would ultimate consumers therefore not benefit through reduced retail rates from reparations at the wholesale level but, speaking generally, ultimate consumers could not reach the proceeds of the award in the hands of the utility wholesale purchaser by way of their own reparation proceeding against it, either before the state regulatory agency or the courts. As to the state regulatory agencies, they are typically without any reparation power.[10] Even where they do have reparation power, they are frequently unable to award reparation where the rates attacked as unreasonable have been prescribed by them in the exercise of their quasi-legislative function.[11]

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[10] See, *e.g.*, *T. R. Miller Mill Co.* v. *Louisville & Nashville R. Co.*, 207 Ala. 253, 92 So. 797; *City of Atlanta* v. *Atlanta Gas-Light Co.*, 149 Ga. 405, 100 S.E. 439; *Texas & Pac. Ry. Co.* v. *Railroad Commission*, 137 La. 1059, 69 So. 837; *State ex rel Railroad* v. *Public Service Commission*, 303 Mo. 212, 218, 259 S. W. 445; *Re Arkansas Power & Light Co.*, 46 P.U.R. (N.S.) 226 (Ark. Com.); cf. *Dunlap Lumber Co.* v. *Nashville, etc. R. Co.*, 129 Tenn. (2 Thomp.) 163, 165 S. W. 224.

[11] *State ex rel. Boynton* v. *Public Service Commission*, 135 Kan. 491, 11 P. 2d 999; *Northern Pac. Ry. Co.* v. *Dept. of Public Works*, 136 Wash. 389, 240 Pac. 362; cf. *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U.S. 370, 389.

Moreover, in several states, the courts have held that the common law right to sue for reparation was abolished by the change to commission supervision.[12] And even where a common law reparation proceeding may be instituted in the courts, the courts are bound by an administratively prescribed rate and barred from investigating into its reasonableness.[13] In many states the bar to judicial inquiry into the reasonableness of the rate attacked is extended to the situation where the regulatory agency has not affirmatively prescribed the attacked rate but merely accepted it for filing, whereby, it is held, the rate becomes a "commission rate" in contradistinction to a "carrier rate."[14] The bar to judicial inquiry which is present in jurisdictions in which the regulatory

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[12] See, *e.g.*, *Graham Ice Co.* v. *Chicago, M. & St. P. R. Co.*, 153 Wis. 145, 140 N. W. 1097; *Gurney Heater Mfg. Co.* v. *New York, N. H. & H. R. R. Co.*, 264 Mass. 427, 162 N. E. 897; *Crook* v. *Baltimore & O. R. Co.*, 32 Ohio App. 263, 167 N. E. 899; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 212 Cal. 370, 298 Pac. 991; *Woodrich* v. *Northern Pac. Ry. Co.*, 71 F. 2d 732 (C.A. 8); cf. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. See also, Note, *The Shipper's Right to Recover for Unreasonable Railroad Rates*, 21 Iowa L. Rev. 751, 758.

[13] *State ex rel. Boynton* v. *Public Service Commission*, 135 Kan. 491, 11 P. 2d 999.

[14] *T. R. Miller Mill Co.* v. *Louisville & Nashville R. Co.*, 207 Ala. 253, 92 So. 797; *E. L. Young Heading Co.* v. *Payne*, 127 Miss. 48, 89 So. 782; *Suburban Water Co.* v. *Borough of Oakmont*, 268 Pa. 243, 110 Atl. 778; *Mathieson Alkali Works* v. *Norfolk & W. Ry. Co.*, 147 Va. 426, 137 S.E. 608; *Missouri-Kansas & T. R. Co. of Texas* v. *Railroad Commission*, 3 S. W. 2d 489 (Tex. Civ. App.); cf. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. 2d 443, 446 (C.A. 5) (Hutcheson, J., concurring).

agency has no reparation power leaves ultimate consumers wholly without remedy.[15]

It is perfectly clear, therefore, that for Congress to have provided for recovery of reparations by the utility purchasers who pay the wholesale rates regulated in the Power Act would have been to provide a windfall to them, and would have been of no benefit to the ultimate consumers, whom the Act was designed to protect.[16] As the court said of the similar provisions of the Natural Gas Act in *Federal Power Commission* v. *Interstate Gas Co.*, 336 U. S. 577, 581:

> * * * The aim of the Act was to protect ultimate consumers of natural gas from excessive charges. * * * They were the intended beneficiaries of rate reductions ordered by the federal commission, though state machinery might have to be invoked to obtain lower rates at the consumer level. The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility. * * *

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[15] *Straube, et al.* v. *Bowling Green Gas Co.*, 227 S. W. 2d 666 (Mo. 1950); *Purcell* v. *New York Cent. R. R. Co.*, 268 N. Y. 164, 197 N.E. 182, appeal dismissed, 296 U.S. 545; *Utah-Idaho Cent. Ry. Co.* v. *Public Utilities Commission*, 64 Utah 54, 227 Pac. 1025; cf. *Charleston Apartments Corp.* v. *Appalachian Electric Power Co.*, 118 W. Va. 694, 192 S. E. 294; Hardman, *The Finality of the Filed Rate in West Virginia*, 49 W. Va. L. Q. 143, 150, *et seq.*

[16] Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5423, 74th Cong., 1st Sess., pp. 427, 447, 498.

C. *To Permit the Recovery of Reparations Would Be Inconsistent With the Purpose of the Statutory Scheme and Might Impair Its Effectiveness.*

1. TO ALLOW REPARATIONS WOULD TEND TO DEFEAT THE PURPOSE OF THE POWER ACT.

The evil which Mr. Benton foresaw if the purchasing utility were permitted "to go ahead receiving service at the established rate for two years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable" was not merely that one utility company would receive a windfall at the expense of another without passing the benefit on to the ultimate consumer who had already repaid the utility for the original excessive rates. If, instead of availing itself of the statutory procedure for challenging the reasonableness of rates as provided in Sections 205(e) and 206(a), a distributing utility had the option of recouping the excessive charges itself through a subsequent reparation proceeding, its pecuniary interest might cause it deliberately to adopt the latter course so that it would not have to pass on the reduction in rates to the consumers. For if the purchasing company proceeds to challenge rates as soon as they are filed and succeeds in having the rates reduced, it would be expected—and if necessary compelled by the appropriate state agency—to pass on the reduction to its customers. On the other hand, if it continued to

charge a rate which gave it a fair return based on the excessive cost of the power to it, and brought a reparation proceeding several years later, it could keep the difference between the filed rate and the rate found subsequently—whether by court or Commission—to be reasonable. This removal of the incentive to follow the procedures prescribed in Sections 205(e) and 206(a) could reasonably be expected to defeat the underlying purpose of the Act by opening up an avenue for wholesale rate reductions which would not have to be passed on, and would also circumvent the statutory scheme for exclusive judicial review by the Courts of Appeals (Section 313(b)).

2. TO ALLOW REPARATIONS WOULD BE INCONSISTENT WITH THE STATUTORY SCHEME.

The Power Act seeks to make ultimate consumers the beneficiaries of its wholesale rate regulation by preventing wholesale rate changes from being made without notice and opportunity for timely action at the retail level. Such action might consist of action by ultimate consumers, or state commissions acting in their behalf, to require concurrent reductions in retail rates to reflect changes in wholesale rates, either by the utility purchasing under a filed rate which has been lowered, or by other local distributing utilities who might be able to effectuate savings by buying from the same source at the new low rate. Or it might consist of efforts by such parties to require the utility pur-

chasing under a filed rate which has been raised to absorb the increase out of otherwise excessive earnings, or to limit its increase in retail rates to the amount necessary to absorb the wholesale rate increase, or to resort to some other, cheaper source of electricity.

Such action as may be appropriate can be taken only if the filed rate is the legal rate, *i.e.*, the rate which shall prevail, by compulsion of court processes if necessary. Otherwise, if the filed rate or commission-fixed rate prescribed in lieu thereof, were not always the legal rate and changes could be made ignoring it, consumers and state regulatory commissions would have no assurance of an opportunity for taking into account the changes in wholesale rates (and their effect on retail distributing companies) early enough to attend to the appropriate resulting adjustment of the retail rates. For this reason, it is important that the purchasing utility be required to make its challenge to the reasonableness of the rate before that rate becomes effective, and not subsequently in a reparations proceeding.

That it was the intention of Congress to rely on the Commission's administration of the filing provisions, and Commission action, prospective in nature, bringing filed rates into conformity with the standard of just and reasonable rates, is shown by the relative prominence in the Act of provisions conferring powers to ascertain the facts in advance and to accumulate the data necessary to enable

the Commission to act effectively and promptly when a change is filed.

Thus, without waiting for a rate case to arise, the Commission is authorized (Section 208) to investigate and determine the principal fixed facts necessary for a rate case, with respect to each company subject to its regulation. Aiding such a determination are the accounting powers of the Commission (Sections 301 and 302) under which virtually all such companies' accounts have already been restated on a sound basis.[17] Provisions for periodic and special reports (Section 304), filed statements (Section 307) and investigations (Section 311) have resulted in the accumulation of a body of detailed data about each company in the industry, from which statistical compilations and computations of unit costs [18] provide standards for comparison and appraisal of the capital and operating costs of individual companies rendering particular classes of service to particular classes of customers. Annually filed Financial and Statistical Reports (F.P.C. Forms Nos. 1, 1-A, 1-B, 1-C), and Power System Statements (F.P.C. Forms 12, 12A, 12D) enable quick checks to be

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[17] F.P.C., *Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees, 1950.*

[18] *E.g.*, F.P.C., *Electric Power Statistics;* F.P.C., *Electric Utility Depreciation Practices;* F.P.C., *Electric Utility Cost Units, Steam-Electric Generating Stations;* F.P.C., *Electric Utility Cost Units, Hydroelectric Generating Stations;* F.P.C., *Statistics of Electric Utilities;* F.P.C., *Steam-Electric Plant Construction Cost and Annual Production Expense.*

made on general questions with respect to a company's operations, on a relatively current basis.

All of these data facilitate scrutiny of filings of proposed changes in rates within the 30-day notice period and assist in complying with the statutory mandate (Section 205(e)) that where rate changes are suspended, "the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

The statutory emphasis on these provisions, particularly as contrasted with the complete silence on court reparations, is sufficient in itself to indicate that Congress intended the "just and reasonable" standard to be effectuated upon the basis of the Commission's prospective determination of all questions relating to rate schedule filings and to whether filed rates satisfy the statutory standard, even if there may be, under the particular circumstances of some case, justification for retrospective consideration of any of those questions.

D. *The absence of a procedure for obtaining reparations from the Commission does not mean that such a remedy was to be available in the courts, but that reparations were not to be recoverable at all.*

The history and purpose of the Federal Power Act, together with the effect of a contrary construction, all lead to the conclusion that Congress

intended that there be no remedy by way of reparations for charging an unreasonable rate in the past. This result is not unfair to the purchasing utility in the normal case, since it can—and will, if a remedy by reparations is not open to it—protect itself against unreasonable rates by means of a complaint filed with the Commission before newly filed rates become effective or a complaint filed promptly with respect to existing rates. (As to the exceptional case of fraud, see Point II, *infra*, pp. 24-32.) Nor does this result mean that the "just and reasonable" standard of lawfulness serves no practical or useful function. For this standard is the statutory guide to the Commission in the exercise of the powers delegated to it under Sections 205(e) and 206(a). It was upon the exercise of those Commission powers that Congress relied exclusively in this new venture in wholesale rate regulation.

All of the considerations referred to herein, which demonstrate that Congress did not contemplate or intend that there be a remedy by way of a procedure for reparations, apply at least as forcefully to a suit in court as to an administrative proceeding. The fact that Congress deleted from an early draft of the bill the provision for a remedy before the Commission, enforceable in the courts, does not mean that it was relegating the parties to a suit at law. For under the well-known rule of the *Abilene* case, resort to the Com-

mission rather than to the courts was obviously thought to be necessary for a determination as to the reasonableness of rates, whether for reparations or any other purpose. Thus, elimination of the administrative reparations remedy was doubtless thought to cover the whole subject of reparations, and not as merely transferring the reparations proceeding from the Commission to the courts. That such was not the intent is indicated by the statements of explanation in the legislative history (see pp. 11-13, *supra*), as well as by the other reasons why a remedy for past overcharges was neither necessary nor desirable.

II

The Commission Has Authority to Determine Whether a Fraud Had Been Perpetrated Upon It in the Filing of Rate Schedules

In the instant case, the district court found that the "frauds practiced by defendant on the Federal Power Commission and on [petitioner's predecessors] also made the attempted filing of rates by the defendant void and ineffective for any purpose whatsoever" (V R. 1961). The Court of Appeals did not find it necessary to review the finding of fraud, and for present purposes we shall assume that respondent's conduct was fraudulent.

The Court of Appeals did not suggest that the victims of fraud are remediless, when the fraud itself prevents them from availing themselves of the statutory remedies. And we make no such

contention here. The Court of Appeals found, however, that the proper agency to correct a fraud perpetrated upon the Commission, through the filing of schedules fraudulently prepared, was the Commission itself.

Petitioner does not deny that there must be resort to the administrative remedy if one is available; its position, as we understand it, is that there is no such remedy. Thus, the point at issue is whether the charge of fraud raises a question which the Commission may resolve.

In order to recover on the basis of fraud, petitioner must establish both that the filed rates were not validly filed because of the fraud and that the rates were unreasonable.[19] Both of these questions are within the primary jurisdiction of the Commission.

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[19] More particularly, recovery would depend on decision of the following questions, among others, within the primary jurisdiction of the Commission:

(1) Were the rate schedules originally filed, or any subsequent changes, accepted for filing by the Commission erroneously because the concurrences of petitioner's predecessors in such filings (V R. 1581; I R. 343-345, 297-298), which were required by the Commission's rules (18 CFR 35.3(a)), were obtained by fraud?

(2) Were the Commission orders giving effective dates to the originally filed rate schedules, or any of the changes therein, erroneous because fraud deterred petitioner's predecessors from objecting to the applications for such orders?

(3) Did the Commission erroneously leave the originally filed rates, or any changes therein, in effect, without finding them to be unjust and unreasonable, because petitioner's predecessors were deterred by fraud from complaining of the rates?

(4) Will corrective action with respect to any of the above errors be necessary or appropriate to carry out the provisions of the Power Act?

As Mr. Justice Roberts declared, when speaking as Umpire for the Mixed Claims Commission:[20]

> Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

Cf. Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238; *Federal Communications Comm.* v. *WOKO*, 329 U.S. 223; *Schachter, et al.* v. *Singer*, 45 A. 2d 364 (M.C.A.D.C.); *Gould* v. *Delsnider*, 42 A. 2d 140 (M.C.A.D.C.), reversed on other grounds, 154 F. 2d 844 (C.A.D.C., 1946).[21]

The Commission's authority to vacate a filing induced by fraud does not rest merely on this general principle. As the Court of Appeals observed (R. 1995), Section 309 of the Power Act gives the Commission authority to "perform any and all acts, and to * * * issue, * * * amend, and rescind such orders * * * as it may find necessary or appropriate to carry out the provisions of this Act." And the Commission is also authorized by Section 307(a) to "determine whether any person has violated * * * this Act or any rule, regulation,

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[20] Mixed Claims Commission, United States and Germany (Opinions and Decisions, January 1, 1933, to October 30, 1939, pp. 1127-1128).

[21] In the *Schachter* and *Gould* cases, the Municipal Court of Appeals for the District of Columbia held that the District Rent Administrator, rather than the courts, had authority in the first instance to vacate rent ceiling orders procured by misrepresentation.

or order thereunder," to take evidence and hold hearings (Section 307(b)), to have access to the companies' files (Section 301(b)), and to require reports (Section 304(a)). Even apart from the implied power to vacate an order procured by fraud, it would certainly be appropriate for the Commission to make use of these statutory powers for that purpose.

Petitioner's assertion that "the fraud question is not one with which a commission is especially equipped to deal" (Pet. 25), will not stand up under analysis. For the "fraud" here involved is that set forth in the District Court's conclusion of law (V R. 1963):

> 13. All of the contracts in question were presumptively fraudulent as to Plaintiff's [Petitioner's] assignor and its predecessors in view of the common directors and officers. Defendant [Respondent] has failed to rebut this presumption and sustain the fairness of the contracts.

Thus, the bases of the fraud are (1) the fact of interlocking directors and officers between the two companies, and (2) respondent's failure to convince the court of the "fairness" of the contracts, i.e., reasonableness of the rates.

Contrary to petitioner's contention, both of these matters are peculiarly appropriate for Commission appraisal. For under Section 305(b) of the Act, officers and directors of companies sub-

ject to the Act may hold interlocking positions only with the approval of the Commission; and indeed, such approval had been granted in this case (I R. 359-362; cf. V R. 1510, 1587-88). As a practical matter the investigation and appraisal of the effect of affiliation and less-than-arm's length-dealing between electric utility operating companies has frequently engaged the attention of the Commission, and is, in fact, a routine aspect of its work.[22] Improper or fraudulent conduct in such relationships is clearly a subject with which the Commission is especially equipped to deal. And the same is obviously true as to the reasonableness of rates.

This does not mean that the Commission has power to award reparations. That would be inconsistent with the legislative history and purposes of the Act, as we have shown (*supra*, pp. 9-22). But it does mean that whatever rights

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[22] *Alabama Power Company*, 1 F.P.C. 25, 39, affirmed in relevant part, 94 F. 2d 601, 617-618 (C.A.D.C.); *Alabama Power Company*, 2 F.P.C. 432, 443, 444, affirmed in relevant part, 134 F. 2d 602, 609 (C.A. 5); *Alabama Power Company*, 2 F.P.C. 479, 486, affirmed in relevant part, 136 F. 2d 929, 930 (C.A. 5); *Canadian River Gas Company, et al.*, 3 F.P.C. 32, 43, affirmed, 324 U.S. 581, 606-608; *Pennsylvania Power & Light Company*, 3 F.P.C. 89, 95, 111, affirmed 139 F. 2d 445, 450 (C.A. 3), certiorari denied, 321 U.S. 798; *Hope Natural Gas Company, et al.*, 3 F.P.C. 150, 178, 179, affirmed on this point, 134 F. 2d 287, 307 (C.A. 4); *Niagara Falls Power Company*, 3 F.P.C. 206, 221-223, affirmed, 137 F. 2d 787, 793-795 (C.A. 2), certiorari denied, 320 U.S. 792; *Pudget Sound Power and Light Company*, 3 F.P.C. 231, 236, 240, affirmed, 137 F. 2d 701, 703 (C.A.D.C.); *California Oregon Power Company*, 3 F.P.C. 368, 374, affirmed, 150 F. 2d 25, 27 (C.A. 9), certiorari denied, 326 U.S. 781; *Cities Service Gas Company*, 3 F.P.C. 459, 480-482, affirmed, 155 F. 2d 694, 703 (C.A. 10), certiorari denied, 329 U.S. 773; *Tennessee Gas and Transmission Co., et al.*, 6 F.P.C. 98, 101.

petitioner may have in the courts are dependent upon the establishment of the answers to questions which the Commission has power to answer in ascertaining and correcting any errors in its action or inaction resulting from fraud. When it has done so the rights of interested parties can be determined and enforced by appropriate administrative or court proceedings as though the correcting Commission action had been effective as of the date of the original error.

Thus if the Commission should find that one or more of the earlier filed rate schedules was validly filed and not affected by fraud, but that some of the subsequent filings of changes in rates were invalid because of fraud, the Commission might vacate the invalid changes and vacate its orders giving them effective dates. The earlier filed rates would then be left standing unchanged by the purported filings of subsequent changes. For charging rates differing from the filed rates left standing such remedies would lie as in any other case in which rates other than filed rates have been charged.

Or the Commission might find that the filings were valid, but that, had it not been for the fraud, it would have suspended one or more of them and fixed and prescribed rates in lieu thereof. Or the Commission might determine that the filings were validly made, that the information submitted in response to the inquiries which were made (I R. 266-323) had furnished sufficient data

to enable a proper determination, and hence that the rates and changes were all validly filed, were properly not suspended, and that the payments made in accord therewith were in full compliance with the statute and the rules. In that case there would be no occasion for recourse to the courts.

The Commission is not precluded from inquiring into questions raised by this case by reason of its lack of power to grant reparations. We have already shown that the Commission has ample power to take corrective action with respect to rates procured by fraud. And, we submit, the Commission also possesses the power to investigate and determine the lawfulness of the past rates in an appropriate situation,[23] such as where a determination of the reasonableness of rates is an essential element in an inquiry into an alleged fraudulent filing, even though it may not have the power to fix such rates.

In addition to the general authority granted the Commission by Section 309 to "perform any and all acts * * * necessary or appropriate to carry out the provisions of this Act," Section 307(a) empowers the Commission to investigate any matter in order to determine whether any person has

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[23] The Court of Appeals for the Fourth Circuit held to the contrary in *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, reversed on other grounds, 320 U.S. 591. The Government argued in this Court that the Commission had such power (No. 34, 1943 Term, Brief for Pet., pp. 115-121), but this Court found it unnecessary to decide the question. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

violated any provision of the Act, and Section 205(a) explicitly forbids and declares unlawful the charging of unjust and unreasonable rates. Since the charging of such rates is an unlawful act and in violation of Section 205(a), an investigation of the lawfulness of past rates is clearly within the ambit of the investigatory power granted the Commission by Section 307(a).[24] Moreover, the Commission may, upon its own motion or at the request of a state commission, investigate and determine the cost of production or transmission of electrical energy in cases where it may not establish rates (Section 206(b)),[25] and is required by Section 209(c) to make available to the several state commissions such information and reports as may be of assistance in state regulation of public utilities. The findings as to past rates, even apart from fraud, fall within the contemplation of these provisions, constituting not

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[24] The Interstate Commerce Commission has made similar determinations under an analogous provision of the Motor Carrier Act of 1935 (Secs. 216, 217). See *W. A. Barrows Porcelain Enamel Co.* v. *Cushman Motor Delivery Co.*, 11 M.C.C. 365, 366; *Dixie Mercerizing Co.* v. *ET & WNC Motor Transportation Co.*, 21 M.C.C. 491, 492.

[25] Petitioner attempts (Pet. 27-28) to construe the power to determine cost of service granted by Section 206(b) as falling short of the power to determine just and reasonable rates. But the "cost" into which the Commission inquires under Section 206(b) includes a return on the amount invested, and therefore the Commission's determination of costs is in fact the equivalent of a determination of what would be a reasonable rate. Compare the retrospective determination of the cost of service in the *Hope* case (3 F.P.C. at 199-202) with the prospective determination of just and reasonable rates (3 F.P.C. at 202-205).

only determinations as to cost but also "information and reports" as to lawful and reasonable rates for the period in question, as an aid to state regulation. There is no reason why the authority granted by Sections 307(a), 205 and 206 may not be exercised to assist the district courts, where such a procedure is appropriate, as well as to assist state regulatory agencies.

But in any event, we think it clear that whether a fraud has been perpetrated on the Commission should first be determined by the Commission itself. Any order of the Commission vacating or refusing to vacate the filing claimed to be fraudulent would, as the court below declared, be reviewable like any other order of the Commission exclusively in the appropriate court of appeals under Section 313(b). Any civil damages attributable to the fraud, and which the Commission was not empowered to order paid, would then be recoverable, upon the basis of the Commission's findings, in a civil action at law. See Point III, *infra*.

III

The District Court Should Stay Its Hand Until the Commission Determines the Questions Over Which It Has Primary Jurisdiction

We have argued that the Commission has primary jurisdiction to determine whether a fraud has been perpetrated upon it, and in doing so to inquire into the reasonableness of past rates—even

though it may not issue reparations orders as to past rates. In very similar situations this Court has required the district courts to wait and follow an administrative determination as to the reasonableness of past rates when the administrative agency had no authority to grant reparations. Thus, the lack of power in the Interstate Commerce Commission to grant reparations for intrastate rates charged and collected which discriminated unduly against interstate commerce does not deprive it of power "to inquire whether injustice had been done and to make report accordingly" to the district court where a shipper's suit for restitution was pending. *Atlantic Coast Line Co.* v. *Florida,* 295 U.S. 301, at 312. And in *United States* v. *Morgan,* 307 U.S. 183, proceedings for the distribution of the fund collected under an invalid order of the Secretary of Agriculture were restrained pending a determination by the Secretary of the just and reasonable rates during the period covered by the fund. This Court pointed out that the lack of authority in the Secretary to award reparations in that proceeding did not affect his power to investigate and decide the reasonableness of past rates (p. 192).

In other cases, this Court has held that a district court having jurisdiction over a controversy should "stay its hand pending a decision by" the administrative agency as to a matter peculiarly within the agency's authority. *Smith* v. *Hoboken R. Co.,* 328 U.S. 123, 133; *Thompson* v. *Texas*

Mexican R. Co., 328 U.S. 134; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *cf.*, *El Dorado Oil Works* v. *United States*, 328 U.S. 12. In the *Thompson* case, the question related to a claim for trackage rentals which the Interstate Commerce Commission could fix "only for the future," but not retroactively. 328 U.S., at 148. The Court held that the Commission's power over trackage rights nevertheless made primary resort to the Commission necessary, stating (pp. 148-149):

> * * * Once the Commission has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the Commission. See *El Dorado Oil Works* v. *United States*, 328 U.S. 12.

The Court concluded, in terms we believe to be applicable here (328 U.S. at p. 151):

> * * * the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. * * *

As this Court said in the *Morgan* case, which, as has been seen, involved a situation very similar to that at bar (307 U.S. at 191):

> * * * [I]n construing a statute setting up an administrative agency and providing for

judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. * * *

CONCLUSION

These decisions and principles point the way to the proper disposition of the present problem. Although the Commission may not grant reparations, or award damages for fraud, it may—at least where fraud is alleged—investigate both the question of fraud and the related issue as to the lawfulness of past rates, vacate any filing found to be fraudulent, and ascertain what reasonable rate should have been accepted as the filed rate apart from the fraud. Where the District Court may award damages resulting from fraud,—even if it may not

grant reparations,—it should hold the case pending a determination of the administrative questions by the Federal Power Commission and thereafter enter an appropriate judgment predicated on the administrative finding.[26]

Respectfully submitted,

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[26] If this Court should conclude, contrary to the argument presented in Point I of this brief, that the district court may award reparations, the same procedure should be followed in a suit for reparations in which fraud is not alleged.

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